



**Responsibilities of transnational corporations and related business enterprises with regard to human rights**

**Submission from the Castan Centre for Human Rights Law, Monash University, Melbourne, Australia<sup>1</sup>**

Contents<sup>2</sup>

1. The identification of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights;
2. The identification of the scope and legal status of these initiatives; and
3. The identification of any outstanding issues.

Part 1: Existing Initiatives

1. There are a multitude of transnational codes and principles in the area of corporations and human rights but the four major players are the Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises,<sup>3</sup> the International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises,<sup>4</sup> the United Nations Global Compact<sup>5</sup> and the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>6</sup>
2. This submission will focus on the Norms. These differ from the other initiatives in that:
  - They are directed not only at transnational corporations<sup>7</sup> but also at 'other business enterprises', a catch-all phrase covering businesses which have relations with a TNC or which have impacts that are not entirely local or which undertake activities that involve violations of the right to security.<sup>8</sup>
  - They are applicable across all industries and sectors.<sup>9</sup>

- ❑ They are framed in mandatory terms, backed up by mechanisms for implementation and enforcement.<sup>10</sup>
- ❑ They set out in one authoritative statement the international human rights law applicable to companies.<sup>11</sup>

## Part 2: Scope and Legal Status of the Norms

### **Scope**

3. Though the substantive content of the Norms is directed at the behaviour of corporations, the primary obligations in the Norms fall on the shoulders of States. It is envisaged, therefore, that it will be largely through the actions of States that TNCs and other business enterprises will be urged or mandated (by way of legal authority, regulation and review) to promote, secure the fulfilment of, respect, ensure respect of and protect human rights.<sup>12</sup>
4. Paragraph 3 of the Norms, which covers the right to security of persons, goes further by prohibiting TNCs from engaging in or benefiting from certain serious human rights abuses. The difficult question of depth of liability is not addressed here or in later paragraphs. While the enforcement provisions state that TNCs should include the Norms in agreements with suppliers and other business partners thus establishing contractual liability within a company's supply chain,<sup>13</sup> liability for supply chain or third party violations of the rights under paragraph 3 from which a TNC has benefited is not detailed.<sup>14</sup>
5. Outside their provision for the State to bear primary responsibility for implementation, the Norms provide for contemporaneous and complementary human rights responsibilities to fall to TNCs, in respect of those within their "spheres of activity and influence".<sup>15</sup> The object of this provision is two-fold: (i) to bolster the potential for better human rights protection where the State's responsibilities are less than fully met (see paragraph 7 below), and (ii) even where a State is adequately fulfilling its responsibilities under the Norms, its jurisdictional reach may still be less than that of TNCs in respect of whose activities there are human rights concerns.<sup>16</sup>

6. This explains the need for transnational regulations that can pierce the corporate veil and trace liability back to the parent company; otherwise TNCs are able to undermine the human rights laws of host States and breach human rights with impunity.
7. The apportionment of responsibility between the State and the TNC described above (paragraph 5, sub-paragraph (i)) occurs when, as frequently happens, a government is failing in its human rights duties. Within the company's sphere of activity and influence joint responsibility applies in such situations to both the government and the TNC. A government is never exonerated for its failure to respect, protect and ensure human rights. But the Norms indicate that companies should not be able to hide behind governments that are failing to implement human rights, and deny any responsibility whatsoever.
8. The phrase 'sphere of activity and influence' is not defined in the Norms and is not therefore a legal term of art. It encompasses such actors as workers, consumers and members of the host community as well as the environment in which the company operates.
9. The addition of the word 'influence' (not present in the OECD Guidelines) apportions responsibility where the company has some degree of influence even if the human rights violations are outside of the company's area of activity.<sup>17</sup>
10. A TNC's sphere of activity and influence with respect to human rights may be viewed as a series of concentric rings. At the centre are core operations, followed by business partners, host communities and finally advocacy and policy dialogue.<sup>18</sup>
11. The most likely site of legal liability will be in regard to a corporation's core activities (for example concerning labour and environmental rights), but it is possible also that derivative activities occurring further from its core (for example in respect of the security of its installations, or actions of partners in joint ventures<sup>19</sup>) may give rise to legal liability.

