



Dialogue on
Globalization

OCCASIONAL PAPERS

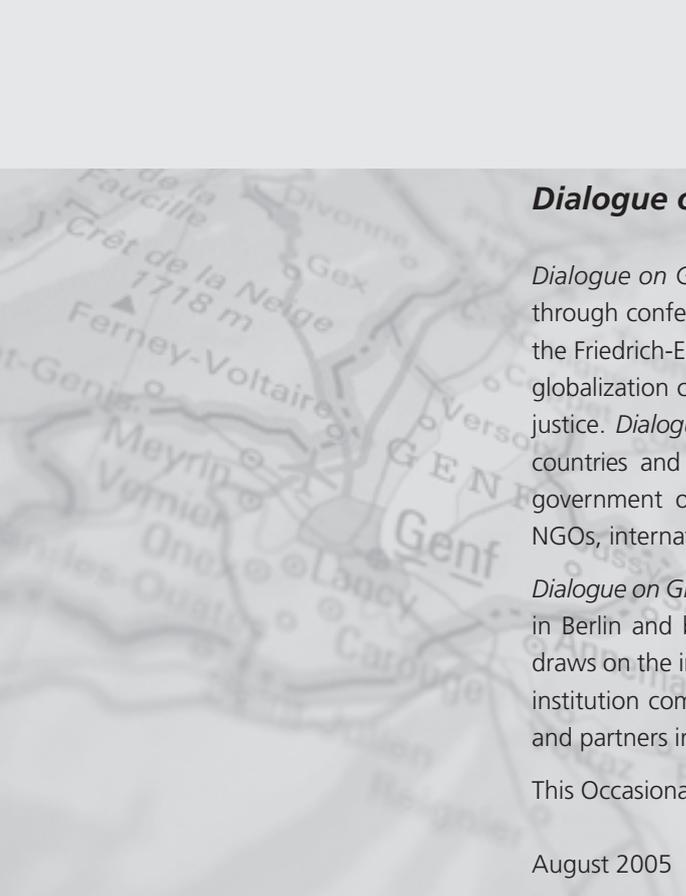
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Nils Rosemann

The UN Norms on Corporate Human Rights Responsibilities

An Innovating Instrument to Strengthen
Business' Human Rights Performance



Dialogue on Globalization

Dialogue on Globalization contributes to the international debate on globalization – through conferences, workshops and publications – as part of the international work of the Friedrich-Ebert-Stiftung (FES). *Dialogue on Globalization* is based on the premise that globalization can be shaped into a direction that promotes peace, democracy and social justice. *Dialogue on Globalization* addresses “movers and shakers” both in developing countries and in the industrialized parts of the world, i.e. politicians, trade unionists, government officials, businesspeople, and journalists as well as representatives from NGOs, international organizations, and academia.

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Preface

Business operations can have – directly or indirectly – repercussions on the human rights situation in their area of activity, and for this reason voices have in recent years become more vigorous in their calls to get business enterprises involved in the respect, promotion and protection of human rights.

Among the various instruments that have been developed so far, the overall system of conventions of the International Labour Organisation (ILO), including its Declaration on Fundamental Principles and Rights at Work and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, is especially noteworthy: Upon ratification, the states party undertake to implement the Conventions in their national legislation in a way that guarantees that business operations will be in line with the updated and, in regard to the ever evolving socio-economic context, adapted understanding of workers' human rights.

But it is also important to mention in this context the OECD Guidelines for Multinational Enterprises with its complaint mechanism of national contact points as well as the UN Global Compact. While the Guidelines are addressed to multinationals of the OECD countries (plus observers) only, the latter is a universal, albeit non-binding, instrument that serves as a dialogue platform for businesses to share best practices in order to improve their voluntary codes of corporate social responsibility.

Nonetheless, business human rights performance has continued to be a cause of concern for the human rights community. In order to fill the perceived gap between corporate power and rights on the one hand and corporate duties and responsibilities in regard to the respect, protection and promotion of all human rights on the other, a new instrument, the “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” (Norms), was developed in 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights, a sub-body of the UN Commission on Human Rights (CHR).

From the very beginning, the Norms have been discussed very controversially by stakeholders involved in the subject of “business and human rights,” i.e. governments, civil society, business, trade unions, international organisations, academic experts. There are both objections and strong support within all of them. As a consequence, the 2004 CHR instructed the Office of the High Commissioner for Human Rights (OHCHR) to make an assessment of the existing different standards related to business' human rights responsibility. The report was tabled shortly before the 2005 session of the CHR and recognizes “useful elements” brought in by the Norms, although it also comes to the conclusion that further dialogue among the stakeholders is needed.

As a consequence, the CHR has requested the UN Secretary General to appoint a Special Representative for further consideration of this issue. The Geneva Office of the Friedrich Ebert Foundation (FES) has always been interested in stimulating the dialogue on this issue and has now commissioned the human rights expert Nils Rosemann to analyse – with special focus on the Norms – existing standards on business and human rights. In his paper, the author comes to the conclusion that the Norms do provide an added value as regards how to improve business' human rights performance and that they are complementary to existing instruments.

