



FACULTY OF LAW
University of Lund

Edin Erkocevic

Human Rights for Business – Identifying Corporate Human Rights Responsibilities

Master thesis
20 points

Supervisor:
Gregor Noll

Field of study:
International Human Rights Law

Semester:
Spring 2007

Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Subject and purpose	6
1.2 Limitations	6
1.3 Method and material	7
1.4 Outline	8
2 DEVELOPMENT OF HUMAN RIGHTS FOR BUSINESS	9
2.1 The voluntary approach – existing initiatives	10
2.2 The compulsory approach	11
3 FORMULATING GLOBAL HUMAN RIGHTS RULES FOR BUSINESSES	13
3.1 Existing soft law	13
3.1.1 <i>The OECD Guidelines for Multinational Enterprises</i>	13
3.1.1.1 Background	13
3.1.1.2 The extent of use	13
3.1.1.3 The provisions	13
3.1.2 <i>ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy</i>	16
3.1.2.1 Background	16
3.1.2.2 The provisions	17
3.1.2.3 The extent of use	19
3.1.3 <i>United Nations Global Compact</i>	19
3.1.3.1 Background	19
3.1.3.2 The extent of use	20
3.1.3.3 The provisions	20
3.1.4 <i>Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms)</i>	22
3.1.4.1 Background	22
3.1.4.2 The provisions	22
3.2 What human rights are relevant to business?	24

3.2.1	<i>Summarizing existing soft law</i>	24
3.2.2	<i>Universality, Indivisibility, Equality and Interdependence of Human Rights</i>	24
4	CORPORATE SPHERE OF INFLUENCE	26
4.1	The Boundaries of Corporate Human Rights Responsibilities	26
4.2	'Sphere of Influence' – a term	26
4.3	Defining the extent of 'Sphere of Influence'	28
4.3.1	<i>Standard of proximity and the duty of care</i>	28
4.3.2	<i>Various levels of influence</i>	29
4.3.2.1	The Workplace	31
4.3.2.2	The Supply Chain	31
4.3.2.3	The Market Place	32
4.3.2.4	The Community	32
4.3.2.5	The Government	33
4.4	Understanding 'Sphere of Influence'	34
5	MECHANISMS FOR IMPLEMENTATION AND CONTROL	35
5.1	Reporting	35
5.1.1.1	Background	35
5.1.1.2	The extent of use	35
5.1.1.3	How to report	36
5.1.1.4	Developments	38
5.2	Auditing	39
5.2.1.1	Background	39
5.2.1.2	The extent of use	39
5.2.1.3	How to audit	40
5.2.1.4	Auditing problems	41
5.3	National Contact Points of the OECD – Specific Instances	41
5.3.1.1	Background	41
5.3.1.2	The extent of use	41
5.3.1.3	The contents of Specific Instances	42
5.3.1.4	Missing factors	43
5.4	Human Rights Impact Assessment (HRIA)	43
5.4.1.1	Background	43
5.4.1.2	How to conduct an HRIA	44
5.4.1.3	The extent of use	46
5.5	The way forward	47
6	CONCLUSIONS AND FINAL REMARKS	48

6.1	Corporate Human Rights Responsibilities	48
6.2	Implementation and control	49
6.3	Do we need a legal framework?	50
APPENDIX I		52
BIBLIOGRAPHY		54

Summary

Corporate responsibilities with regard to human rights have long time been in the grey zone, but the area of human rights for businesses has been expanding rapidly. International instruments for corporate human rights responsibilities have been followed by voluntary initiatives, certification schemes, national standards and laws, and other tools and instruments. Analyzing the existing soft law one can find specific human rights that are repeatedly mentioned as relevant for corporate human rights responsibilities. This is a group of human rights, mostly labor rights, which businesses face most frequently. These rights, found in the most frequently used and most prestigious human rights instruments for businesses, are however not exhaustive.

In order to identify human rights for which corporations and business entities may be held responsible for, the concept of “sphere of influence and activity” is developing in the international arena as this paper is being written. At this point of time, it is a non-legal concept, let be that some call it pre-legal. “Sphere of influence” tries to identify corporate responsibilities for human rights through demarcating the boundaries of corporate human rights responsibilities by factors such as: the size of the company in question, the relationship with its partners, the nature of its operations, and the proximity of people to its operations. States having the primary responsibility for human rights, the concept is also helping to draw boundaries between corporate responsibilities and obligations of states.

When monitoring and controlling the implementation of corporate human rights responsibilities, reporting and auditing top the list of tools used by the business community. Both tools have problems with credibility and independence, something that may be improved by informational regulations. The OECD has introduced a “specific instances” mechanism which so far has turned out to be rather respected. The emerging implementation tool is today the Human Rights Impact Assessment, which is gaining more and more importance in the business community as a way to predict human rights risks for businesses and prevent human rights violations in advance, rather than react to problems already caused.

An international legal framework for corporate human rights responsibilities may be emerging, but the main problem still remains how to identify and impose which and whose human rights corporations and business entities may be held responsible for.

Preface

Once upon a time, in a kingdom far, far, away, the Eastern Kingdom, the little prince discovered a new topic within international human rights. A scientist, called *Manfred Nowak*, inspired him to start an extraordinary journey into the world of human rights and business corporations.

Having returned home, the little prince consulted this topic with his councilor, *Gregor Noll*, who was extremely interested and fully supported the idea. The little prince was surer than ever that this is the path he was going to follow.

Meanwhile, an opportunity arose for the little prince to immerse himself in this topic in a kingdom further away than ever. On the invitation of *Zhenghan Law Firm*, its consuls *Li Jia Ming* and *Saideh Yahyavi*, he was given the opportunity to visit the Middle Kingdom, 中国, and do his research at this prestigious Shanghai office. The time spent in this “Paris of the Orient” was going to be unforgettable, not only due to the help received at *Zhenghan*, but also thanks to the persons that surrounded him during this period in this land far, far away.

The journey back home was long and dull, but it was still not over. The little prince was sent to learn the language of the court in the kingdom of its natives. Arriving at the completion of his journey, he wrote the final words of this journey a late, quiet night, somewhere in real Paris, thinking of all those who have made this journey possible, not forgetting any single one of them.

Edin Erkočević

Paris, August 2007

Abbreviations

BLIHR	The Business Leaders Initiative on Human Rights
CHR	United Nations Commission on Human Rights
CSR	Corporate Social Responsibility
ESIA	Environmental and Social Impact Assessment
HRIA	Human Rights Impact Assessment
IFC	International Finance Corporation
ILO	International Labour Organisation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
MNE	Multinational Enterprise
NCP	National Contact Point
NFR	Non-Financial Reporting
NGO	Non-Governmental Organization
NRE	Nouvelles Régulations Économiques
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
SRI	Socially Responsible Investment
SRSG	Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	The United Nations
UNGC	United Nations Global Compact
UN Norms	Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
UNSG	United Nations Secretary-General

1 Introduction

Following the intensified globalization, a number of Transnational Corporations (TNCs) have been accumulating far more economical and political powers than some states. Possessing this power, TNCs worldwide are increasingly having more impact on human rights. Unfortunately, many times this impact has been negative with human rights violations as a result.

The number of TNCs worldwide has grown from about 7 000 corporations in the 1960s to over 77 000 today, with at least 770 000 foreign affiliates. More than 25 % of the TNCs originate in developing countries.¹ Parallel with their growth in numbers their powers grow and with them the impact on the society. This has led to cases where some TNCs have more actual power than the states where they operate. However, TNCs' responsibilities have not followed this development and the area of TNCs' responsibilities regarding human rights is still in the grey zone.

Transnational corporations and other business enterprises are traditionally not subjects of international law and subsequently not directly bound by international human rights treaties. They are however in the position where they substantially affect human rights and are able to conduct serious breaches of universal human rights. Still, there is no universal standard on the responsibilities of transnational corporations and other business enterprises with regard to human rights.

8 out of 10 people in an opinion poll conducted among 21,000 respondents in 20 industrial countries and emerging markets assign to large companies at least part of the duty to reduce the number of human rights abuses in the world.² As the United Nations Secretary-General, Kofi Annan, has noted, individuals and companies do take advantage of, maintain and have even initiated armed conflicts in order to plunder destabilized countries and to enrich themselves, with devastating consequences for civilian populations.³

A number of transnational corporations have far more economic and political powers than many states. Governments sometimes fear that if they strictly control businesses, this will drive away foreign investors. Many states are thus unwilling or unable to influence the behavior of companies effectively, or to protect their citizens from abuses that may occur. States are simply afraid of losing investment opportunities in their country.⁴

¹UNCTAD, World Investment Report 2000, p. 8; UNCTAD, World Investment Report 2006, p. 10

² Leisinger, 2006, p. 3

³ Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, 2002, para. 58

⁴ Amnesty International (a), 2005, chap. Business and human rights

Some TNCs do not respect even minimum international human rights standards and can be implicated in abuses such as employing child laborers, attempting to repress independent trade unions, failing to provide safe and healthy working conditions, dumping toxic wastes, etc. The list is long.⁵ Given the amount of public information on human rights and business, there is today no excuse for any company, lender or investor to claim being unaware that their projects or investments could have an impact on human rights.⁶

There has long been a debate in the international arena as to what can be done to solve these problems. Some advocate voluntary initiatives to cope with the problems, and others see an international legal framework imposing direct legal obligations on business entities as the best approach.

International human rights law generally imposes obligations on States. State parties to human rights treaties have the obligation to protect individuals and groups of individuals from the actions of third parties, including business entities. The making of universal standards for business regarding human rights raises the question whether these standards would impose direct legal obligations on business. The human rights field has been developed with support from treaties, conventions, international legal decisions, and reports from various national and international bodies. The majority of standards have been developed for governments, not companies.⁷

Numerous voluntary initiatives have been started in order to bring TNCs to comply with some minimum human rights standards, but also some standard-making from international organizations, such as the UN, ILO or the OECD. These initiatives not only take up human rights issues, but also other social and environmental issues which go under the name of Corporate Social Responsibility, CSR. They are mainly referred to together as a group. When looking at existing human rights related initiatives they will mainly be included in the area of CSR. Therefore, this paper will explore the CSR flora of initiatives and mechanisms and concentrate on the parts related to human rights.

CSR is today mostly seen as something corporations do besides what they are legally obliged to do. However, the area of CSR is developing rapidly and covers more and more of the universally recognized human rights, if not all. Different mechanisms are elaborated and being put in place to monitor companies' compliances with their CSR commitments. The vast majority of these mechanisms is still voluntary, not public and far from being perfect or in some cases even far from being satisfactory. However, these initiatives and monitoring mechanisms make good starting ground for elaborating on

⁵ Weissbrodt/Kruger, 2003, p. 901

⁶ "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Human rights impact assessments – resolving key methodological questions'" (HRIA Report), p. 10

⁷ UNGC/OHCHR, 2004, p. 175

what to include in a global regulatory framework for TNCs and their compliance with human rights standards.

1.1 Subject and purpose

Leveling the playing field by setting up global human rights standards for businesses could make the competition fairer. Businesses are ambivalent in this regard and they do not tend to favor more regulations. However we are entering a pre-legal phase of human rights rules for business.⁸ Subsequently, the question posed in this paper is:

What responsibilities regarding human rights can be attributed to transnational corporations and other business enterprises, and how can these responsibilities be implemented and controlled in the best way?

The purpose is thus to assess the human rights which businesses may be responsible for and also to assess the different ways in which their compliance may be controlled and implemented. Comparing the four most prestigious existing instruments on human rights for business this paper identifies what human rights are most relevant for transnational corporations and other business enterprises and which ones are most frequently named. While all human rights are universal and thus highly relevant, a corporation cannot be expected to have influence on all of these rights. Hence, the paper concentrates further on how to identify corporate human rights responsibilities through the concept of corporate “sphere of influence”. The concept is thoroughly analyzed in order to give the reader an understanding of how it is to be used. A descriptive overview of the different monitoring and implementation mechanisms used in this area is presented and discussed.

1.2 Limitations

There is a myriad of initiatives, documents and guidelines regarding human rights and businesses. In a paper like this it would be impossible to cover all this documents and probably very ineffective. Therefore I have chosen to limit this research to four of the most used, most known, most referenced and most prestigious documents regarding human rights and business enterprises. These documents have been most frequently referenced in reports, books and surveys written by special representatives, high commissioners, international organizations, NGOs, and international lawyers as well as private consulting companies. They are: “*The OECD Guidelines for Multinational Enterprises*”, “*ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*”,

⁸ See chapter 4.2

“United Nations Global Compact” and “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”.

During the drafting of these four documents, a lot of work has been done on mapping human rights for business enterprises. This fact leaves very little space that some issue regarding human rights and business enterprises may not have been covered.

While analyzing the four documents I have left out environmental and issues regarding consumer interests. The issue of non-state actors in the context of international law is also a discussion not subject of this research paper.

As to the implementation and control mechanisms I have chosen to analyze two most frequently used: reporting and auditing. Further, I have included a mechanism particular for the OECD member and adhering states, the *“Specific Instances under the National Contact Points of the OECD”*. Not only does it apply for businesses operating from the OECD area, but also for any business operating within the OECD area, which makes this mechanism frequently used and thus very important. Finally, I have included an emerging implementation mechanism, the Human Rights Impact Assessment. Although not widely used, this mechanism is quickly gaining importance and so gains a place in this analysis as well.

1.3 Method and material

The area of human rights and business is a new area not highly present at the libraries. Very few books have been written and published and even less have reached the libraries. However, more material can be found in digital form on the Internet. This is where most of the material has been found for this paper. Most of the material used for this research consists of reports, surveys, articles and other materials found on the Internet, and mostly on the official websites of different international organizations, NGOs and other institutions.

As a starting point, when approaching the subject, I have used the four most prestigious standard documents when it comes to human rights for business. This is the closest I could get to a document with legal standing with regard to human rights for business. Some of them are to some extent legally binding; some are politically binding on participating states, and others completely voluntary. Besides the documents themselves, I have also used the preparatory work and the commentaries. As to the concepts and tools still in development, I have in first hand examined the preparatory reports, prepared by recognized international organizations, but also reports and articles by NGOs and independent scholars.