12. The next circle, business partners, opens up the difficult issue of supply chain liability. Companies are told to include the Norms in contracts and agreements<sup>20</sup> so that suppliers will be in breach of contract if they commit human rights violations. TNCs must exercise due diligence to ensure that they do not benefit from abuses that they were aware of or ought to have been aware of.<sup>21</sup> Thus the Norms require that TNCs monitor the activities of their supply chains to ensure compliance, though it remains a moot point as to how far down (or up) the supply chain this responsibility should travel.<sup>22</sup>
13. However, it can be assumed that TNCs would be legally liable for the actions of business partners only if they are complicit in the wrongdoing. This concept, from paragraph 3 of the Norms, also applies with respect to TNC complicity in government or other third party human rights abuses in the host community, and makes TNCs accountable for some benefits received as a result of serious human rights abuses by third parties.
14. Liability for complicity needs to be fleshed out further if the Norms are to become legally enforceable. Unanswered questions include: what level of involvement or knowledge on the part of the company is required?
15. The Alien Tort Claims Act [hereafter 'ATCA'] litigation from the United States provides useful insight into how the concept of complicity might develop.<sup>23</sup> When a company benefits from human rights abuses of another it is unlikely that this alone will attract ATCA liability. Courts in the US have borrowed from international criminal law the concept of aiding and abetting to define what level of involvement results in complicity<sup>24</sup> and similar reasoning could apply with respect to the Norms. Aiding and abetting or accomplice liability should require intentional participation in the wrongdoing, but not necessarily any intention to do harm. Rather, knowledge of foreseeable harmful effects should be sufficient to incur liability.<sup>25</sup> Thus it should be made clear that if a company is warned of past or current abuses and continues to take part in and benefit from the venture including those activities where the abuses are taking place, it should be liable for the wrongdoing as an accomplice.

16. Serious abuses of civil and political rights such as forced labour<sup>26</sup> and unlawful killings<sup>27</sup> by companies gain wide media coverage and notoriety. However it is in the area of economic, social and cultural rights including environmental rights and the right to development that the activities of TNCs are most likely to have direct impact<sup>28</sup> covering as it does such rights as the right to safe and healthy conditions at work<sup>29</sup> and the right to join a trade union.<sup>30</sup> In line with how economic, social and cultural rights are laid out in international human rights law, the Norms require that States and corporations *must work towards accomplishment* of these rights,<sup>31</sup> which is distinct from the apparently more immediate requirements under international law as to civil and political rights.<sup>32</sup> In respect, however, of the actual practice of how human rights laws are or can be implemented in domestic law, this difference is more apparent than real. The achievement of both sets of rights is progressive, albeit to varying degrees as dictated by the social, economic, political and legal circumstances of any particular State.
17. Paragraph 12 of the Norms states that corporations shall respect and contribute to the realisation of economic, social and cultural rights,<sup>33</sup> which is in fact a less onerous obligation than that required of States in the ICESCR. For most companies contribution to the realisation of these rights would centre on labour rights, environmental rights (under the right to health), children's rights, but might also conceivably extend to cover rights to education and participation in cultural life – that is, the rights associated with the workers and communities who most directly fall within the company's sphere of activity and influence.<sup>34</sup>
18. Environmental rights are dealt with inferentially in the Norms, which require companies to adhere to existing international environmental protection law.<sup>35</sup> In addition, TNCs and other business enterprises are required to generally conduct their activities in a manner contributing to the wider goal of sustainable development.<sup>36</sup>
19. In order to conduct a business in a manner which contributes to sustainable development a company will need to engage in complex balancing exercises to evaluate the strength of competing rights such as the economic development needs of the country versus the environmental, social and other consequences of a proposed

development. Inherent in such a balancing process is the fact that there will be no “correct” answers, rather a band of what might be described as reasonable responses to the situation. This balancing process should provide a framework for decision-making allowing companies a reasonable margin of discretion in what they decide. Companies which undertake this balancing exercise diligently and in good faith will have fulfilled their obligations under the Norms.

20. In this respect it should be noted that as a matter of principle and practice, human rights law is always to some extent based on the balancing of competing interests such as public safety or the protection of public morals and the rights of the individual. The position regarding TNCs is analogous. For corporate responsibility and accountability must turn on the balancing of both individual rights and community interests with the legitimate interests and rights of the corporation using concepts such as proportionality to determine whether the ends justify the means.
21. The balancing exercise inherent in many of the rights laid out in the Norms are not new to international law but rather international human rights law is new to corporations and their legal advisers and its processes are alien. Implementation of the Norms will necessarily involve undertaking balancing exercises in order to determine the validity of competing and at times imprecise human rights claims as well as legitimate corporate interests.
22. As a first step towards implementation, the Norms envisage self-regulation.<sup>37</sup> TNCs are to incorporate the Norms into their codes of conduct as well as contracts with others, to report on them and thus to incorporate them into their working practices. Some form of external verification will be necessary and while this will initially come from industrial peak bodies, financial regulatory bodies (such as stock exchanges), social and accounting firms, law firms, non-governmental organisations, corporate social responsibility consulting firms and others,<sup>38</sup> in the longer term these initiatives may be supplemented by an international monitoring system established under the auspices of the UN.

23. Such measures of enforcement (as envisaged in paragraph 22) would work in tandem with the domestic legislation, to provide backup if the State is failing to uphold adequately the Norms or is incapable of holding companies to account.
24. Thus the implementation provisions from the Norms follow the traditional human rights model; that is enforcement through domestic legislation backed up by a transnational reporting and complaints procedure.
25. An important issue to be resolved is the question of which nation is the correct forum for claims to be brought, given the fact that many corporations operate across jurisdictions. For example, actions can be brought in the State in which the alleged wrongdoing occurs (host State), or in the State in which a transnational corporation is headquartered (home State). The reparations provisions in paragraph 19 of the Norms do not address this issue, which might therefore leave it to the rules of jurisdiction from each country to determine where claims can be brought.

### **Legal Status**

26. As international rules directed at TNCs, the Norms form part of the growing phenomena of non-State parties attracting responsibilities under international law. The phrase ‘privatising human rights’ has been used by detractors of the Norms in support of their view that somehow the implementation of the Norms will let States off the hook in their role upholding human rights. However, it does not follow that from additional sites of responsibility comes a corresponding reduction of the State’s liability in respect of human rights protection and promotion.<sup>39</sup> Rather, the human rights burden is both increased in size and to some extent differently composed, as the duty to discharge is shared out across the different entities.<sup>40</sup>
27. As a compendium of human rights principles relating to TNCs and other business enterprises, the Norms have no immediate ramifications in international law. The Sub-Commission which compiled the Norms is not, of course, able to enact new international law: such law can only evolve through international agreement in a treaty or through customary use. At present there is no treaty which incorporates the Norms. The necessary *opinio iuris* that is required for the development of customary

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international law is an opinion or acceptance, traditionally expressed by States, that a practice is observed because such observance is required under international law.<sup>41</sup>

28. The most that can be said regarding the legal status of the Norms is that those paragraphs which re-state existing international law retain their force as international law and are unchanged by their re-statement in the Norms. These paragraphs may be described as having a 'declaratory effect'.<sup>42</sup>
29. The obligations imposed on companies with respect to consumer protection found at paragraph 13 of the Norms are not traditional human rights although their infringement may amount to a violation of human rights if this results in death or serious injury.<sup>43</sup>
30. Likewise the anti-corruption obligations from paragraphs 10 and 11 of the Norms are not derived from international human rights law although their infringement may have the effect of denying populations economic, social and cultural rights, if national resources are squandered to the benefit of a privileged few leaving the country unable to fund social services for the poor.
31. With respect to environmental obligations, extreme cases of environmental degradation could infringe such rights as the right to food, health, shelter and security of person.
32. The fact that the Norms are not 'instant international law' does not prevent them from 'hardening' over time into 'international custom, as evidence of a general practice accepted as law',<sup>44</sup> if State practice moves accordingly. The required practice would be that of States participating in the implementation of the Norms through whatever mechanism for enforcement is created, with the necessary legal intent that the enforcement process be a process under international law.<sup>45</sup>
33. Another means by which codes and other non-binding instruments may become legally binding is that of interpretation of existing treaty law as occurred in the European Union employment law case of *Hertz*,<sup>46</sup> in which non-binding codes were

used as tools of interpretation and gap-filling in existing treaty law.<sup>47</sup> In a similar fashion the Norms could develop a binding character by becoming general principles of international public policy whose standards may be used in aid of interpretation of instruments of international law such as in GATT trade disputes.

34. The most direct and obvious means by which the Norms might harden into positive law would be if they continue their progress through the UN and are eventually adopted either as a declaration or later as a treaty.<sup>48</sup> Indicators of the authority of a non-legally binding instrument and its potential to create obligations include the circumstances which have led to the adoption of the instrument and the degree of agreement upon which it is based.<sup>49</sup> Also significant are the form of the instrument (for example a declaration or a resolution), the content of the instrument, the political rank of the organ adopting the instrument and the implementation procedures contained in the instrument.
35. The domestic arena is the most appropriate and likely place for the Norms to obtain substantial legal effect (either before or after the Norms acquire international legal status) through the enactment of domestic law that incorporates the Norms, thereby bringing TNCs and other business enterprises within a national human rights framework.<sup>50</sup> This fits with the traditional model of implementation of international human rights law, in which domestic remedies are exhausted before international complaints mechanisms may be accessed. Furthermore, municipal avenues of redress, so long as they are effective, are clearly more efficient and accessible than international avenues.
36. As a non-binding international code the Norms might still have domestic impact. Such codes can become a source of guidance for national authorities and TNCs since both can rely on and utilise the codes to fill in gaps in the relevant law and practice. The Norms may thus become a springboard for legally creative action by national courts and other agencies.<sup>51</sup>
37. Use could also be made of the Norms in private law suits without their prior adoption as a treaty or other legally binding instrument. For example, an action in contract