1.4 Outline

Firstly, this paper describes the existing soft law regarding human rights and business enterprises as set out in the four documents chosen for this study. Combining the human rights referred to in these documents this paper maps the most relevant human rights for businesses. Secondly, the fact that all human rights are universal, indivisible and interdependent and interrelated leads this research to enter into the discussion of what human rights a business enterprise can have an influence on. Thirdly, an overview is given of four different mechanisms for implementation and control. Finally, this thesis will be concluded with an assessment of global human rights for businesses and some analytical closing remarks.

2 Development of Human Rights for Business

During the past decades several attempts have been made to draft international codes of conduct and guidelines for businesses with regard to human rights. The United Nations unsuccessfully attempted to draft an international code of conduct for businesses in the 1970s and 1980s. The Organisation for Economic Co-operation and Development (OECD) made similar efforts in 1976, establishing its first Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws, updated in 2000. The International Labour Organization (ILO) adopted in 1977 its Tripartite Declaration of Principles Concerning Multinational Enterprises. It calls upon businesses to follow the relevant ILO conventions and recommendations. In January 1999, United Nations Secretary-General (UNSG) Kofi Annan initiated a project called the “UN Global Compact” (UNGC). It sets out ten principles for companies to follow, two of which are related to human rights, and asks businesses to voluntarily support and adopt these principles. All of the initiatives above failed to bind all business to follow minimum human rights standards, due to the fact that most of them are voluntary.⁹ Nor do any of them, for different reasons, provide a comprehensive perspective. The ILO Tripartite Declaration has a very specific focus on workers’ rights; the Global Compact is too general to offer adequate guidance; and the OECD Guidelines have geographical limitations.

In an attempt to compile global human rights standards for businesses, the Sub-commission on the Promotion and Protection of Human Rights (Sub-commission) adopted in August 2003 the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (UN Norms).¹⁰ The Norms lead to major controversy and The United Nations Commission on Human Rights (CHR) decided not to pass a Resolution on the Norms, but requested in its decision 2004/116 the Office of the United Nations High Commissioner for Human Rights (OHCHR) “to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of Transnational corporations and related business enterprises with regard to human rights”.¹¹ The OHCHR was also to take into account the new Norms in its report. However, following the OHCHR Report the CHR didn’t adopt the Norms as a document with legal standing and affirmed that the Sub-Commission should not perform any monitoring function in this regard. The

⁹ Weissbrodt/Kruger, 2003, pp. 902-903

¹⁰ See chapter 3.1.4

¹¹ “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” (OHCHR Report)

Norms were said to have a negative undertone and impractical monitoring verifications mechanisms.¹²

This deadlock had to be overcome. In April 2005 the CHR requested that the UNSG appoint a Special Representative to identify ways through which the accountability of transnational corporations for human rights violations may be improved.¹³ The Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises (SRSG), John Ruggie, was appointed in July 2005 and given a two-year mandate to raise awareness of the human rights responsibilities of companies, look at the tough issues that have blocked progress to date, and map a way forward. The 2004 resolution together with the appointment of a special representative are of big significance, since this is the first time that the CHR officially recognizes and seriously considers the impact of business on human rights. The mandate was finalized with a special report of the SRSG.¹⁴

2.1 The voluntary approach – existing initiatives

There already exists a variety of initiatives and standards relevant to the business impact on human rights. The OHCHR Report identified over 200 existing initiatives and standards. The report categorizes the existing initiatives as follows:¹⁵

- i. *International instruments* – treaties and declarations directed at States, but relevant to or directed specifically to business, such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises;
- ii. *Nationally based standards* – national laws and regulations and other national legal standards of relevance to business activities. These can also have extraterritorial effect, such as the United States Alien Torts Claims Act;
- iii. *Certification schemes* – standards established by an organization, group or network requiring compliance with the standards set out in their program in order to get their certification. Compliance is generally monitored independently to ensure credibility, the

¹² Leisinger, 2006, p. 3

¹³ UN Commission on Human Rights, Res. 2005/69

¹⁴ “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and human rights: mapping international standards of responsibility and accountability for corporate acts” (SRSG Report)

¹⁵ OHCHR Report, para. 7

SA8000 certification scheme and the Kimberley Process Certification Scheme are examples;

- iv. *Voluntary initiatives* - include codes of conduct, directives, policies, third-party and self-reporting initiatives established by individual companies, groups of companies, intergovernmental organizations or civil society groups and adopted by business on a voluntary basis. United Nations Global Compact is just one example.
- v. *Mainstream financial indices* – also known under Socially Responsible Investment, the indices require companies listed to comply with the social, environmental and sometimes human rights criteria set out and monitored by the Index ; and
- vi. *Tools, meetings and other initiatives* – seek to promote greater understanding of and respect of human rights, as well as development of tools for human rights and businesses through various activities such as work on methodologies for undertaking human rights impact assessments, management tools, training manuals, workshops, pilot projects, multi-stakeholder consultations, public-private partnerships and so on. The Human Rights Compliance Assessment (HRCA), the world’s first comprehensive human rights impact assessment for companies, developed by the Danish Institute for Human Rights Human Rights and Business Project is one example.

The entire range of existing initiatives falls within the category of non-binding documents. Existing initiatives such as the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, are valuable in rising awareness of general human rights issues among corporations. On the other hand, these voluntary initiatives have not been sufficient to prevent human rights abuses caused by company activities or to ensure corporate accountability for respect for human rights.¹⁶ The UN Global Compact for example, is a learning forum, purely voluntary and with no monitoring mechanism.

2.2 The compulsory approach

The work on corporate accountability has mostly been emphasizing voluntary approaches, systems of self-regulation based on ethical principles, rather than forms of legal accountability supported by mechanisms to enforce them. Amongst these we can find company-sponsored codes of conduct, the United Nations Global Compact, and many NGO initiatives. Existing voluntary initiatives are insufficient, as they do not cover

¹⁶ Amnesty International, 2005, chapter: Business and human rights

corporations that deliberately exploit opportunities to violate human rights and do not adequately cover many areas of human rights.¹⁷ There is though a growing interest in the duty of companies to respect human rights. However, more attention should be given to the role international law can play in transforming these responsibilities into a legal framework that crosses national boundaries.

International law is primarily concerned with the obligation of states, but it gives a basis for extending legal obligations to transnational corporations and other business enterprises. There are two ways in which such obligations may arise, firstly through indirect international legal obligations to companies in relation to human rights. States have duty to protect human rights, which means that they must ensure that private actors, including businesses, don't abuse them. Thus, the duty of states implies indirect obligations on companies. Secondly, there is a basis for international law to extend direct legal obligations to companies.¹⁸

“No theoretical obstacle prevents states from imposing obligations on companies to respect human rights, should they decide to do so.”¹⁹ The international legal system is made by states but is no longer exclusively for states. It has already granted some rights and obligations to a variety of non-state actors, including international organizations, rebel groups, corporations and individuals. The international legal system is developing and doing so in the direction of regulating companies directly, as well as indirectly through states. We already have several international standards that refer explicitly or by interpretation to companies, such as the Universal Declaration on Human Rights, the ILO Tripartite Declaration, and the OECD Guidelines.²⁰ There are also other binding international legal norms that impact companies. The best example of this is the evolution of international criminal law. It outlaws the most serious human rights violations and imposes universal individual responsibility. Thus, managers or employees may be prosecuted if they are implicated in crimes against humanity or war crimes.²¹

¹⁷ ICHRP, 2002, p. 7 and Oxford Analytica, 2006

¹⁸ ICHRP, 2002, p. 159-160

¹⁹ Ibid., 2002, p. 160

²⁰ Ibid., 2002, p. 73

²¹ ICHRP, 2002, p. 63 and Misol, 2006, p. 5

3 Formulating global human rights rules for businesses

3.1 Existing soft law

3.1.1 The OECD Guidelines for Multinational Enterprises

3.1.1.1 Background

The principal intergovernmentally agreed instrument for securing corporate accountability through a non-legally binding mechanism is the OECD Guidelines for Multinational Enterprises. The Organisation for Economic Co-operation and Development (OECD) first negotiated and established the Guidelines for Multinational Enterprises in 1976 to promote responsible business conduct consistent with applicable laws. The Guidelines have been renegotiated four times, latest in 2000. They are a part of the OECD Declaration on International Investment and Multinational Enterprises of 27 June 2000, where the 39 adhering States²² “jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines.”²³ The latest revision expanded the scope of application of the guidelines to cover companies’ operations in all countries and also cover their work with environment, bribery and human rights. It also added recommendations on abolition of forced- and child labor and now the guidelines include all of the core labor Conventions of the ILO.

3.1.1.2 The extent of use

In a survey of governments conducted by the SRSG, the OECD Guidelines were most frequently cited among the international instruments States use to regulate the role of TNCs and other business enterprises with regard to human rights. This might however depend on the high percentage of respondents being OECD members. Among the literature on human rights and business, the OECD Guidelines are constantly cited as one of the major instruments in the field of human rights and businesses.²⁴

3.1.1.3 The provisions

The OECD Guidelines are a set of voluntary recommendations by governments to multinational enterprises. The adhering governments have

²² Adhering countries comprise all 30 OECD member countries, and nine non-Member countries (Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia)

²³ OECD Declaration on International Investment and Multinational Enterprises, para. I

²⁴ See for example: SRSG Report, pp. 15f, 21; KPMG, 2005, p. 25f; OHCHR Report, para.

committed to promote them among multinational enterprises operating in or from their territories. The observance of the Guidelines by enterprises is voluntary and not legally enforceable.²⁵ Being a joint recommendation from the governments of the adhering countries, it is politically binding upon the governments. Despite the non-legal character, enjoying the backing of governments that are the source of most of the world's investment flows and home to most multinational enterprises, this is where the Guidelines derive their authority from.²⁶

Applying to multinational enterprises' operations *in or from* the territories of the adhering states, it does not only apply to companies coming from the adhering states, but also to those multinational enterprises whose home governments do not adhere to the Guidelines but whose operations are situated in one of the adhering states' territories.²⁷

The most significant change introduced in the 2000 revision was a general statement, in paragraph II.2, concerning human rights. It is relatively unspecific and gives little guidance on what it means specifically.

Paragraph II.2: “[Enterprises should] respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”.

The Commentary on the OECD Guidelines reiterates that the primary responsibility for promoting and upholding human rights lies with governments. It recognizes however that enterprises do have a role to play when corporate conduct and human rights intersects, and states that “MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments’ international obligations and commitments”.²⁸

The term “affected by their activities” extends the responsibility of enterprises far beyond the respect for the labor rights of their workers. It puts an obligation on enterprises for ensuring that their activities do not interfere not only with the human rights of their employees, but also with the human rights of those living in the communities in which they operate. In some cases national laws can be weaker than international standards, and thus paragraph II.2 explicitly states that the human rights should be measured against the international obligations and commitments of the host state and not only national laws. Further, the commentary underlines especially the importance and relevance of the Universal Declaration of Human Rights in this regard.²⁹

²⁵ OECD Guidelines for Multinational Enterprises, para. I.1

²⁶ UD, 2006, p. 8

²⁷ OECD Declaration on International Investment and Multinational Enterprises, para. I

²⁸ OECD, Commentary on the OECD Guidelines for Multinational Enterprises, para. 4

²⁹ Ibid., para. 4

The OECD Guidelines echo relevant provisions of the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, as well as the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.³⁰ A special chapter on Employment and Industrial Relations (chapter IV) includes recommendations on all the four core labor standards, namely *the freedom of association* and *right to collective bargaining*, the effective *abolition of child labor*, the *elimination of all forms of forced or compulsory labor*, and *non-discrimination in employment and occupation*.³¹

In paragraph four (IV.4), the *right to a safe and healthy working environment* is included and the reference to the observance of employment and industrial relations standards is understood to include compensation and working-time arrangements. However, the Guidelines state that the observance of these standards is not to be "less favorable than those observed by comparable employers in the host country." This would mean that a company following the Guidelines does not necessarily need to bring practice up to internationally accepted standards, but can follow practice by comparable employers in the country, even if this is internationally not accepted.

Besides the provisions mentioned above, the OECD Guidelines give further recommendations on information disclosure, environmental matters, fighting corruption, protecting consumer interests, fair marketing and advertising practices, science and technology, competition issues and compliance with tax legislation.

Throughout the text of the Guidelines, enterprises are reminded that the first obligation of business is to obey domestic law and that the Guidelines are not a substitute for national laws, but are merely non-legal supplementary principles and standards of behavior.³² Thus, although compliance with national law is necessary, this is not necessarily sufficient to observance of the Guidelines.

Whilst not strictly speaking binding as international law, the OECD Guidelines are not purely voluntary either. They are politically binding on adhering countries who have committed to promoting them and encouraging their use. Its status might be compared to the political commitments made by states participating in the Conference on Security and Co-operation in Europe, more known as the Helsinki process. Although not legally binding³³, some have seen the commitments in the Helsinki process as having legal force.³⁴ The strong political will was expressed in the statement by the Chair of the OECD Ministerial in June 2000:

³⁰ Ibid., para. 20

³¹ Para. IV.1. These principles and rights have been developed in the form of specific rights and obligations in ILO Conventions recognized as fundamental. See chapter 3.1.2

³² OECD, Commentary on the OECD Guidelines for Multinational Enterprises, para. 2

³³ Nowak, 2003, p. 218

³⁴ ICHRP, 2002, p. 67

“...the OECD Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promoting. The Guidelines express the shared values of the governments of countries that are the source of most of the world’s direct investment flows and home to most multinational enterprises. They apply to business operations world-wide.”³⁵

Further, the OECD Guidelines include an implementation procedure that is binding on adhering states who commit to ensure the effectiveness of the Guidelines through establishing “National Contact Points” (NCP). NCPs will deal with issues raised about the implementation of the Guidelines in specific instances. Anyone may file a complaint with the NCPs against a multinational firm operating within the sphere of the OECD Guidelines and whether they like it or not, companies may be subject of investigations by NCPs on their compliance with the Guidelines.³⁶ The procedure resembles a quasi-judicial approach.³⁷

3.1.2 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy³⁸

3.1.2.1 Background

The International Labour Organisation is a tripartite UN-affiliated body which brings together representatives of governments, employers, and workers on an equal footing to address issues related to labor and social policy. The organization has produced conventions on basic labor rights including child labor, freedom of association, forced labor, equality of opportunity and treatment, and other standards regulating working conditions. The ILO’s unique tripartite structure ensures that these standards are a universal consensus among those concerned with labor issues. ILO standards therefore lay down the basic minimum social standards agreed upon by all players in the global economy.³⁹

The ILO issues conventions, recommendations or declarations. Only the conventions are international treaties legally binding on member states, not on corporations. ILO member states are required to submit any convention adopted, to their national competent authority for ratification. Once it has ratified a convention, a country is subject to the ILO’s regular supervisory system responsible for ensuring that the convention is applied.⁴⁰

³⁵ OECD; “The OECD Guidelines for Multinational Enterprises, Revision 2000”, p. 5

³⁶ Ward, 2003, p. 6 and SRSR Report, para. 50

³⁷ See chapter 5.3

³⁸ For references to ILO Tripartite Declaration see: SRSR Report, pp. 15f, 21, para. 69; KPMG, 2005, p. 25f; OHCHR Report, para. 10; Addendum 3 - SRSR Report, p. iv

³⁹ ILO, 2005, p. 8

⁴⁰ Ibid., pp. 12, 16

One instrument of the ILO is also directly addressed to business enterprises: the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Adopted in 1977 the Tripartite Declaration is voluntary in nature and addresses its principles to “the governments, the employers’ and workers’ organizations of home and host countries and to the multinational enterprises themselves.”⁴¹ Although legally not binding for businesses⁴², the declaration has been adopted by its 180 member states, including employers’ and workers’ representatives from these states, and represents the authoritative voice of the vast majority of the world’s governments and social partners.

Besides the Tripartite Declaration itself, in March 2000 the ILO Governing Body incorporated into the Tripartite Declaration⁴³, the Declaration on Fundamental Principles and Rights at Work and its Follow-Up.⁴⁴ Considering that the contribution of multinational enterprises is important to the latter’s implementation, Addendum II of the Tripartite Declaration states that the Tripartite Declaration should fully take into account the objectives of the ILO Declaration on Fundamental Principles and Rights at Work and thus addresses it to the multinational enterprises as well.⁴⁵

3.1.2.2 The provisions

The Tripartite Declaration first and foremost encourages all parties concerned to respect the sovereign rights of States and to obey the national laws and regulations (para. 8). In other words it does not claim to be above national law. It explicitly states that the parties should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations (para. 8). However general in terms, this reference covers the human rights as set out in the “International Bill of Human Rights”.⁴⁶ The Declaration also calls on respect for the ILO Constitution and states especially the right to freedom of expression and association as essential.

While covering human rights in general terms, the Tripartite Declaration has specific provisions on certain labor rights or workers’ human rights. These rights include:

- *Non-discrimination* – elimination of any discrimination based on race, color, sex, religion, political opinion, national extraction or social origin. (para. 21-22)

⁴¹ ILO Tripartite Declaration, para. 4

⁴² Although the ILO Tripartite Declaration is voluntary for business, the ILO conventions it refers to are binding on States parties.

⁴³ Adopted by the Governing Body of the International Labour Office at its 277th Session (Geneva, March 2000)

⁴⁴ Adopted by the International Labour Conference in June 1998

⁴⁵ ILO Tripartite Declaration para. 8 and Addendum II

⁴⁶ See Appendix 1

- *Payment of a living wage* – workers should be paid wages at least adequate to satisfy basic needs of the workers and their families, enabling them to maintain an adequate standard of living. (para. 33-34)
- *Prohibition of child labour* – respect for the minimum age for admission to employment or work in order to secure the effective abolition of child labor. (para. 36)
- *Safe and healthy work environment* – provision of a safe and healthy work environment. (para. 37-38)
- *Freedom of association and the right to organize* - workers should be able to establish and join organizations independent of government and of their own choosing, without prior authorization of the company or fear of retaliation. (para. 42-43)
- *Right to collective bargaining* – workers should have the right to bargain collectively through the organizations described above. (para. 49)

Furthermore, the Declaration on Fundamental Principles and Rights at Work, incorporated into the Tripartite Declaration, has identified four core labor rights and thus adds “the elimination of all forms of forced or compulsory labor” to the Tripartite Declaration.

*ILO Declaration on Fundamental Principles and Rights at Work,
86th Session, Geneva, June 1998
Para. 2*

“[The International Labour Conference] Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;*
- (b) the elimination of all forms of forced or compulsory labour;*
- (c) the effective abolition of child labour; and*
- (d) the elimination of discrimination in respect of employment and occupation.”*

All ILO members are obliged by their membership to abide by the four rights set out above and as part of the Tripartite Declaration these rights are addressed to multinational enterprises as well. With the exception of the right to bargain collectively, each of these labor rights can be found in the UDHR or subsequent widely accepted human rights treaties. The rights to freedom of association and freedom from discrimination, the prohibition of

slavery, and forced or compulsory labor are contained explicitly in the UDHR and the ICCPR.

Besides the specific workers' human rights described above and the general reference to international human rights standards, the ILO Tripartite Declaration does not cover other areas of human rights.

3.1.2.3 The extent of use

However, the ILO Tripartite Declaration and the ILO Conventions to which it refers have achieved universal recognition. Most codes of conduct, either company or multi-stakeholders, are built upon the ILO conventions.⁴⁷ ILO Conventions top the lists of international instruments used by companies in formulating their policies and renowned certification schemes, such as Social Accountability 8000, are based on ILO core rights.⁴⁸ Even the labor chapter of the OECD Guidelines was negotiated with ILO participation and covers all core labor standards.⁴⁹

3.1.3 United Nations Global Compact

3.1.3.1 Background

The Global Compact's operational phase was launched at UN Headquarters in New York on 26 July 2000. The UNSG challenged businesses to join in an international initiative that would bring businesses, together with UN agencies, governments, the labor and social society, to support ten principles in the areas of human rights, labor, the environment and anti-corruption. The vision of the UNSG was to create a more sustainable and inclusive global economy.⁵⁰

The Global Compact is not legally binding and views itself as complementing other voluntary initiatives and regulatory approaches. It is a purely voluntary initiative and a set of principles that relies on public accountability, transparency and the enlightened self-interest of all social actors involved:⁵¹

- *companies*, whose actions it seeks to influence;
- *labor*, in whose hands the concrete process of global production takes place;
- *civil society organizations*, representing the wider community of stakeholders;

⁴⁷ The World Bank Group [a], 2003, pp. 21, 81, 91;

⁴⁸ SRSG Report, para. 69, 71; Addendum 3 – SRSG Report, para. 86; Addendum 4 – SRSG Report, para. 108, 162, 202

⁴⁹ OECD, 2007, p. 2

⁵⁰ *What is the Global Compact*, at www.unglobalcompact.org

⁵¹ Guide to the Global Compact, 2003, p. 5; *What is the Global Compact and FAQ*, at www.unglobalcompact.org

- *governments*, who defined the principles on which the initiative is based; and
- the *UN* itself has a role as convener and facilitator.

3.1.3.2 The extent of use

The Global Compact is a network-based initiative which now has grown to over 3,800 participants, including over 2,900 businesses in 100 countries.⁵² Involving all the social actors above, the GC has three main objectives:⁵³

- to integrate the GC into business operations of the corporations the world over;
- to offer a neutral platform in which dialogue and solutions between business, labor and civil society can be found; and
- to facilitate actions and partnerships in support of broader UN goals and taking advantage of the huge UN network already in place.

3.1.3.3 The provisions

The ten principles of the GC in the areas of human rights, labor, the environment and anti-corruption are based on shared universal values and thus they enjoy “universal consensus” being derived from the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention Against Corruption.⁵⁴

United Nations Global Compact

“The Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption:

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure that they are not complicit in human rights abuses.”

All the principles in the GC are very general in terms. Their intention is not to create some regulatory instrument for enforcement or for measuring

⁵² *Participants & Stakeholders* at www.unglobalcompact.org

⁵³ Guide to the Global Compact, 2003, p. 5; *What is the Global Compact*, at www.unglobalcompact.org; OECD/GC, 2005, para. 6; Ersmarker, 2003, p. 11

⁵⁴ Guide to the Global Compact, 2003, p. 5; *The ten principles*, at www.unglobalcompact.org

behavior or actions of companies.⁵⁵ The GC works to advance the ten principles, not to enforce them, hence their general nature.

The first two principles have their origin in the UDHR, the ICCPR, the ICESCR and its two Optional Protocols which together constitute the International Bill of Human Rights.⁵⁶ The UDHR in particular is considered to reflect international customary law, binding upon all states.⁵⁷ Arising from the UDHR and the two Covenants, the first two principles should be interpreted in the light and spirit of the three instruments. This means that the human rights covered in the UNGC are all those set out in the UDHR, the ICCPR, and the ICESCR⁵⁸. However, the GC limits the corporate responsibility for human rights issues explicitly to activities “*within their sphere of influence*”. Furthermore, principle two, asks of businesses not to be complicit in human rights abuses by others. It extends the corporations’ responsibilities beyond their immediate acts.

The four following principles on labor are a direct incorporation of the four core labor rights in the ILO Declaration on Fundamental Principles and Rights at Work.⁵⁹

*United Nations Global Compact
Labour*

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

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

Principle 5: the effective abolition of child labour; and

Principle 6: eliminate discrimination in respect of employment and occupation.”

Having the advantage of the universality of its principles, the international legitimacy of the United Nations and being based on universally accepted declarations and conventions, the Global Compact has gained strong support, not only in the developed world, but also in developing countries.⁶⁰ It has widespread use as reference in company codes of conduct and other voluntary initiatives.⁶¹

⁵⁵ *What is the Global Compact*, at www.unglobalcompact.org

⁵⁶ See Appendix I

⁵⁷ Fussler et al., 2004, p. 20; Guide to the Global Compact, 2003, p. 15; *The ten principles*, at www.unglobalcompact.org

⁵⁸ See Appendix 1

⁵⁹ See chapter 3.1.2

⁶⁰ Over half of all GC participants are from non-OECD countries. OECD/GC, 2005, para. 5

⁶¹ The World Bank Group [b], 2003; UNCTAD, 2006; KPMG, 2005;

3.1.4 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms)

3.1.4.1 Background

The draft UN Norms is the first attempt of global human rights standards that try to impose direct responsibilities on business entities. They want to achieve comprehensive protection of all human rights. The UN Norms identify specific human rights relevant to the activities of business, such as the right to equal opportunity and non-discrimination, the right to security of persons, the right of workers, and the rights of indigenous peoples. They also refer to responsibilities in relation to environmental protection and consumer protection.⁶² The UN Norms seem to be more comprehensive and more focused at human rights than any other initiative, whether legal or voluntary, drawn up by the ILO, the OECD, the European Parliament, the UN Global Compact, trade groups, individual companies, unions, NGOs, and others.⁶³

3.1.4.2 The provisions

The UN Norms are criticized for recognizing legal obligations on corporations as based on international standards, international law, and international customary law. Critics say that only States have legal obligations under international human rights law. The UN Norms give the states primary responsibility for human rights but they also put some obligations on corporations for what is within their “sphere of influence”.

*Draft UN Norms, General obligations,
Para. 1:*

“States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”

This provision implies that transnational corporations and other business enterprises have the responsibility to use due diligence in ensuring that their

⁶² OHCHR Report, para. 18

⁶³ Weissbrodt/Kruger, 2003, p. 912

activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.⁶⁴ It is clear from the first paragraph that the UN Norms have an exclusively human rights based approach.

The human rights set out in the UN Norms are following:

- *Right to equal opportunity and non-discriminatory treatment* – eliminating discrimination based on race, color, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or other status. The commentary states health status (including HIV/AIDS, disability), marital status, capacity to bear children, pregnancy and sexual orientation as examples of other sorts of status. Discriminatory forms of harassment or abuse, intimidation, degrading treatment and being disciplined without fair procedures are all covered within this paragraph. (para. 2)
- *Right to security of persons* – TNCs and other business enterprises are not to engage in nor benefit from war crimes, violations of international humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law. (para. 3)
- *Rights of workers* – prohibition of forced or compulsory labor. (para. 5)
- *Respect for the rights of children* – prohibition of child labor and economic exploitation of children. (para. 6)
- *Right to safe and healthy working environment* – responsibility of TNCs for the occupational health and safety of their workers and provision of a working environment in accordance with the national requirements of the countries in which they are located and with international standards. (para. 7)
- *Right to just and favorable remuneration* - remuneration of workers that ensures an adequate standard of living for them and their families. In other words, to provide a living wage. (para.8)
- *Freedom of association and the right to collective bargaining* - the right to establish and join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes. (para. 9)
- *Respect for economic, social and cultural rights as well as civil and political rights* – including the right to water. TNCs and other business enterprises should also contribute to their realization. (para. 12)

⁶⁴ UN Norms, commentary to operative paragraph 1, (b)

Besides the human rights set out above, the UN Norms include provisions on respect for national sovereignty and human rights (para. 10), bribery and corruption (para. 11), and on obligations with regard to consumer protection (para. 13) and environmental protection (para. 14).

3.2 What human rights are relevant to business?

3.2.1 Summarizing existing soft law

Looking at the four most authoritative instruments for human rights and businesses, following rights can be identified in the texts:

general respect for international human rights, right to freedom of association and right to organize, right to collective bargaining, abolition of child labor (respect for the rights of children), elimination of all forms of forced or compulsory labor, right to equal opportunity and right to non-discrimination in employment and occupation, right to a safe and healthy working environment, right to freedom of expression, right to just and favorable remuneration, and right to security of persons.