could be brought against a company where adherence to the standards contained within the Norms is a term of a contract to which that company is party and it fails to comply with one or more of the Norms. Such an action could also be brought on grounds of misrepresentation, false or misleading conduct if a company holds out that it is complying with the Norms and this turns out to be false. An action for misrepresentation could be brought by any party including a consumer who has purchased from the company in reliance upon the assertion of compliance with the Norms.<sup>52</sup> Finally, negligence actions might be brought in which the tortious standard of care is based upon the Norms. Thus it could be alleged that failure to comply with the Norms is evidence that the company in question is not meeting accepted standards of conduct that may represent general principles and is, therefore, not exercising reasonable care or diligence.<sup>53</sup>

38. Regulatory authorities<sup>54</sup> or ethical investment indexing bodies<sup>55</sup> might adopt the Norms as part of their mandatory reporting requirements. For example, socially responsible investment (SRI) performance criteria in the area of human rights could be based on the Norms. In this way companies subject to the regulation or participating in the ethical investment index would be required to report on human rights issues as laid out in the Norms and would be subject to legal sanction if they misstated their compliance. Thus the Norms would take on a legally binding character despite their current informal status.

39. Many scholars<sup>56</sup> have addressed the question of whether TNCs *should* be made legally accountable for their human rights violations in what has become known as the voluntary versus mandatory debate. The main reasons for some form mandatory international framework are:

- Given the imposition of fundamental, international, legal obligations on individuals<sup>57</sup> and armed oppression groups<sup>58</sup> it would be anomalous for companies to maintain only minimal obligations under international law.
- This is particularly true given the unique mobility, power and transnational nature of corporations.<sup>59</sup> The growing importance of companies in the face of increased ‘contracting out’ of State functions attaches particular urgency to the need to regulate and punish corporate wrongs.<sup>60</sup>

- ❑ Sometimes States are in connivance with TNCs, in which case the State may benefit from failing to enforce human rights obligations against TNCs.
- ❑ States are notoriously inconsistent in their respect for and enforcement of international human rights, which calls into question the efficacy of an approach which relies on States to enforce human rights obligations on TNCs.<sup>61</sup>

### Part 3: The identification of any outstanding issues

40. As a preliminary point, it should not be overlooked that the Norms already represent a big leap forward in the field of international human rights standards for TNCs. Their traits of being tailored, universal, comprehensive and authoritative set them apart from all other initiatives and this in itself has inherent value.
41. The OHCHR has an important role in ensuring that this value is not lost either by allowing them to atrophy through failure to take action on them or by undermining what little legal status they have already. With respect to the latter, to the extent that the Norms re-state what is already international human rights law, the OHCHR cannot remove their legal force. But as a work in progress moving through the UN human rights machinery (albeit at the bottom of the UN hierarchy) the Norms in their entirety gain a certain status, which might be described as soft law, and the OHCHR should preserve this status.
42. It may be that the OHCHR takes the view that more academic (and other) debate and work on drafting is required in order to tighten up some of the duties and concepts contained in the Norm – if this course is preferred it should be borne in mind that the nature of human rights as derived from the various conventions is of progressive steps towards achievement of the duties and obligations they contain; imprecise duties; and rights that must be balanced against each other and against other legitimate interests. Also the role of domestic implementation in fleshing out the duties and obligations should be kept in mind. The Norms in essence provide a framework that could be used for national or international regulation but, assuming the former approach is taken, it will be incumbent on States to articulate the specifics.

43. This tightening up may be achieved through the consultation process taking place during 2004 or may be something for the future which the OHCHR can plan and organise. If, as many feel likely,<sup>62</sup> more consultation is required, this should be in the context of an agreed timeframe, rather than an open-ended process.
44. What is clear however is that if and when the OHCHR wants to see the Norms progress towards becoming binding standards, it needs to be put them ‘out there’ amongst the governments which have power to pick them up and re-state them through practice and use. The OHCHR would be most likely to achieve this by creating and informing inter-governmental debate on the subject, with the aim that the Norms in due course be adopted by the Commission or even the by the UN General Assembly.
45. In order to achieve this, the OHCHR will have to accept and persuade others that basic standards must be attained not just by States but also by transnational bodies – and that most prominent among these in terms of economic power and influence, and therefore priority, are corporations. Further, the OHCHR will need to accept that voluntary initiatives to regulate the behaviour of TNCs will never be enough – there will always be those companies that violate human rights if the power remains within corporate hands only.
46. In the long term it must be understood that international monitoring and enforcement are needed for the effective implementation of the Norms. This could take the form of an international reporting and complaints mechanism either by way of a “yet to be created” TNC-specific scrutiny body or process (see Norms, paragraph 16), or at least in the first instance, by way of explicit lines of inquiry pursued under the existing scrutiny procedures of the UN’s six principal human rights committees as to what States are doing to ensure that all corporations are protecting and promoting human rights within their (the States’) jurisdiction.
47. However this is for the future. Domestic regulation is the rightful starting place as there are already systems in place to protect certain rights, particularly labour rights

and environmental rights, and these can be built on in order to provide wider human rights protection.