The rights set out in the four instruments included in this study, being the ones most referenced to when it comes to corporate responsibilities with regard to human rights, could through a quick evaluation be considered those relevant to businesses. This mapping can conclude that the rights above may be the ones *most* relevant for businesses, but not the only ones. Even though there is a lot of legal research lying behind the four instruments above and the rights included therein, concluding that the rights mentioned above are the only ones relevant to businesses would be an overstatement.

Why? There is an easy answer: All human rights are relevant.

3.2.2 Universality, Indivisibility, Equality and Interdependence of Human Rights

The principle of universality, indivisibility, equality and interdependence of **all** human rights was expressly recognized by the 171 heads of state and government at the 1993 Vienna World Conference on Human Rights.⁶⁵

*1993 Vienna Declaration and Programme of Action
Article 5*

⁶⁵ Nowak, 2003, p. 25-27, 149

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

Economic, social, cultural and collective human rights are as important and necessary as civil and political rights. To achieve real human rights protection a well-balanced mix of different human rights, with negative and positive obligations, is needed.⁶⁶

All human rights are universal and apply to all, irrespective of national and regional idiosyncrasies and differences in historical, cultural and religious backgrounds.⁶⁷ They are also indivisible; they are all part of one body, one set of human rights, and thus interdependent of each other. Last, but not least, all human rights are equal. Not one right is more important than the other, nor is any less relevant than the other.

If all human rights are universal, indivisible, equal and interdependent, than all human rights are relevant to businesses. However, a transnational corporation or any other business enterprise cannot be said to have influence on all human rights. For example, it would be very difficult for a corporation to ensure the right of a fair trial as this lies outside the reach of corporate activities. Nor can a transnational corporation or any other business enterprise be capable of ensuring some political rights, such as the right to vote or the right to hold public office.

The further away a right is from corporate activity, the more difficult or even impossible it is for a business enterprise to have an influence on this right. However, businesses do have influence over an array of human rights. These rights are those that lay within the reach of the corporate activities, they are those affected by the corporate activities and they are said to be within the corporate “sphere of influence”.⁶⁸

Some companies might find that certain rights are more relevant within their sphere of influence, for example labor rights in the supply chain, the focus on security issues particularly by the extractive sector, and the emerging focus on the right to health by the pharmaceutical sector. A company is confronted with human rights issues for example most directly in its labor relations and human resource management.⁶⁹ Thus, labor rights may be substantially influenced by a company’s policies and operations, whereas civil rights are most appropriately protected by the government.⁷⁰

⁶⁶ Ibid., p. 14

⁶⁷ Ibid., p. 27

⁶⁸ Clapham, 2006, pp. 219f; OECD Guidelines, para II.2; UNGC, principle 1; UN Norms, para. 1

⁶⁹ UNGC/OHCHR, 2004, p. 18

⁷⁰ Ibid., 2004, p. 37

4 Corporate Sphere of Influence

4.1 The Boundaries of Corporate Human Rights Responsibilities

When it comes to the extent of responsibilities towards human rights, states have territorial boundaries. The business case is rather more complicated, as businesses are part of an international web of diverse business relationships where the degree of responsibilities varies widely.⁷¹ The boundaries of corporate human rights responsibilities have no territorial limits, but are demarcated by factors such as: the size of the company, the relationship with its partners, the nature of its operations, and the proximity of people to its operations.⁷²

The responsibility to respect human rights, as concluded above, applies to all recognized human rights. But positive rights applicable to businesses are necessarily narrower than those applicable to states, due to the very different nature of the business role and its role in society.⁷³

The UN Norms attempt to address the scope of TNCs' influence and power by using the notion of a company's "sphere of activity and influence" to demarcate the boundaries of their responsibility. The phrase is however not defined in the UN Norms. The demarcation of responsibility in the specific terms of the "sphere of influence" of business is also used in the Global Compact. Similarly, the OECD Guidelines provide that TNCs should "respect the human rights of those affected by their activities".⁷⁴ However, it is reasonable to assume the inclusion of such stakeholders as workers, consumers and members of the host community as well as the environment in which the company operates. Moreover, the word "influence" adds responsibility where the company has some degree of influence, even if the human rights violations are at the periphery of the company's area of activity.⁷⁵

4.2 'Sphere of Influence' – a term

The exact legal status and relevance of the concept of "sphere of influence" is the subject of an ongoing debate among stakeholders. As SRSR Ruggie

⁷¹ OHCHR/UNGC/UN Staff College, 2007, section 2

⁷² OHCHR Report, para. 36

⁷³ Ibid., para. 41

⁷⁴ Narula, 2006; UNGC/OHCHR, 2004, p. 36

⁷⁵ Narula, 2006

has argued⁷⁶, the concept is – at least at this point in time – non-legal⁷⁷. However, Gasser calls it a “*pre*-legal (“*vorrechtliches*”) concept”⁷⁸ which has developed outside the legal system and evolved in the political environment. No national or international court seems to have adjudicated on the concept in the context of TNCs and human rights⁷⁹, which further speaks for its non-legal character. Nevertheless, “sphere of influence” has relevance in the soft law evolving around TNCs and human rights but also as a “*pre*-legal” concept. It is likely to influence law- and policy-makers as well as courts.

The term “sphere of influence” has so far mostly been in use in political discussions and the private sector has been using it relatively recently. However not legal, the concept is being used widely by companies to understand human rights responsibilities but also by other stakeholder groups to establish the scope of corporate responsibility for human rights issues based on the extent of a particular business’ influence.⁸⁰ It is a fact that “sphere of influence” is an emerging concept in international human rights law⁸¹ and however undeveloped in international law, it is a fast growing concept in the context of corporate obligations regarding human rights.⁸² The concept has been evolving from company practices, work of international organizations, NGOs, academics and national jurisprudence of what constitutes a company’s sphere of influence.⁸³

In order to clarify the boundaries of corporate human rights responsibilities, the concept of “sphere of influence” seeks to:⁸⁴

- Set limits on responsibilities according to a business entity’s power to act,
- Assess the degree of influence that one company exerts over a business partner (i.e. the extent to which it is responsible for acts or omissions of a subsidiary or a partner in the supply chain), and
- Help draw boundaries between responsibilities of businesses and obligations of states.

Further, “sphere of influence” does not only require respect for human rights through a company’s own activities but also the promotion of the protection of human rights by others where the company can exert influence.⁸⁵

⁷⁶ “Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises” (SRSR Interim Report), Para. 67; SRSR Report, para. 9, 87

⁷⁷ See also OHCHR Report, para. 37; GC/OHCHR, 2004, p. 15;

⁷⁸ Gasser, 2006

⁷⁹ Gasser, 2006; Allens Arthur Robinson, 2006, para. 47

⁸⁰ OHCHR/UNGC/UN Staff College, 2007, sections 2.1-2.2

⁸¹ Fussler et al., 2004, p. 21

⁸² Allans Arthur Robinson, 2006, para. 92

⁸³ UNGC/OHCHR, 2004, p. 15

⁸⁴ OHCHR Report, para. 37f

⁸⁵ UNGC/OHCHR, 2004, p. 15

4.3 Defining the extent of ‘Sphere of Influence’

According to the UNGC, “sphere of influence” provides a means for addressing the following questions:

- Whose human rights should a business be mainly concerned about?
- Which human rights should a company pay particular attention to?

The term “sphere of influence” implies that the more control, authority or influence a business has over a situation giving rise to human rights abuses (or the means to improve respect for human rights), the greater the business responsibility to act. Therefore every company, both large and small, has its own unique sphere of influence depending on its political, contractual, economic, and geographical proximity to individuals. The larger or more strategically significant the company, the larger that company’s sphere of influence is likely to be, being proximate to a larger number of individuals and even proximate to a larger extent.⁸⁶

4.3.1 Standard of proximity and the duty of care

A company’s sphere of influence includes individuals to whom the company has a certain political, contractual, economic or geographical proximity. This idea resembles the standard of proximity, recognized in both criminal and tort law.⁸⁷ As a matter of fact, all the criminal law and tort law principles that could hold a company responsible for omission to act turn on the proximity of a company to victims or perpetrators, be it physical proximity or the closeness of relationship.⁸⁸ The proximity of a company to the negative effects of its operations is of crucial importance when determining the level of the company’s legal and moral responsibility for any particular human right.⁸⁹ The closer a company is to the victims or perpetrators, the greater will be its control and authority over their acts and lives. At the same time the impact of a company’s actions (or inactions) and the understanding of their consequences, will be greater the closer the relationship is. The company in question is the one most likely to know or ought to know the human rights consequences of its own actions and omission. It should be able to predict or reasonably foresee that its actions or inactions might result in human rights abuses, for which it is to be held responsible.⁹⁰

Accordingly, those in the immediate proximity of a company’s operations are most likely to be its own employees, the workers, for whom the

⁸⁶ UNGC/OHCHR, 2004, p. 17

⁸⁷ ICHRP, 2002, p. 136; UNGC/OHCHR, 2004, p. 17

⁸⁸ ICHRP, 2002, p. 135

⁸⁹ Jungk, 2005, p. 10; ICHRP, 2002, p. 162

⁹⁰ ICHRP, 2002, p. 136, 138

company thus should carry the biggest responsibility when it comes to human rights. But also with other proximate people or institutions, the company might have power, authority, influence, leverage or opportunity to protect victims or intervene with abusers and should be obliged to do so.⁹¹ Sphere of influence thus encompasses human rights violations committed both *against* people proximate to the company as well as *by* people proximate to the company.

Another legal principle relevant when assessing the concept of “sphere of influence” is the concept of duty of care. According to a study made for the SRSB, the tortious doctrine of duty of care, found in the area of corporate civil liability, is the legal doctrine most analogous to the concept of “sphere of influence”. It defines the extent of interests that are protected when negligence occurs.⁹² According to the legal duty of care, everyone has to avoid causing damage by negligence to those who are so closely and directly affected by one’s acts that one ought reasonably to have them in mind when acting.⁹³ The access to information and the legal principle of predictability makes the companies most likely to be aware of and realize the human rights implications of their actions and inactions.⁹⁴

4.3.2 Various levels of influence

The degree of a company’s influence may vary significantly from partner to partner, issue to issue, and operation to operation. A company’s ability to act on human rights issues, its degree of influence, varies depending on the human rights issue in question, the size and strategic significance of the company, the proximity between the company and the (potential) victims and perpetrators of human rights violations.⁹⁵ There are different levels of control that a company may exert on its operations and a company should be held accountable for the activities within the operations which the company owns or controls and those which they can influence such as their local partners in forward or backward linkages.⁹⁶

A company’s all core operations fall within its sphere of influence, let be that the influence is of varying degrees. Companies have a responsibility to ensure the safety and security of its operations.⁹⁷ Five different levels of influence may be identified within a company’s sphere of influence, three being within its core operations:⁹⁸ (*see fig. 1*)

- Workplace – employees (core) [99 %]

⁹¹ ICHRP, 2002, p. 136

⁹² Allans Arthur Robinson, 2006, para. 48

⁹³ ICHRP, 2002, p. 138

⁹⁴ Neijd, 2002, p. 42f

⁹⁵ UNGC/OHCHR, 2004, p. 17

⁹⁶ ILO, 2002, p. 22f; ILO Tripartite Declaration, para. 20

⁹⁷ UNGC/OHCHR, 2004, p. 18

⁹⁸ The differentiation has been outlined in OHCHR/UNGC/UN Staff College, 2007, 2.2; BLIHR/UNGC/OHCHR, 2006, p. 8; BLIHR, 2006, p. 9.

- Supply Chain – business partners (core) [92.5 %]
- Market Place – customers (core)
- Community – broader stakeholder relations [71 %]
- Government⁹⁹ – public policy dialogue [63 %]

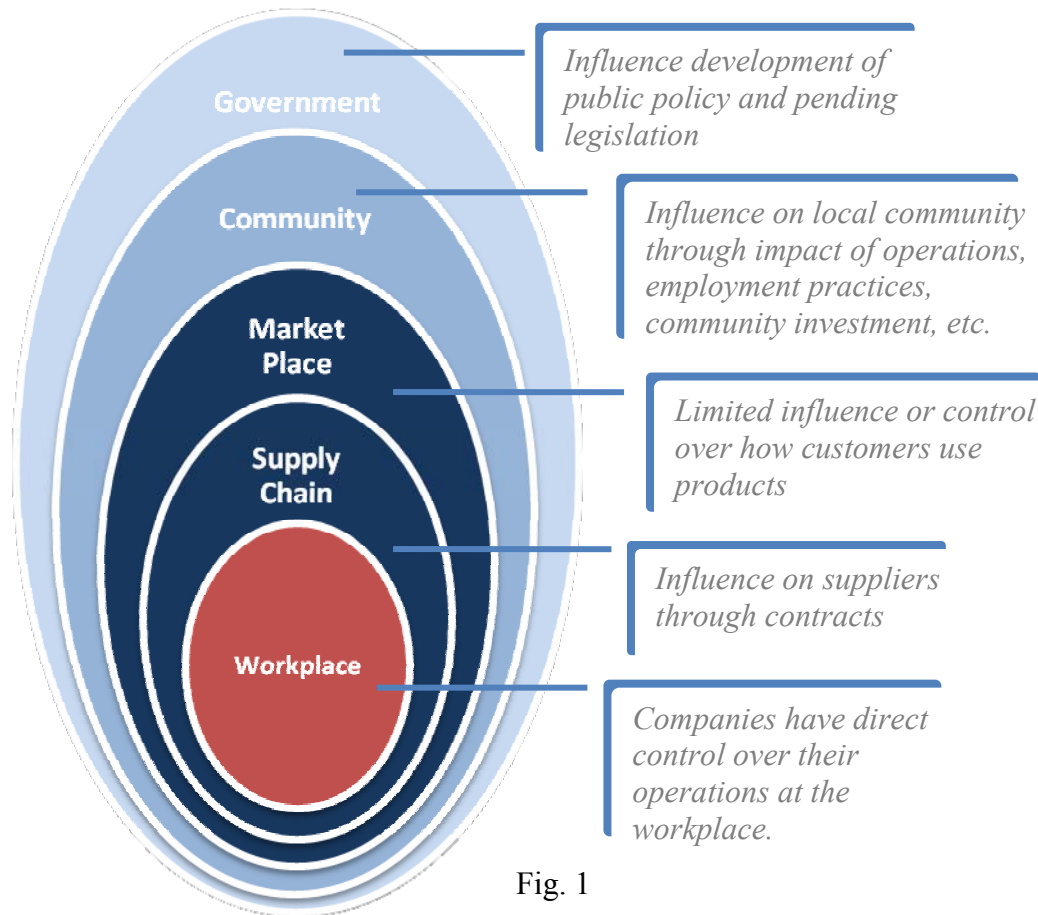


Fig. 1

A study of the Fortune Global 500 firms, conducted on the behalf of the SRSR, asked companies which stakeholders their human rights policies and practices encompass. The responses sum up to company policies and practices encompassing employees (referenced by 99 per cent); suppliers and others in their value chain (92.5 per cent); the communities in which they operate (71 per cent); the countries in which they operate (63 per cent); and others (23.7 per cent), a category that includes customers, shareholders, and investors.¹⁰⁰