48. If domestic regulation is to be effective, the question of jurisdiction needs to be resolved in favour of a broad approach allowing cases to be heard where TNCs are headquartered or their assets are kept.<sup>63</sup> This is so that liability may be established and reparations orders enforced, preventing the situation described above (in paragraphs 5 and 6) where the State has limited ability to control companies within its jurisdiction.

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<sup>1</sup> This submission was prepared by Rachel Chambers in consultation with Prof David Kinley and Dr Sarah Joseph on behalf of the Castan Centre for Human Rights Law.

<sup>2</sup> The contents are as requested by the OHCHR at <http://www.ohchr.org/english/issues/globalization/business/reportbusiness.htm>.

<sup>3</sup> See <http://www.oecd.org/dataoecd/56/36/1922428.pdf> - the Guidelines are not legally binding and apply only to multinational enterprises from member States of the Organisation for Economic Cooperation and Development (hereafter 'OECD') plus a few other State parties.

<sup>4</sup> See <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> - the Principles are internationally agreed through the International Labour Organisation (hereafter 'ILO')'s tripartite structure (employers, trade unions and governments) but only cover labour rights rather than the whole spectrum of human rights. The process by which they are interpreted is little utilised: governments must request interpretations and only if they fail to do so will workers and employers associations having standing to fill the breach and make requests themselves.

<sup>5</sup> See <http://www.unglobalcompact.org/Portal/Default.asp> - companies commit to adhere to 10 Principles as part of their membership of the Global Compact. There is no enforcement mechanism: the GC is a forum for dialogue and exchange of experience and best practice rather than a means of holding companies to account for human rights violations.

<sup>6</sup> Norms document: UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003): <http://www1.umn.edu/humanrts/links/norms-Aug2003.html> (hereafter 'Norms').

<sup>7</sup> The term 'transnational corporation' (hereafter 'TNC') is defined in paragraph 20 of the Norms as referring to "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively". The reference to transnational corporations in this submission is adopted purely as a form of representation used in the Norms and within United Nations circles. This submission does not address the different definitions of the term transnational corporation or of other terms such as multinational corporation and multinational enterprise.

<sup>8</sup> The term 'other business enterprise' is defined in paragraph 21 of the Norms. The OECD Guidelines and ILO Principles are directed at multinational enterprises, the UN Global Compact is open to all companies.

<sup>9</sup> Many initiatives are directed at one industry or sector alone for example the Clean Clothes Campaign Code is directed at the apparel sector: <http://www.cleanclothes.org/codes/ccccode.htm>

<sup>10</sup> Paragraph 15-19 of the Norms containing the general provisions of implementation require TNCs and other business enterprises to adopt, disseminate and implement internal operational rules in compliance with the Norms and also to incorporate the Norms in contracts with other parties. There are provisions for the internal and external monitoring and verification of companies' application of the Norms including the use of a new or existing UN monitoring mechanism. In addition, States are called upon to establish and reinforce the necessary legal framework to ensure that the Norms are implemented although the wording of the paragraph ('should' rather than 'shall') suggests that this is not an obligatory or normative provision. The monitoring and verification is backed up by a

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reparations provision which holds that companies must provide prompt, effective and adequate reparations to those affected by failure to comply with the Norms.

<sup>11</sup> The OECD Guidelines and the UN Global Compact contain general principles of human rights protection. The ILO Principles address labour rights only. The Norms are different in that they set out each duty and obligation under the umbrella of human rights and thus provide a complete check-list for companies to follow.

<sup>12</sup> Paragraph 1 of the Norms contains the primary obligation. The Norms commentary paragraph 1(b) expands on this in the following terms: "Transnational corporations and other business enterprises shall have the responsibility to use due diligence in ensuring that their activities do not contribute directly or indirectly to human abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware".

<sup>13</sup> Paragraph 15 of the Norms, see note 10 above.

<sup>14</sup> Complicity and supply chain liability are addressed at paragraphs 12-15 below.

<sup>15</sup> Norms paragraph 1. The delineation of responsibility in terms of the sphere of influence of the business is used in the UN Global Compact; the OECD Guidelines do not contain the word "sphere" but instead provide that TNCs should "respect the human rights of those affected by their activities".

<sup>16</sup> For example, a TNC may set up an undercapitalised subsidiary in a host country, and the subsidiary breaches the human rights of some of the host country citizens. The State in question may hold the subsidiary to account by finding it guilty of human rights abuses. But the State may not be able to provide compensation if the subsidiary has no assets, and the State may lack jurisdictional power to enforce a judgment debt against the offshore foreign parent company.

<sup>17</sup> Nolan, Justine "Human Rights Norms for Corporations: Tracking Their Progression from Voluntary to Mandatory", a Research Summary Report dated December 2003, prepared for the Castan Centre for Human Rights Law, Monash University, Melbourne (on file) at p14 gives the example of certain of the maquiladoras in Tijuana, Mexico whose activities contributed to a scarcity of potable water in the area – these were companies that could bring their influence to bear in the provision of potable water for the local population despite the fact that their activities did not include potable water provision. This poses the question whether they should be individually accountable for the water situation or whether the State, which controls the number of maquiladoras in the area, is responsible. The answer is that the maquiladoras are able to influence the situation and have played a part in creating the problem. They share responsibility therefore with the local authority.

<sup>18</sup> Frankental, Peter and House, Frances "Human Rights – Is it Any of Your Business?" published by Amnesty International and the Prince of Wales International Business Leaders Forum.

<sup>19</sup> Including where the corporation is complicit in the human rights violating action of the partner; see further below, paragraphs 13-15.

<sup>20</sup> Paragraph 15 of the Norms, see note 10 above.

<sup>21</sup> Norms Commentary paragraph 1(b).

<sup>22</sup> The question of whether a company should be liable for the failure of its suppliers to comply with human rights standards is a vexed one, not least because each TNC may have a potentially endless chain of suppliers, many of which may be untraceable. Exacerbating the situation is the nature of the global supply chain. As noted by Human Rights First in its Statement to the UN on Working Methods and Activities of Transnational Corporations "In many low-wage, labour-intensive industries such as clothing or toys, companies have become marketing and distribution companies. They own few, if any, of their production facilities. They rely on foreign suppliers in poor countries, particularly in Asia and Latin America, where wages are low and where local government regulations are weak, and enforcement weaker still" see

[http://www.humanrightsfirst.org/workers\\_rights/wr\\_other/wr\\_lchr\\_st\\_072903.htm](http://www.humanrightsfirst.org/workers_rights/wr_other/wr_lchr_st_072903.htm)

<sup>23</sup> Joseph, Sarah, "Corporations and Transnational Human Rights Litigation" (Hart, 2004), Chapter 2.

<sup>24</sup> In *Presbyterian Church of Sudan v. Talisman Energy*, Case number 244 F Supp 2d 289 (SDNY 2003), US District Court for the Southern District of New York, the court agreed that international criminal law was the appropriate source of law in determining whether the corporate defendant had aided and abetted the Sudanese government in committing war crimes and genocide.

<sup>25</sup> In respect of the particular operation of the ATCA, Joseph, Sarah, note 23 at p83 maintains that while: "TNCs should be held liable for aiding and abetting human rights abuse when their actions foreseeably lead to the perpetration of identifiable grave human rights abuses by another ... courts must retain a sense of proportion in establishing the causal link between a TNC and an abuse perpetrated by a third party. Corporations should not be held liable under ATCA for simply doing business with 'bad' people, including 'bad' governments, except in the rare situations where such

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engagement is *per se* a breach of the law of nations.” See also Ramasastry, Anita “Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations”, 2002 Berkeley Journal of International Law at p143-144.

<sup>26</sup> See for example the ACTA case of *Doe v. Unocal* available at [www.earthrights.org](http://www.earthrights.org).

<sup>27</sup> See for example the ACTA case of *Sinaltrainal v. Coca-Cola Co* available at [www.laborrights.org](http://www.laborrights.org).

<sup>28</sup> Kinley, David and Tadaki, Junko “From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations at International Law” (2004) 44 Virginia Journal of International Law 44 (2004) 931, at 963-66, refer to a binary of so-called “self-reflective” and “third party” duties on the part of TNCs. Self-reflective obligations are those that require the corporation not to interfere with the enjoyment of human rights on which its activities have direct impact, whereas third-party duties are concerned with preventing others, with whom the corporations may have some relationship, from breaching human rights.

<sup>29</sup> International Covenant on Economic, Social and Cultural Rights (hereafter ‘ICESCR’) article 7.

<sup>30</sup> ICESCR article 8.

<sup>31</sup> Paragraph 12 provides that TNCs shall respect economic, social and cultural rights including the right to development and contribute to their realisation.