Companies have direct control over their operations at the workplace. In the supply chain they can exert influence on suppliers through contracts. There is limited direct influence or control at the market place over how customers use the products and the influence on the local community may be exerted through the impact of its operations, employment practices and community

⁹⁹ Including armed groups controlling the territory in which the company operates. UNGC/OHCHR, 2004, p. 17

¹⁰⁰ Addendum 3 - SRSR Report, para. 81

investment. At the government level, companies may be very involved in public policy dialogue and even be asked for opinions on impending legislation.¹⁰¹

4.3.2.1 The Workplace

A company has direct control over its workplace and thus the closest relation a company has to any stakeholder is with its own employees. This relation lies at the very centre of its sphere of influence.¹⁰² This close relationship is a result of the company having control and authority over its employees.¹⁰³ This control is routinely exercised and as long as the control is exercised a company should take a role as a government towards its workers, who can be regarded as its citizens.¹⁰⁴

Within the core operations the most frequent interaction with human rights issues a company has is in its labor relations and human resources management.¹⁰⁵ The rights of employees are said to be one of the best understood human rights within the business sphere.¹⁰⁶ A company has a duty towards employees whose human rights are affected by the company's operations, but it also has a duty towards employees whose rights are threatened by others.¹⁰⁷ Besides the basic and fundamental labor rights, some suggest that a company duty to respect and protect the human rights of its employees should extend into taking reasonable steps to protect its employees even from human rights violations committed by the state. One way could be to seek legal redress for a violation against its employees.¹⁰⁸

4.3.2.2 The Supply Chain

A company can have varying influence on its business partners in the supply chain. The company and its code of conduct set standards for suppliers to comply with. Through dialogue, contract conditions, self-assessment, and audit, a company has influence on the business conduct in their supply chain.¹⁰⁹ An example can be a company that presses a supplier too hard on the price of the product. This pressure may have a negative impact on the labor conditions at the supplier's workplace, e.g. right to receive fair wages, right to safe and healthy working conditions, right to reasonable limitation of working hours, etc. Companies may thus be complicit in abuses committed by its partners in case the company concerned does not try to prevent or stop abuses.¹¹⁰

¹⁰¹ OHCHR/UNGC/UN Staff College, 2007, 2.2

¹⁰² UNGC/OHCHR, 2004, p. 17

¹⁰³ ICHRP, 2002, p. 136

¹⁰⁴ Jungk, 2005, p. 8

¹⁰⁵ UNGC/OHCHR, 2004, p.18

¹⁰⁶ OHCHR/UNGC/UN Staff College, 2007, 2.3

¹⁰⁷ UNGC/OHCHR, 2004, p. 36

¹⁰⁸ UNGC/OHCHR, 2004, p.18; ICHRP, 2002, p. 138

¹⁰⁹ OHCHR/UNGC/UN Staff College, 2007, 2.3

¹¹⁰ UNGC/OHCHR, 2004, p. 18

4.3.2.3 The Market Place

At the market place a company should act to ensure that its products or activities do not threaten the health, safety and livelihoods of their clients and customers.¹¹¹ It has a duty to ensure that its products are not used in human rights violations. This may be done through taking reasonable steps to prevent a product from being intentionally misused or unintentionally wrongfully used.¹¹² There is a possibility of harm to the end-user through misusing the product or service. A business customer may use or misuse a product or service, for example by using e-mail surveillance technology to infringe on employees' privacy. Use or misuse of products which may result in human rights violations can also be conducted by a government customer.¹¹³ However, to avoid the imposition of unrealistic responsibilities for businesses, a company may only be responsible for human rights violations caused by wrongful use or misuse of its products, which the company could legitimately be expected to foresee as a potential possibility.¹¹⁴ Considering the above, the human rights issues and responsibilities vary from industry to industry.

4.3.2.4 The Community

The responsibilities of a company in the community extend to the communities living near its operations or those otherwise dependent on the company.¹¹⁵ One of the main responsibilities of companies on this level is its positive responsibility to anyone residing on its land, in particular the indigenous peoples. Many cases of human rights challenges for companies within the community have involved the use of land formerly of benefit to the local community. In regard to indigenous peoples' rights, clearance of forest, disruption to animal routes and contamination of water or soil have given rise to human rights issues as these activities may put their food sources and health at risk.¹¹⁶

Several human rights issues may be raised at the community level. Issues related to the right to health are relevant when a company's operations have an environmental impact¹¹⁷ but a company may also have incentives to support the community as a whole to improve health as it has an impact on its workforce.¹¹⁸ The ways in which community protests are handled by the company or state forces may raise the issue of the right to peaceful assembly, which is to be respected, but also the way in which the company treats the community as a whole. Favorism of one ethnic group may lay

¹¹¹ ICHRP, 2002, p. 139

¹¹² Jungk, 2005, p.9; ICHRP, 2002, p. 139

¹¹³ OHCHR/UNGC/UN Staff College, 2007, 2.3

¹¹⁴ Jungk, 2007, p. 9

¹¹⁵ ICHRP, 2002, p. 137

¹¹⁶ Jungk, 2005, p. 9; OHCHR/UNGC/UN Staff College, 2007, 2.3; UNGC/OHCHR, 2004, p. 18

¹¹⁷ UNGC/OHCHR, 2004, p. 18

¹¹⁸ OHCHR/UNGC/UN Staff College, 2007, 2.3

ground for conflict in the community, thus non-discrimination and equality of opportunity should be practiced by businesses.¹¹⁹

4.3.2.5 The Government

Furthest away from its core operations is a company's influence on government. Every company has a different sphere of influence, and being furthest away from a company's core operations, the intensity of influence over government will vary strongly between companies. A large company may have considerable economic leverage with a government and therefore be in a better position to raise concerns over human rights issues, whereas smaller companies with less influence would be unable to do that. The closeness of a company's relationship with the government will determine the extent to which the company is expected to react on human rights violations committed by the authorities.¹²⁰ A company may be asked for opinions on public policy and even on pending legislation. Through dialogue, businesses may influence public policy on taxation, environmental protection, health and safety, equality, etc.¹²¹

Though not speaking in legal terms, the society has some expectations on what businesses may use their influence for. They may be expected to ensure their formal position on supporting human rights, quietly encouraging respect for human rights in their dialogue with government, encourage or support investigation of human rights abuses in the vicinity of their operations and even to speak out against human rights violations.¹²²

In extreme cases, a company may de facto replace a government, when the government allows the company to take over a certain area. The vacuum of governance is filled by the company, which becomes the only authority in the area and thus steps into the shoes of the government taking on some of the responsibilities and positive duties of the government in respect of human rights.¹²³

When a company is unable to influence a government known for human right violations to change its behavior, it is unclear if the company must avoid doing business with this government.¹²⁴ Under legal principles, however, even if the company knows of the existing violations, it is not sufficient in order to make the company responsible.¹²⁵

¹¹⁹ Ibid.

¹²⁰ UNGC/OHCHR, 2004, p. 21

¹²¹ OHCHR/UNGC/UN Staff College, 2007, 2.3

¹²² Ibid.

¹²³ Jungk, 2005, p. 9

¹²⁴ UNGC/OHCHR, 2004, p. 37

¹²⁵ ICHRP, 2002, p. 135

4.4 Understanding ‘Sphere of Influence’

Professor Ruggie, in his report, clearly points out that there currently is no legal definition of the whole or any part of the notion of a corporation's 'sphere of activity and influence', either in the UN Norms or elsewhere in international law, and that defining its terms is crucial to any endeavor that seeks to make corporations liable for human rights abuses within their respective spheres.¹²⁶

There is a need for further developing, what has been called, the “pre-legal” concept of ‘sphere of influence’.¹²⁷ Greater understanding of ‘sphere of influence’ may inform the development of the legal understanding of corporate complicity in human rights abuses and the boundaries of corporate human rights responsibilities.¹²⁸ Broader clarification and understanding of ‘sphere of influence’ is also essential for companies in assessing their corporate responsibilities with regard to human rights.

¹²⁶ Narula, 2006; SRSG Report, para. 87; see also SRSG Interim Report, para. 67

¹²⁷ See above, chapter 4.2

¹²⁸ BLIHR, 2006, p.9

5 Mechanisms for implementation and control

In this chapter, four different mechanisms for implementation and control will be presented. *Reporting* and *auditing* have been chosen as the two mechanism most frequently used today when it comes to human rights and business. The “*Specific Instances under the National Contact Points of the OECD*” is as well frequently used, but has another character. It does not only apply for businesses operating from the OECD area, but also for any business operating within the OECD area, which makes this mechanism very useful and important. The *Human Rights Impact Assessment*, however new, it is an emerging implementation mechanism. Although not widely used, this mechanism is quickly gaining importance and developing as this paper is being written.

5.1 Reporting

5.1.1.1 Background

The terminology used in regard to reporting on corporate responsibility varies. Reports may refer to sustainability, sustainable development, corporate social responsibility and corporate responsibility. However, all of these terms cover the three topics of social, environmental and economic performance, although with varying levels of detail. This approach is better known as the “triple-bottom line” and it refers to the use of economic, environmental and social factors in the assessment of a company’s performance. Only until recently has the social aspect of corporate reporting been in the shadows, but the trend has turned and more and more corporate reports include social aspects. Up until 1999, besides financial reporting, only the environmental aspect was covered. Since 1999 it has changed to social, environmental and economic reporting being the mainstream.¹²⁹ This kind of reporting has also been called non-financial reporting (NFR)¹³⁰ or CSR reporting. Due to the fact that all three aspects may be included in the reports included in this study, the term corporate responsibility (CR) report will be used.

5.1.1.2 The extent of use

A KPMG 2005 CR reporting study, covering more than 1600 companies worldwide, suggests that “Corporate responsibility reporting in industrialized countries has clearly entered the mainstream”. According to the same study, CR reporting has been steadily rising since 1993 and has

¹²⁹ KPMG, 2005, p. 3

¹³⁰ Palenberg, et al, 2006, p. 5

increased substantially in the three years previous to the study.¹³¹ The KPMG study shows that CR reporting¹³² has risen to 64 percent amongst the Global 250 companies.¹³³ Another study of 314 companies, mainly companies adhering to the GC, shows that nearly all of them report on their human rights performance in some form.¹³⁴ However, looking at all transnational corporations, them being 77,000 in numbers, the share of those reporting on non-financial aspects of their company's performance is extremely low, estimated to below 5 percent.¹³⁵

The push for greater CR reporting is a result of rising concerns over corporate social and environmental behavior. The biggest pressure is especially on large companies to become more transparent and accountable in these areas, not least through reporting on the issues.¹³⁶ Lately, the CR reports tend to be more comprehensive and integrate economic, social and environmental data. Still, however, it is mostly performed as a public relations trick rather than a serious commitment to the CR values.¹³⁷ Advocates of CR reporting see it as a powerful instrument to promote sustainable development, while skeptics doubt the effectiveness of reporting as companies rarely act on the issues reported.¹³⁸

CR reporting is increasingly becoming important to the financial community, asking companies to report on CR in a systematic and standardized manner. This development has also been strengthened by the emergence and rise of Socially Responsible Investment funds.¹³⁹

5.1.1.3 How to report

The contents of CR reporting may vary widely. The concept of CR reporting is based on regular corporate annual reports, but the contents may divert more strongly from company to company. A CR report will be a description of a company's way of supporting sustainability, including social and environmental performance. A CR report may be separate from the annual or financial report or it may be integrated with the financial performance of the company. When integrated with the financial performance, a CR report will cover the three areas of sustainability, the so called triple bottom line, which best reflects the currently most excepted definition of sustainable reporting.¹⁴⁰

A great deal of discretion is afforded the company when deciding on what to include in their CR report since very few regulations exist in the area. The

¹³¹ KPMG, 2005, p. 3

¹³² Including annual financial reports with CR information

¹³³ KPMG, 2005, p. 3

¹³⁴ Addendum 4 – SRSG Report, para. 70

¹³⁵ Palenberg et al, 2006, pp. 12, 34

¹³⁶ *Ibid.*, p. 6

¹³⁷ *Ibid.*, p. 18

¹³⁸ *Ibid.*, p. 6

¹³⁹ KPMG, 2005, pp. 3, 7

¹⁴⁰ Ersmarker, 2003, p. 23

report can simply consist of a company's commitment to the principles of a voluntary initiative to which they have adhered, but CR reporting is typically focused on labor rights.¹⁴¹ The social topics discussed in CR reports are mostly core labor standards, working conditions, community involvement and philanthropy.¹⁴² Some reports may only report on philanthropic activities, while others, more detailed, may use a human rights checklist for the company's activities.¹⁴³ In the 2005 KPMG survey the CR reporting of G250 companies on core labor standards cover following issues:

- Diversity – 68 %
- Equal opportunity – 61 %
- Human rights – 51 %
- Collective bargaining – 33 %
- Child/forced labor – 30 %
- Freedom of association – 27 %

Majority of the reports contain general commitments to human rights, but very few report on the progress toward non-labor human rights as they appear in the ICCPR, ICESCR and UDHR.¹⁴⁴ Details on how the commitments to respect human rights are translated into practice are missing in most reports.¹⁴⁵

There are no clear social indicators or regulations on what CR reporting should include, and therefore CR reporting remains blurry. However, the growing pressure on companies to be accountable for the actions of their suppliers has resulted in CR reporting on the supply chain being a common practice.¹⁴⁶

The drivers behind CR reporting are various. Reporting on corporate responsibility is important in assessing progress and identifying areas for improvement, but public reporting also promotes public accountability and transparency of a company.¹⁴⁷ Companies' impact on the environment has led them to reporting on environmental performance, and as companies more and more have impact on the community where they operate they should also report on their social performance, where the respect for human rights has a given place. Not least the pressure from NGOs has played a crucial role in the development of CR reporting. This reporting provides consumers as well as financial markets with crucial information they can use to pursue companies to improve their social and environmental performance.¹⁴⁸

¹⁴¹ Addendum 4 – SRSR Report, para. 71

¹⁴² KPMG, 2005, p. 5

¹⁴³ Addendum 4 – SRSR Report, para. 116

¹⁴⁴ KPMG, 2005, p. 24 and Addendum 4 – SRSR Report, para. 71

¹⁴⁵ KPMG, 2005, p. 24

¹⁴⁶ *Ibid.*, pp. 5, 24

¹⁴⁷ Amnesty International et al., 2000, p. 9 and Ersmarker, 2003, p. 13

¹⁴⁸ Palenberg et al., 2006, p. 6

However many companies sort their CSR department under their Public Relations department. A survey shows that 94% of the respondents think that “strategically managing reputation and brand” is a very important or important driver to produce sustainability/CSR reports. 32 % think that “preparing a smooth transition into legally required NFR” is a very important or important driver.¹⁴⁹

5.1.1.4 Developments

Some European governments are beginning to encourage or require social and environmental reporting.¹⁵⁰ The emergence of requirements for companies to report on non-financial aspects or their performance includes legislation requiring companies to report on particular environmental or social issues; legislation that establishes legal frameworks for the administration of environmental or social labeling schemes, and legislation requiring pension fund managers to report on the environmental or social policies that they apply to their investments.¹⁵¹ The United Kingdom has adopted a new company law in November 2006, which will require large listed companies to include in their directors’ report information on environmental matters, employees, social and community issues and “essential” business partners. The information has to be provided “to the extent necessary for an understanding of the development, performance and position or the company’s business”.¹⁵² In France, the Nouvelles Régulations Economiques (NRE) law came into force effectively for the fiscal year 2003. NRE requires all publicly listed companies to provide data on non-financial performance covering the entire triple bottom line.¹⁵³ The UK, Belgium, Germany and Australia have regulations requiring trustees of occupational pension funds to disclose the extent to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments.¹⁵⁴

Even some stock markets are beginning to require forms of social reporting as part of listing requirements. The Johannesburg and Bovespa stock exchanges for example, require their listed companies to produce NFR and to commit to the UNGC principles.¹⁵⁵

The regulations mentioned above do not require any direct change in companies’ non-financial practices and they form a new branch of regulatory economics, called “informational regulation”. It requires only the provision of information. When it comes to improving performance, it relies

¹⁴⁹ Palenberg et al., 2006, p. 20

¹⁵⁰ Carnegie Council on Ethics and International Affairs, 2004, p. 12

¹⁵¹ Ward, 2003, p. 3

¹⁵² Companies Act 2006, Section 417 (5) [SRSG Report, para. 78, note 62)]

¹⁵³ Palenberg et al, 2006, p. 27

¹⁵⁴ Ward, 2003, p. 3

¹⁵⁵ Carnegie Council on Ethics and International Affairs, 2004, p.12 and Palenberg et al, 2006, p. 9 note 10

upon economic markets and public opinion as the mechanisms to bring about changes.¹⁵⁶

The majority of respondents in a survey still favor mandatory CR reporting. Many think that mandatory reporting would generate more positive than negative results, while opponents argue that a mandatory approach would reduce innovation in the area. They also argue that a mandatory approach would take away the incentive for companies to compete on NFR. However, a mandatory framework may level the playing field and make it easier to compare companies' non-financial performance.¹⁵⁷

5.2 Auditing

5.2.1.1 Background

As more and more companies are working with CSR, many are still sorting their CSR departments under Public Relations. This fact alone puts the credibility of their CSR work in question. If the CSR work is to be acknowledged by the public it has to be transparent and credible. It is also important to assure that a company's code of conduct, or any international CSR instrument that they adhere to, is followed and implemented correctly. It is crucial for the CSR work to connect credibility to the CSR reports and performance statements of the company's activities. Auditing is a formal, often periodic examination and checking of accounts or financial records to verify their correctness. More generally it refers to any thorough examination and evaluation of a problem. The financial auditing has been transferred to the CSR area to thoroughly examine human rights or labor practices against a certain set of human rights or labor standards.¹⁵⁸ It is important, if not necessary, that a company audits its performance and actions even in the CSR field.

5.2.1.2 The extent of use

Accountability mechanisms can range from periodic audits to certifying individual factories of global brands. A growing proportion of sustainability reports, about 40 per cent, now include some form of audit statement. These audits are typically provided by large accounting firms or smaller consultancies. However, two global assurance standards have emerged, the ISAE3000 and the AA1000AS.¹⁵⁹ By evaluating the quality of the management, monitoring, data collection, its materiality and other systems in place to generate the CSR information given by the companies, both

¹⁵⁶ Palenberg et al, 2006, p. 6 note 6

¹⁵⁷ Palenberg et al, 2006, p. 24f

¹⁵⁸ Ascoly/Zeldenrust, 2003

¹⁵⁹ International Auditing and Assurance Standards Board ISAE3000, and AccountAbility AA1000AS

standards are there to help the public determine whether the information reported is reasonably likely to be accurate.¹⁶⁰

5.2.1.3 How to audit

Auditing can be divided into internal, external and independent auditing or monitoring. Internal monitoring is conducted by the company itself, external by a third-party for-profit firm, and independent monitoring is conducted by not-for-profit or non-governmental organizations.¹⁶¹ At the moment companies rarely use external auditors or other assurance processes to verify reported information. In a recent study only 18 out of 314 companies surveyed reported that they employ such measures. In case of external monitoring, the majority of the companies use a private consulting firm.¹⁶²

One of the perhaps most known social auditing systems is the SA8000, developed by Social Accountability International. The SA8000 is a standard for workplace conditions and a verification system based on already existing quality verification systems like ISO9000 and international human rights instruments. A full SA8000 audit will result in a certification of compliance, valid for three years. An audit according to the SA8000 will include a specially trained local audit team assigned to the facility in question. During the first visit, the audit team can issue a major or minor corrective action request, if it finds something that doesn't fully meet the requirements of the standards. A major action request will be issued in case of system-wide non-compliance, while a minor action request will be issued in cases of isolated non-compliance.

A short period of time will be given for the corrections to be made before the team audits the corrections made and approves it or not. If the standards are met, a certificate of compliance will be issued. This certificate is valid for three years, but there will be surveillance audits performed every six months during this period. If the auditor finds that the facility completely complies with the standards, the audits will be conducted once a year. After the expiration of the certificate a full compliance audit will be made again in order to receive a new certificate of compliance.¹⁶³

The audit consists of two parts. The first, more technical one includes the audit of the corporate finances, their papers and interviews with the management. The second part includes investigations of the plants and interviews with the employees.¹⁶⁴

¹⁶⁰ SRSG Report, para. 79

¹⁶¹ Ersmarker, 2003, p. 65, 67

¹⁶² Addendum 4 – SRSG Report, para. 75

¹⁶³ Ersmarker, 2003, p. 40

¹⁶⁴ Ibid., p. 55

5.2.1.4 Auditing problems

There is however a problem of credibility within auditing. Internal monitoring and external monitoring conducted by for-profit firms are not considered to be credible and there is a struggle concerning the definition of independent monitoring. Auditing has become a business many firms are interested in getting involved in, which doesn't mean that they are the ones best suited for the monitoring and their independence towards the companies can be questioned.¹⁶⁵

5.3 National Contact Points of the OECD – Specific Instances

5.3.1.1 Background

The OECD Guidelines provide for a system of National Contact Points (NCPs). This is a government-backed implementation mechanism of the OECD Guidelines. The adhering states are obliged to establish NCPs in their countries with the task to promote the OECD Guidelines, handle enquiries about them, assist in solving problems that may arise, gather information on national experiences with the Guidelines, and report annually to the OECD Investment Committee.¹⁶⁶ This system of NCPs provides a unique follow up mechanism for raising “specific instances”. “Specific instances” procedure allows interested parties, including any person or organization, to bring a complaint against a multinational firm, operating within the sphere of the OECD Guidelines, to the attention of an NCP. The NCP is expected to help resolve the issues of alleged non-observance of the OECD Guidelines relating to specific instances of business conduct.¹⁶⁷ Since the creation of the “specific instances” procedure in 2000, it has been used 130 times, where issues concerning company practices in OECD as well as non-OECD countries have been raised. Of these, 96 requests have actively been taken up by NCPs and 43 of these have dealt with human rights issues explicitly.¹⁶⁸

5.3.1.2 The extent of use

One of the main tasks of the NCPs is to be a forum for discussion of questions regarding the implementation of the OECD Guidelines and contribute to the solution of problems which may arise in this connection.¹⁶⁹ According to the Procedural Guidance (I-A-1) the NCP may be either a senior government official or a government office headed by a senior official. However, representatives of the business community, employee organizations and other interested parties may also be included.

¹⁶⁵ Ibid., p. 67

¹⁶⁶ OECD/UNGC, 2005, para. 24

¹⁶⁷ SRSR Report, 2007, para. 50; UNGC/OHCHR, 2004, p. 34

¹⁶⁸ OECD, 2007, para. 9

¹⁶⁹ UD, 2006, p. 11

Besides promotional tasks, such as spreading knowledge about the OECD guidelines, raising awareness of the guidelines and responding to enquiries about the guidelines, the most important task of the NCPs is to:

*“contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law.”*¹⁷⁰

This means that anybody concerned can bring a complaint to the attention of an NCP. Thus, companies may be subjects of investigations by NCPs whether they like it or not and without having the options to pick or choose which guidelines they apply.

5.3.1.3 The contents of Specific Instances

The NCP first makes an initial assessment whether the issue raised merits further examination. It has to determine whether the issue is bona fide and relevant to the implementation of the guidelines. It specially takes into account the following:

- the identity of the party concerned and its interest in the matter;
- whether the issue is material and substantiated;
- the relevance of applicable law and procedures;
- how similar issues have been, or are being, treated in other domestic or international proceedings;
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.¹⁷¹

When further examination is called for, the NCP will offer good offices to help the parties resolve the issue. It will seek advice from relevant authorities, and/or representatives of the business community, employee organizations, other NGOs, and relevant experts. It will also consult the NCPs in other country or countries concerned and seek the guidance of the OECD Investment Committee, when in doubt, of how to interpret the guidelines in particular circumstances.¹⁷²

If the parties involved fail to reach an agreement, the NCP will publish a statement with recommendations on the implementation of the OECD Guidelines. These recommendations will be public and reflect the result of the procedure, while the confidentiality of the proceedings themselves will be maintained.¹⁷³

¹⁷⁰ OECD Guidelines, Procedural Guidance para. I-C

¹⁷¹ OECD, 2001, p. 51

¹⁷² OECD Guidelines, Procedural Guidance para. I-C-2

¹⁷³ OECD, 2001, p. 52

The “specific instances” procedure is today the only international dispute resolution procedure based on a comprehensive code of conduct for international business. It is specific while each OECD and adhering government must establish an NCP. Following the OECD Guidelines, the issues may be raised with regard to alleged non-compliance of MNEs operating in OECD countries as well as with regard to MNEs headquartered in an OECD country but operating outside of the OECD area.¹⁷⁴

5.3.1.4 Missing factors

However, the implementation procedure of the OECD Guidelines, the Procedural Guidance, doesn’t provide information on how companies themselves should implement the guidelines through their operations. It does not give guidance on how to monitor compliance, how to report about progress or how to allow for independent verification. The operational aspects, which are essential for implementing the guidelines, are lacking.¹⁷⁵

5.4 Human Rights Impact Assessment (HRIA)

5.4.1.1 Background

An impact assessment, simply defined, is the process of identifying the future consequences of current or proposed action. The term “impact assessment” can be used for activities ranging from post-project evaluations to compliance checks, but in the context of Human Rights Impact Assessment (HRIA) it will refer to ex ante activity.¹⁷⁶ A Human Rights Impact Assessment is a tool used to analyze the functions of and identify the intended or unintended impacts of a proposed business activity on human rights. The purpose of the exercise is to discover potential human rights risks at the pre-stage of a business project, be it a construction project or investment project.¹⁷⁷ It is also a mechanism to bring together representatives of the company, community, NGOs and government together in a dialogue.

Interventions in order to enhance positive effects and avoid or mitigate negative impacts and risks of business activity impacts are most effective and least costly when implemented in anticipation rather than in reaction to changes caused by business activity.¹⁷⁸ Besides from preventing negative impacts on human rights or even human rights abuses, an HRIA also helps

¹⁷⁴ Oldenziel, 2005, p. 10

¹⁷⁵ Ibid., p. 9

¹⁷⁶ HRIA Report, p. 3 footnote 1

¹⁷⁷ UNGC/OHCHR, 2004, p. 23

¹⁷⁸ HRIA Report, para. 2

preventing irreparable damages to the company that risks non-compliance with human rights.