<sup>32</sup> Article 2 of the ICESCR obligates each State party to take steps ‘to the maximum of its available resources’ with a view to achieving progressively the full realisation of the rights set out in the Covenant. The State’s role with respect to the right to development is also programmatic: the Declaration on the Right to Development requires States to formulate national development policies (Declaration on the Right to Development article 2, paragraph 3) and to take all necessary measures for the realisation of the right to development (Declaration on the Right to Development article 8, paragraph 1). This can be contrasted with the International Covenant on Civil and Political Rights (hereafter ‘ICCPR’) in which the equivalent provision requires States to take steps necessary for the implementation of the rights contained in the Covenant.

<sup>33</sup> The phrase ‘secure the fulfilment of ... human rights’ is used in paragraph 1 of the Norms. All other paragraphs from the Norms should be read in the light of paragraph 1 (paragraph 1(a) of the Commentary) – what this means in practice is unclear. The obligation in paragraph 12 (to ‘contribute to the realisation’ of certain economic, social and cultural rights) is less onerous than that contained in paragraph 1. It is submitted that ‘contribute to the realisation of’ is the correct obligation with respect to the rights contained in paragraph 12 and that the commentary should clarify this position.

<sup>34</sup> Some TNCs will have a role which goes beyond merely abstaining from interference with these rights if for example a TNC has assumed de facto control of a region in which it operates or the resources of that region.

<sup>35</sup> Paragraph 14 of the Norms. It should be noted however that paragraph 14(a) of the Commentary requires companies to respect the right to a clean and healthy environment.

<sup>36</sup> Paragraph 14 of the Norms.

<sup>37</sup> Paragraphs 15-19 of the Norms, see note 10 above.

<sup>38</sup> See generally, Nolan, Justine, note 17 and in respect of law firms in particular, Kinley, David “Lawyers, Corporations and International Human Rights Law” (2004) 25(10) The Company Lawyer, 298-302.

<sup>39</sup> Kinley, David “Corporate Social Responsibility and International Human Rights Law” in Mullerat, Ramon (ed) Corporate Social Responsibility: The Corporate Governance of the 21<sup>st</sup> Century, Kluwer (forthcoming) p2 (on file).

<sup>40</sup> Kinley, David, note 39 at p2.

<sup>41</sup> Brierly, James L. “The Law of Nations”, 6<sup>th</sup> edn. (1963) at p61 states “What is sought for is a general recognition among States of a certain practice as obligatory”.

<sup>42</sup> Brownlie, Ian “Legal Effect of Codes of Conduct for MNEs: Commentary” in Horne, Legal Problems of Codes of Conduct for Multinational Enterprises (Kluwer) p40. At the very least it is clear that obligations such as those in paragraph 3 of the Norms which prohibit TNCs and other business enterprises from engaging in or benefiting from egregious human rights abuses including war crimes and genocide are already binding on individuals as well as States and as such are re-statements of existing obligations or paragraphs of ‘declaratory effect’.

<sup>43</sup> Muchlinski, Peter “The Development of Human Rights Responsibilities for Multinational Enterprises” in Sullivan (Ed) Business and Human Rights at p43.

<sup>44</sup> The Statute of the International Court of Justice, article 38(1)(b).

<sup>45</sup> Muchlinski, Peter, note 43, at p47: “the Working Group has recognised that, given the uncertainties around the precise legal status of companies and other non-State actors, some form of ‘soft law’

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exercise is a necessary starting point. This has been the normal pattern of operation in relation to the adoption of other binding human rights instruments. Hence, in the absence of State opinion to the contrary (perhaps an unlikely eventuality), some transition from 'soft' to 'hard' law is more likely to occur, with the Draft Norms as the first step in the process."

<sup>46</sup> Hertz case EEC doc. 424/76, 15 November 1976, European Parliament, Resolution of 16 November 1976, O.J. 1976 C.293/12; Debates, same date at 46-51.

<sup>47</sup> In *Hertz* the provision to be interpreted was the principle of free movement of workers from the Treaty establishing the Europe Community (EC Treaty). The company Hertz was accused of importing labour to Denmark in order to break a strike, which is prohibited by the ILO Tripartite Declaration of Principles concerning MNEs but which the EC Treaty made no provision in respect of. Hertz sought to rely on the free movement provisions of the EC Treaty to defend its actions. The Council of the European Communities, in an opinion requested by Denmark, interpreted the free movement provisions as being of use in the positive sense of enabling workers to travel and work throughout the EC rather than as a defence in trade disputes such as this. The opinion concluded by citing the ILO Tripartite Declaration and stating its substance.

<sup>48</sup> By enshrining the Norms in a treaty they would be given definite international legal status.