For those companies that physically and socially leave large impacts on the societies where they operate, their corporate accountability should start with an assessment of the human rights impact of their projects, trying to avoid negative impacts from the beginning. “No single measure would yield more immediate results in the human rights performance of firms than conducting such assessments where appropriate”.¹⁷⁹

5.4.1.2 How to conduct an HRIA

The method of impact assessments has been well-developed in the areas of environmental and social impact assessments (ESIA). It has now become a routine for projects with significant physical footprints and is in many cases required by national law or financing institutions. ESIA's often raise human rights issues but they can still miss human rights violations embedded in society.¹⁸⁰ A number of organizations are experimenting with HRIA for private sector projects. However, until now only one HRIA has been made public.¹⁸¹ Only few companies go beyond dialogue in the community and include some kind of HRIA as part of the consultation process with the community. The fact is that the company use of HRIAs is still very rare.¹⁸²

There is today no universal standard on the contents of an HRIA. However, the SRSG's mandate on the issue of human rights and transnational corporations and other business enterprises included the task of developing materials and methodologies for undertaking human rights impact assessments for business activity.¹⁸³ The description below of how a HRIA should be conducted builds upon SRSG's report on Human rights impact assessments.¹⁸⁴ Building on ESIA, the HRIA should describe the proposed business activity, whether it is question of new investment or a significant change in the project (e.g. expansion), or if a new policy is put in place. An HRIA should also consider the full business life cycle, all the way from construction through closure of project.

HRIAs should list the legal, regulatory and administrative standards relevant to the business activity. Besides national and local laws, regulations of home and host countries, requirements of project financiers, and company policies HRIAs should also catalogue relevant human rights standards. These include human rights standards listed in international conventions signed by home and host countries, also mentioning those conventions not signed by those countries, other relevant standards such as indigenous customary laws

¹⁷⁹ SRSG Report, p. 22

¹⁸⁰ HRIA Report, para. 3-5

¹⁸¹ HRIA Report, para. 6, para. 9; The HRIA for BP's Tangguh liquefied natural gas project in Indonesia is the only one made public.

¹⁸² Addendum 4 – SRSG Report, p. 24, p. 30

¹⁸³ Commission resolution 2005/69, § 1(d) and Council decision 1/102

¹⁸⁴ HRIA Report

and traditions, and in cases of armed conflict the catalogue should include international humanitarian law. Even associated investment treaty obligations, host government agreements, or contracts with government agencies and suppliers should be listed and checked for their compliance with human rights standards.¹⁸⁵

The difference between an ESIA and an HRIA is that the International Bill of Rights¹⁸⁶ frames the HRIA's conduct and content. HRIAs examine a project's interaction with each and every right.¹⁸⁷ HRIAs could also use the Human Rights Based Approach (HRBA) that states the primacy of the Universal Declaration of Human Rights and other international human rights instruments as both the goal and the guiding principles for programs and policies.¹⁸⁸

The added value of HRIAs is the description of human rights conditions in the societal context. It is important to identify human rights abuses embedded in society, i.e. human rights practice separate from the law. For this exercise it is of utmost importance to engage human rights experts and local stakeholders.¹⁸⁹

Identifying the human rights impact of the business activity, HRIAs should attempt to anticipate what changes are possible due to the intended activities. This may be done through constructing multiple scenarios or predicting outcomes based on varying levels of intervention, but also considering community perceptions of what changes the business activity may bring.¹⁹⁰

Subsequently the impact assessment should prioritize the human rights at risk for the proposed activity, make recommendations to address those risks and finally incorporate those recommendations into a management plan with provisions for monitoring and reviewing the issues identified in the HRIA.¹⁹¹

The credibility of an HRIA depends on the involvement of experts in different areas, the industry, local context, and human rights, and the intensity in which they are involved. It is important to have in mind that independent third parties, as external experts, bring more credibility to an impact assessment, although their credibility may be questioned as they are on the payroll of the company conducting the HRIA. Currently there is however no other source of funding available for independent and external assessors, as the case is for auditors of corporate reports. The assessment is left to be judged on its merits, including the third parties involved.¹⁹²

¹⁸⁵ Ibid., p. 4, p. 6

¹⁸⁶ See Appendix 1

¹⁸⁷ HRIA Report, p. 6

¹⁸⁸ Ibid., p. 7

¹⁸⁹ Ibid., p. 4

¹⁹⁰ Ibid., p. 5

¹⁹¹ Ibid.

¹⁹² Ibid., p. 5

It is desirable for an HRIA to be published in full but some reasonable potential risks must be considered and possibly lead to a limited version or summary being published. Details in the HRIA that could create political or legal risks for the company or endanger its staff may be reason enough for a company not to publish in full its HRIA.¹⁹³

Finally, a HRIA is not an end in itself, but a tool. What matters is how those involved use the findings and how they engage with the process of conducting a HRIA.¹⁹⁴

5.4.1.3 The extent of use

It is a fact that any industry can have significant impacts on human rights, both positive and negative. Impact assessments are at the time though discussed almost only for projects with large physical impact and only large multinationals are known for undertaking HRIA. However, in recent years more and more criticism has been given to technical and financial industries for not paying enough attention to human rights issues. HRIAs are currently not required by any law, lending institution, or standard. They have not yet been clearly defined or standardized which makes it more difficult to make them a requirement.¹⁹⁵

In a report on governments and Fortune Global 500 firms, conducted by the SRSG, it is said that social impact assessments are becoming a practice that is more common and that they are beginning to incorporate a human rights dimension to them. However, hardly any company has ever conducted a dedicated HRIA and the standard tools needed are still in the developing-process.¹⁹⁶ In the results of the questionnaire¹⁹⁷, only ten percent of responding countries require HRIA for outward investments and that in very specific cases.¹⁹⁸ Not one country of the twenty percent that responded on the question of HRIA in incoming investments requires HRIA for incoming investments. However, one country says to have a de facto requirement that it is transforming into written policy. Other countries argue that all investors, inward as well as outward, are subject to national laws that incorporate human rights. As a result, an HRIA would therefore not be necessary.¹⁹⁹ On the company side, one third of all respondents claim to

¹⁹³ Ibid., p. 5

¹⁹⁴ Ibid., p. 6

¹⁹⁵ Ibid., p. 10

¹⁹⁶ Addendum 3 - SRSG Report, p. 25

¹⁹⁷ Note the low response rate, as well as the unequal geographic and regional distribution of the responding companies. A total of 102 companies completed the questionnaire, a response rate of 20 per cent, and 29 out of 192 Member States of the United Nations submitted answers, a response rate of 15 per cent. (Addendum 3 – SRSG Report, pp. 7, 25)

¹⁹⁸ It has to be added that the question of whether HRIAs are required or encouraged for outward investment, e.g. export and foreign investment promotion policies, received the lowest rate of responses in the survey: almost 75 percent did not answer.

¹⁹⁹ Addendum 3 – SRSG Report, p. 9-10

conduct HRIAs as a routine while just under fifty percent say they do it occasionally.²⁰⁰

For example, the Committee on Economic, Social and Cultural Rights suggests HRIAs for States before increasing intellectual property protection. The Committee wants States parties to prevent unreasonably high medicine, food and education costs resulting from protecting intellectual property.²⁰¹

The International Finance Corporation (IFC) has performance standards that companies have to fulfill in order to get IFC investment funds. The standards include human rights elements and IFC can require an impact assessment that includes human rights elements. A multi-stakeholder initiative, the Voluntary Principles on Security and Human Rights, also promotes human rights risk assessments in the extractive sector.²⁰²

Within Socially Responsible Investment (SRI) indices HRIAs receive the greatest support. Four out of five SRI indices surveyed in a study under the direction of SRSB require a human rights risk assessment or a prior permission from the community for the activities planned. Two of the indices require a pre-project human rights impact assessment.²⁰³

5.5 The way forward

Despite topping the list of mechanisms used for implementation and control of corporate human rights behavior, reporting and auditing has severe difficulties. They are still used for public relations tricks and they face problems of independence and credibility. The HRIA is gaining importance and is going to continue to do so. Still, all three instruments are in big need of standardization. The “specific instances” of the OECD have gained authority but is yet not strong enough. More transparent procedure could make this mechanism gain more authority.

The raise of informational regulations might bring about some change. These regulations only require information, but may be combined with penalties for wrongful or false reporting. The reliance on the market and the public opinion may get another dimension when these stakeholders have reliable information to base their decisions and behavior on. Including reporting, auditing and HRIAs in these regulations would make implementation and control much more effective.

²⁰⁰ Addendum 3 – SRSB Report , p. 21

²⁰¹ Ruggie, 2007, § 47

²⁰² SRSB-Report, p. 16f

²⁰³ Addendum 4 – SRSB Report, p. 53; the SRI indices included in the study were chosen for being well-known and commonly used by the SRI community of investors and featured the following: the Dow Jones Sustainability World Index (DJSI), the Financial Times Stock Exchange 4 Good Index (FTSE4 Good), the Calvert Social Index, the Ethibel Sustainability Index Global, and the Domini Social Equity Index.

6 Conclusions and final remarks

6.1 Corporate Human Rights Responsibilities

In international human rights law, one cannot claim that a specific human right is more relevant than another one.²⁰⁴ Thus, we cannot isolate specific human rights to be those relevant to corporations. Even if some rights may be identified above as the ones that businesses get in contact with most frequently, all human rights are to be relevant for business corporations. Meanwhile, businesses may not be able to have an influence on all human rights as governments might have, due to the very different nature of the business role and its role in society.

The boundaries of corporate responsibility for human rights have to be made through other means. A transnational corporation or any other business enterprise may have influence and control over those human rights that fall within their “sphere of influence and activity”. The term identifies, in each specific case, which and whose human rights the business entity is to be concerned about.

Using the notion of “sphere of influence and activity”, limits are set on corporate human rights responsibilities according to the business entity’s possibility and power to act and influence a specific human right. It means that any human right can come in question, as long as the business entity has some kind of influence over the fulfillment, respect or promotion of the specific human right. It also assesses the extent to which a business is responsible for acts or omissions of for example a subsidiary or a partner within its supply chain.

Business entities are not supposed to take over the role of governments. Therefore, we can also use the notion of “sphere of influence and activity” to draw the boundaries between responsibilities of businesses and obligations of states. Businesses are to be responsible for what is within their sphere, but not to take over the human rights obligations of states. States still bear the primary responsibility for the fulfillment, protection and promotion of human rights. One should not forget that corporate compliance with human rights obligations is also a state responsibility. TNCs and other business enterprises, as non-state actors on the international arena, do not have the same degree of responsibilities as states. However, we might be seeing a development towards more obligations for business under international law.

²⁰⁴ See above, chapter 3.2.2

The concept of “sphere of influence and activity” does not identify specific human rights that businesses are always responsible for. The concept is to be implemented in each and every case to determine whose and which human rights, at a given place and time, a specific company has the responsibility for. The degree of influence will vary depending on the human rights in question, the size of the company, its strategic significance and the proximity between the company and the potential victim or perpetrator or the human rights violations.

Business entities are responsible to fulfill, respect and promote human rights. The extension of these responsibilities is also to be defined by the specific entity’s “sphere of influence and activity”. Where businesses may not be able to fulfill a human right, such as some political rights, depending on their leverage with the government in question, they may be in the position to promote these rights.

“Sphere of influence and activity” has been widely used by companies to understand their own responsibilities. Thus, companies realize that they are not supposed to be responsible for each and every person’s human rights. The reluctance towards legal obligations in this case may weaken. However, it is crucial to define what the term “sphere of influence and activity” really comprises. It has no legal standing and there is yet no recognized definition of its implications.

When identifying corporate human rights responsibilities, using a rights catalogue is not the most efficient or correct way of attributing human rights responsibilities for business. The very different nature of business does not allow for a human rights catalogue to be used in the same way it is used for states. Depending on the circumstances and different factors named above, one, several or no human rights may be relevant for a company. That is why the concept of “sphere of influence and activity” is today the most adequate way of identifying corporate human rights responsibilities. It does not point out specific human rights for business but assesses every situation separately. This is where corporate human rights responsibilities differ from the state responsibility. The state has a comprehensive responsibility for all human rights, whereas the corporate actors are restricted in their influence on human rights and their human rights responsibilities are only relevant in those situations where they have a real influence.

6.2 Implementation and control

When it comes to implementation and control mechanisms for human rights and business corporations, reporting tops the list, followed by auditing. CR reporting and auditing is widely used, but still mostly as a public relations trick and not as a serious commitment. Companies rarely act on the issues reported and they are allowed to choose themselves what to report on and most importantly what not to report on. Auditing, for example, still has

serious problems with independence and credibility. There are no indicators or regulations in place as to what CR reporting should include.

However, there is an emergence of informational regulations, legal requirements for companies to report on non-financial aspects of their performance. As to improving the corporate performance, this method relies upon economic markets and the public opinion as the mechanism to bring about changes.

Mandatory reporting through informational regulations, including indicators of what to report on, combined with independent and credible auditing, also through regulations, may make some changes. Informational regulations combined with penalties for wrongful or false reporting may make it possible for the economic market and the public opinion to bring about some changes when it comes to corporate performance on human rights. Reports and audits, following informational regulations, would certainly not be a public relations exercise anymore, and above all, they would be taken seriously by the market and the public.

Even HRIAs can be included in informational regulations, as they prevent human rights abuses rather than react to abuses that have already taken place. They may be taken more seriously when incorporated in informational regulations and combined with penalties for wrongful or false conduct. Informational regulations including the mechanisms mentioned above, may prove to be very efficient. CSR reporting, auditing and HRIAs would enjoy higher confidence and the purpose of the regulations, change through the economic market and the public opinion, might be possible to achieve.

The “Specific instances” of the OECD has proven to be successful and is an example of how an international legal framework for human rights and businesses may be monitored. Not being able to penalize the violators, the “specific instances” mechanism is able to publish recommendations on the specific case. Similar to informational regulation, this mechanism relies on the market and the public opinion for redress. It has turned out to be a respected mechanism worth having in mind when looking at monitoring and implementation mechanisms for an international legal framework for human rights and businesses. Improved and more transparent, a specific instances mechanism would make a good candidate as a first step in monitoring a possible international document on human rights for business.