<sup>49</sup> Bothe, Michael "Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?" NYIL 11 (1980) 65-95 at p78.

<sup>50</sup> The Norms do not contain any jurisdictional or 'home State control' provisions. Paragraph 17 provides: "States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises". There have been unsuccessful attempts in the United States, the United Kingdom and Australia to pass into law corporate code of conduct/corporate responsibility bills: see Kinley, David and Tadaki, Junko, note 28 at p942.

<sup>51</sup> Baade, Hans W. "The Legal Effects of Codes of Conduct for Multinational Enterprises" in Horn, Legal Problems of Codes of Conduct for Multinational Enterprises (Kluwer) at p29 quoting the UN Commission on Transnational Corporations: "Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature" UN Doc. E/C.10/AC.2/9 (22 December 1978). Baade uses the example of the case of *Nigerian Cultural Property* to demonstrate the use of internationally agreed upon principles of public policy for the purposes of domestic adjudication of a transnational dispute. A United Nations Educational, Scientific and Cultural Organisation (UNESCO) recommendation and a treaty to which the country in question (Federal Republic of Germany (FRG)) was not party were utilised to determine whether certain goods being transported between Nigeria and the FRG were cultural property. The court regarded the instruments as demonstrating 'certain fundamental convictions' of the international community: this reasoning would presumably apply if the articles in question were already in the FRG so that this was a purely domestic dispute. The Norms could be similarly utilised in domestic courts despite their status as an informal statement and not binding international law.

<sup>52</sup> See *Marc Kasky v. Nike* 27 Cal 4<sup>th</sup> 939 (2002); for the US Supreme Court decision dismissing a writ of certiorari see *Nike v. Marc Kasky*, 539 US (2003); 123 S.Ct 2554: discussed in Kinley, David and Tadaki, Junko, note 28 at p957 and also, Spencer, Tamiaka "Talking about Social Responsibility: Liability for Misleading and Deceptive Statements in Corporate Codes of Conduct" (2003) 29(2) Monash University University Law Review, 297-315.

<sup>53</sup> Muchlinski, Peter, note 43 at p51.

<sup>54</sup> Kinley, David and Tadaki, Junko, note 28, at p957 list the legislative and regulatory authorities that have adopted mandatory reporting requirements on social and/or environmental issues.

<sup>55</sup> For example Dow Jones Sustainability Index, <http://www.sustainability-indexes.com/default.html>  
Ethibel Sustainability Index, [http://www.ethibel.be/subs\\_e/4\\_index/main.html](http://www.ethibel.be/subs_e/4_index/main.html)  
FTSE4Good Index Series, <http://www.ftse.com/ftse4good/index.jsp>  
The Johannesburg Stock Exchange's Socially Responsible Investment Index, <http://www.jse.co.za/sri/index.htm>

<sup>56</sup> Deva, Surya "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" 19 Connecticut Journal of International Law Fall, 2003, Joseph, Sarah "The Human Rights Accountability of MNEs" in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* at p75-93, Kinley, David and Tadaki, Junko, note 28 and Ratner, Steven R. "Corporations and Human Rights: A Theory of Legal Responsibility" Yale Law Journal December 2001.

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<sup>57</sup> Kamminga, Menno T. "Corporate Obligations under International Law" – submission to the OHCHR available at [www.business-humanrights.org](http://www.business-humanrights.org), uses the example of the crimes listed in Articles 6-8 of the Statute of the International Criminal Court.

<sup>58</sup> Kamminga, note 57, uses the example of Protocol II to the Geneva Conventions on international humanitarian law.

<sup>59</sup> Joseph, Sarah, note 56 at p78

<sup>60</sup> An example of a traditional function of the State now taken over by corporations is that of interrogating prisoners of war: this has been demonstrated in Iraq where companies such as Titan Corporation and CACI International have been accused of torture and unlawful killing of Iraqi prisoners at Abu Ghraib prison (Iraq) in the case of Al Rawi et al v. Titan Corporation:  
<http://www.mirkflem.pwp.blueyonder.co.uk/pdf/alrawititan60904cmp.pdf>

<sup>61</sup> Deva, Surya, note 56.

<sup>62</sup> Outline of Amnesty International's submission to UN consultation on business & human rights: <http://web.amnesty.org/pages/ec-outlineofsubmission-eng> and the Draft Framework for Inputs to OHCHR Report on Human Rights Responsibilities of Business from Rights and Accountability in Development; World University Service (German Committee)-Forum Menschenrechte and the International Network for Economic, Social, and Cultural Rights:  
<http://www.choike.org/documentos/Overview-English.pdf>

<sup>63</sup> Domestic courts in common law countries are becoming more amenable to hearing transnational cases against their home-TNCs, see Joseph, Sarah, note 23.