6.3 Do we need a legal framework?

Through their principles of accountability and redress, legal regimes, unlike the voluntary initiatives, may bring about compensation, restitution and rehabilitation for damage caused by transnational corporations and other business enterprises. A legal framework further encourages a culture of compliance. Company practice cannot be changed overnight, but when

actions are judged to be illegal and the judgment has international weight and authority, deterrence may follow. Claims grounded in law may be taken more seriously by businesses, but this does not mean that voluntary initiatives should be completely dropped. The best effect may be achieved when these two regimes complement each other. Whereas the legal framework sets out minimum standards, a company may show its commitment with its own voluntary codes of conduct or adherence to an initiative or scheme that go beyond the legal framework. This may even introduce competitiveness in the field of human rights and business corporations.

Companies genuinely committed to respecting human rights should have nothing to fear from a development towards legally binding obligations. When commitments are voluntary, companies more committed to human rights can lose out to competitors who do not make similar commitments or are not serious about compliance, the so-called “free rider” phenomenon.

Today’s system of rules and constraints on corporate behavior is discriminatory and does not create a fair competitive environment. In reality it applies only to those companies that fall under media’s scrutiny or the public eye, leaving other businesses free to break the rules. Only binding standards can ensure a leveled playing field, which means that the choice for companies is not between adopting voluntary codes of conduct and doing nothing. It is between continuing to compete on an uneven playing field and participating in the elaboration of universally binding and enforceable legal regime that applies equally to all businesses.

Minimum standards do not imply the end of voluntary initiatives. Here, voluntary initiatives can really make a difference. Enforceable minimum standards should be complemented by voluntary initiatives. Serious businesses that care about human rights have nothing to lose from a development toward legally binding obligations, on the contrary. By dragging the “free riders” under the umbrella of binding obligations, serious businesses can only benefit from a competitive point of view. We need not mention that the civilian population exposed to human rights violations by businesses certainly does not have anything against universally binding legal obligations. It is in the interest of all parties involved to develop such an international legal framework. So, let us level the playing field!

Appendix I

International Bill of Human Rights²⁰⁵

The International Bill of Human Rights consists of:

- The Universal Declaration of Human Rights (UDHR),
- The International Covenant on Economic, Social and Cultural Rights (ICESCR), and
- The International Covenant on Civil and Political Rights (ICCPR)

The UDHR and the Covenants can be read in their entirety at www.ohchr.org/english/law. Below you will find the headings of the articles in the Covenants (excluding articles concerned with procedural or organizational matters).

International Covenant on Economic, Social and Cultural Rights (ICESCR)

- Article 1: The right to self-determination for peoples.
Article 2: Non-discrimination in relation to all rights
Article 6: The right to work, including the right to vocational guidance and training
Article 7: The right to a minimum wage and equal pay, to safe and healthy working conditions, and to rest, leisure and holidays with pay
Article 8: The right to form trade unions and join a trade union, and the right to strike
Article 9: The right to social security, including social insurance
Article 10: The right to a family life, to maternity leave and prohibition of exploitative child labor
Article 11: The right to adequate food, clothing, housing and fair distribution of food
Article 12: The right to the highest attainable standard of physical and mental health
Article 13-14: The right to education
Article 15: The right to participate in cultural life and the technological development and the right to protection of moral and material interests resulting from one's inventions

International Covenant on Civil and Political Rights (ICCPR)

- Article 1: The right to self-determination for peoples.
Article 2: Non-discrimination in relation to all rights
Article 6: The right to life
Article 7: Prohibition against torture or cruel, inhumane or degrading treatment or punishment and against medical or scientific experimentation without free consent

²⁰⁵ OHCHR, “*Fact Sheet – The International Bill of Human Rights, United Nations High Commissioner of Human Rights*”, OHCHR, Fact Sheet No.2 (Rev.1), (available at <http://www.unhcr.ch/html/menu6/2/fs2.htm>)

- Article 8: Prohibition against slavery, forced or other compulsory labour
- Article 9 - 10: The right to freedom and personal safety (arrest and detention)
- Article 11: Prohibition against imprisonment for non-fulfillment of a contractual obligation
- Article 12: The right to liberty of movement and freedom to choose residence
- Article 13: The right to seek asylum
- Article 14-15: The right to a fair trial and prohibition against retroactive punishment
- Article 16: The right to recognition as a person before the law
- Article 17: The right to privacy
- Article 18: Freedom of thought, conscience and religion
- Article 19: The right to hold opinions and the right to freedom of information and freedom of expression
- Article 20: Prohibitions against inciting war and against hate speech
- Article 21: The right of peaceful assembly
- Article 22: Freedom of association, including the right to form and join trade unions
- Article 23-24: The right to form a family and the rights of the child
- Article 25: The right to take part in public affairs
- Article 26: Equality before the law
- Article 27: Minority rights to culture, religious practice and language

Bibliography

Litterature

Ascoly, Nina – Zeldenrust, Ineke; “*Monitoring and verification terminology guide*”, SOMO (Stichting Onderzoek Multinationale Ondernemingen), Amsterdam, 2003

Clapham, Andrew; “*Human Rights Obligations of Non-State Actors*”; Oxford University Press, Oxford, 2006

Ersmarker, Caroline; “*Monitoring Trans-National Corporation’s performance - The Voluntary Approach*”; Faculty of Law, University of Lund; Lund, 2003

Fussler, Claude – Cramer, Aron - van der Vegt, Sebastian (eds); “*Raising the Bar: Creating Value with the United Nations Global Compact*”; Greenleaf Publishing, Sheffield, 2004

Neijd, Mikaela; “*Violations of Human Rights in the Supply Chain: Conjoining Human Rights with Corporate Law in the Search for Accountability*”; Faculty of Law, University of Lund; Lund, 2002

Nowak, Manfred; “*Introduction to the International Human Rights Regime*”, Leiden/Boston: Martinus Nijhoff Publishers, 2003

Oldenziel, Joris; “*The added value of the UN Norms - A comparative analysis of the UN Norms for Business with existing international instruments*”; SOMO (Stichting Onderzoek Multinationale Ondernemingen), Amsterdam, 2005

Palenberg, Markus - Reinicke Wolfgang – Witte, Jan Martin; “*Trends in non-financial reporting November 2006 - Paper prepared for the United Nations Environment Programme, Division of Technology, Industry and Economics (DTIE)*”; Global Public Policy Institute, Berlin, 2006

Utrikesdepartementet (UD); “*OECD:s Riktlinjer för Multinationella Företag – en handbok*”, Edita Stockholm, Stockholm, 2006

Ward, Halina; “*Legal Issues in Corporate Citizenship - Prepared for the Swedish Partnership for Global Responsibility*”, Globalt Ansvar – Swedish Partnership for Global Responsibility/Swedish Ministry for Foreign Affairs, Stockholm, 2003

Articles

Jungk, Margaret; “*Defining the Scope of Business Responsibility for Human Rights Abroad*”; Human Rights & Business Project of The Danish Centre for Human Rights, Copenhagen, 2005

Lesinger, Klaus M.; “*On Corporate Responsibility for Human Rights*”, Basel, 2006

Misol, Lisa; “*Private Companies and the Public Interest: Why Corporations Should Welcome Global Human Rights Rules*”, in “Human Rights Watch World Report 2006”, 2006

Narula, Smita; “*The Right to food: Holding Global Actors Accountable Under International Law*”; in Columbia Journal of Transnational Law 691, Columbia Journal of Transnational Law Association, Inc., 2006

Oxford Analytica, “*Human rights/business report divides*”, 14 March 2006 (available at www.oxan.com - last visited 18 August 2007)

Ruggie, John G.; “*State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations’ core Human Rights Treaties – Prepared for the mandate of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*”; Kennedy School of Government and Harvard Law School, Boston, 2007

Weissbrodt, David - Kruger, Muria; “*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*”, American Journal of International Law, 97 (October 2003), pp. 901-922

Reports and NGO publications

Allens Arthur Robinson; “*Brief on Corporations and Human Rights in the Asia-Pacific Region – Prepared for Professor John Ruggie United Nations Special Representative of the Secretary-General for Business and Human Rights*”; Allens Arthur Robinson, 2006

Amnesty International (AI) - The Prince of Wales Business Leaders Forum; “*Human Rights – is it any of your business?*”; Amnesty International UK and The Prince of Wales Business Leaders Forum, 2000

Amnesty International (AI); “*2005 UN Commission on Human Rights: The UN’s chief guardian of human rights?*”, 2005, AI Index: IOR 41/001/2005

BLIHR – UNGC – OHCHR; “*A Guide for Integrating Human Rights into Business Management*”; 2006

Business Leaders Initiative on Human Rights (BLIHR); “*Report 3: Towards a ‘Common Framework’ on Business and Human Rights: Identifying Components*”; London, 2006

“*Guide to the Global Compact – A Practical Understanding of the Vision and Nine Principles*”, 2003.

(available at <http://www.uneptie.org/outreach/compact/docs/gcguide.pdf> - last visited 18 August 2007)

Carnegie Council on Ethics and International Affairs; “*The Impact of Corporations on Global Governance*”; Carnegie Council, New York, 2004

International Council on Human Rights Policy (ICHRP), “*Beyond Voluntarism – Human rights and the developing international legal obligations of companies*”, February 2002

KPMG; “*KPMG International Survey of Corporate Responsibility Reporting 2005*”; Drukkerij Reijnen Offset, Amstelveen, 2005

OHCHR, “*Fact Sheet – The International Bill of Human Rights, United Nations High Commissioner of Human Rights - Fact Sheet No.2 (Rev.1)*”, United Nations, Geneva, 1996

(available at <http://www.unhchr.ch/html/menu6/2/fs2.htm> - last visited 19 August 2007)

The World Bank Group [a]; “*Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains*”; The World Bank Group, 2003

The World Bank Group [b]; “*Company Codes of Conduct and International Standards: An Analytical Comparison*”; The World Bank Group, 2003

UNCTAD, “*World Investment Report 2000 – Cross-border Mergers and Acquisitions and Development*”, New York and Geneva, 2000

UNCTAD, “*World Investment Report 2006 - FDI from Developing and Transition Economies: Implications for Development*”, New York and Geneva, 2006

UNGC - OHCHR; “*Embedding human rights in business practice: a joint publication of the United Nations Global Compact and the Office of the United Nations High Commissioner for Human Rights*”, 2004

International Documents

UN

“Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict”, UN Doc. S/2002/12300; 2002

UN Commission on Human Rights Res. 2005/69, *“Human rights and transnational corporations and other business enterprises”*, adopted on 20 April 2005, chap. XVII, UN Doc. E/CN.4/2005/L.10/Add.17; 2003

“Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2; 2003 [**UN Norms**]

“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”, UN Doc. E/CN.4/2005/91; 2005 [**OHCHR Report**]

“Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”, UN Doc. E/CN.4/2006/97; 2006 [**SRSB Interim Report**]

“Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Business and human rights: mapping international standards of responsibility and accountability for corporate acts”, UN Doc. A/HRC/4/35; 2007 [**SRSB Report**]

[**Addendum 3 – SRSB Report**] *“Addendum [3] Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms”* in SRSB Report; UN Doc. A/HRC/4/35/Add.3; 2007

[**Addendum 4 – SRSB Report**] *“Addendum [4] Business recognition of human rights: Global patterns, regional and sectoral variations”* in SRSB Report; UN Doc. A/HRC/4/35/Add.4; 2007

“Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Human rights impact assessments – resolving key methodological questions’” A/HRC/4/74; 2007 [**HRIA Report**]

OECD

OECD; “*OECD Declaration on International Investment and Multinational Enterprises, adopted by the Governments of OECD Member countries on 21 June 1976. Reviewed in 1979, 1984, 1991 and 2000.*”

OECD; “*OECD Guidelines for Multinational Enterprises, revision 2000, 27 June 2000*” [**OECD Guidelines**]

OECD [a]; “*Commentary on the OECD Guidelines for Multinational Enterprises*” in OECD, “*The OECD Guidelines for Multinational Enterprises – Revision 2000*”, OECD Publications, Paris, 2000

OECD [b] ; “*The OECD Guidelines for Multinational Enterprises – Revision 2000*”, OECD Publications, Paris, 2000

OECD; “*The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*”;
OECD Doc. DAFFE/IME/WPG(2000)15/FINAL, 2001

OECD/UNGC; “*The UN Global Compact and the OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions*”; Investment Division, Directorate for Financial and Enterprise Affairs, OECD, Paris, 2005

OECD; “*Human Rights, Alternative Dispute Resolution and the OECD Guidelines for Multinational Enterprises - Briefing note for the participants at the Workshop on Accountability and Dispute Resolution*”; Investment Division, Directorate for Financial and Enterprise Affairs, OECD, Paris, 2007

ILO

ILO; “*Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy - adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) - amended at its 279th Session (Geneva, November 2000)*” [**ILO Tripartite Declaration**]

ILO, “*A Guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy – Knowing and Using Universal Guidelines for Social Responsibility*”; International Labour Office - Multinational Enterprises Programme; Geneva, 2002

ILO; “*Rules of the Game – A brief introduction to International Labour Standards*”; International Labour Organization, Switzerland, 2005

Web Documents

www.unglobalcompact.com

- *What is the Global Compact*
- *Participants & Stakeholders*
- *The ten principles*

OHCHR - UNGC - UN Staff College; “*Human Rights and Business Learning Tool*”; July 2007

(available at <http://www.unssc.org/web/hrb/Default2.asp> - last visited 19 August 2007)

Speeches

Gasser, Urs; “*Speech at the Norwegian Government Pension Fund - Global Council of Ethic’s Workshop on Corporate Complicity in Human Rights Violations*”; 2006

(available at <http://blogs.law.harvard.edu/ugasser/2006/10/25/corporate-social-responsibility-what-is-the-meaning-of-sphere-of-influence/> - last visited 19 August 2007)