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Executive Summary

The globalization process has so far shown that transnational corporations serve as its main engines and that they are gaining the bulk of its economic benefits. The increasingly important role they play and their considerable economic power imply that transnational corporations are, theoretically, able to contribute to creating a better social and political environment as well. In practice, however, quite a few of them have been involved in human rights violations or commit human rights abuses while maximizing their profits.

With a view to framing corporate compliance with internationally recognized human rights standards, the Sub-Commission on the Promotion and Protection of Human Rights, a sub-body of the UN Commission on Human Rights, drafted in 2003 the *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (Norms). Considering the hybrid nature of the Norms, which amount to both a recommendation and a clarification of states' obligations and an identification of the need for further development of direct corporate obligations, a look at the potential of the Norms has to consider both natures. The Norms face another dilemma: They use mandatory language for principles that are legal obligations with regard to states but voluntary standards for corporations. This assessment suggests resolving this dilemma by more clearly focusing on the different legal, political, and moral dimensions of human rights obligations.

The "secondary responsibility" of business outlined in the Norms is distinguished from the "first responsibility" of states and existing standards of corporate social responsibility that are based on the voluntary principles. On the other hand, the different dimensions of corporate social responsibility, such as obedience to the law, self-interest, and philanthropy, can be used to implement human rights obligations as long as specific, dedicated mechanisms are lacking. It is argued that – as in any other human rights standard – if the idealistic element of human rights obligations is not covered by legal enforcement mechanisms, it has to be addressed in the framework of patterns of moral, ethical, and so-called social accountability.

Viewed in this way, it would be misleading to judge the Norms only as non-binding. The Norms are able to develop their own system of obligations simply by being used and referenced as such. They have their own political and moral standing, and a potentially independent legal standing, too. Furthermore, the Norms can be used as a clarification of existing standards of the ILO, the OECD, and the European Union. Finally, the Norms have served to identify the need to transform political and moral standards into international law. In this sense, they are a point of departure not only for formalized developments of international law but also for compliance by willing corporations as well as for lobbying by NGOs and litigation by victims.

2. Introduction

In 2004, the *United Nations Commission on Human Rights* (Commission) underlined for the very first time the relationship between human rights and corporate behaviour. By doing so, the Commission “[confirms] the importance and priority it accords to the question of the responsibilities of transnational corporations and related business enterprises to human rights.”¹ This affirmation goes back to an intensive debate and lobby efforts by governments, NGOs, and business interest groups concerning the “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.”²

Much has already been said about the evolution, content, and means of implementation of the Norms.³ This assessment focuses on the general mandate of human rights protection mechanisms to address and deal with corporate obligations with regard to human rights. It would, however, go far beyond the scope of this undertaking to investigate all 15 substantive standards, ranging from the principles of non-discrimination, protection of civilians and laws of war, use of security forces, workers’ rights, corruption, consumer protection, and environment up to indigenous people’s rights. Consequently, the focus will be on the general obligation and most contested principle contained in Article 1:

“[States] have the primary responsibility to promote, secure the fulfilment 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 fulfilment 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.”⁴

The Norms were drafted by a working group of the United Nations Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) between 1999 and 2003 and, together with a commentary, approved by the Sub-Commission and transmitted to the Commission for further consideration.⁵ The mandate

The Norms were drafted by a working group of the United Nations Sub-Commission on the Promotion and Protection of Human Rights between 1999 and 2003.

1 Lit. a) of Commission on Human Rights Decision 2004/116 of April 20, 2004, U.N. Doc. E/CN.4/DEC/2004/116.

2 U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, hereinafter referred to as “Norms”.

3 One of the first but more descriptive reflections on the work of the Sub-Commission was made by Hillemanns, Caroline F.: UN Norms on the Responsibilities of Transnational Corporations and Other Enterprises with regard to Human Rights, in: German Law Journal, Vol. 04, No. 10 / 2003, pp. 1065ff.; and Nowrot, Karsten: Die UN-Normen on the Responsibilities of the Transnational Corporations and Other Business Enterprises with Regard to Human Rights – *Gelungener Beitrag zur transnationalen Rechtsverwirklichung oder das Ende des Global Compact?*, Beiträge zum Transnationalen Wirtschaftsrecht (Tietje, Christian et al., eds.), September 2003, Heft 21. See also: Weissbrodt, David, and Kruger, Muria: Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, The American Journal of International Law, Vol. 97, 2003, pp. 901ff.; Cooper, Katy / Warhurst, Alyson: UN Human Rights Norms for Businesses, Amnesty International (UK) / maplecroft, Bradford on Avon / London, 2004.

4 Para. 1 of the Norms, see Footnote 2.

5 Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2, hereinafter referred to as “Commentary”; Article 2, 4 lit c) and d) of Resolution 2003/16 of Sub-Commission on the Promotion and Protection of Human Rights, hereinafter referred to as “Sub-Commission,” of August 13, 2003, U.N. Doc. E/CN.4/Sub.2/RES/2003/16.

Focusing on the legal status of the Norms tends to narrow the view to only one aspect of human rights standards.

of the working group was – among other things – to contribute to the drafting of binding norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights.⁶ The working group itself considered the Norms as legally binding standards, while the Commission affirmed bluntly that the principle of Norms “[has] not been requested [...] and, as a draft proposal, has no legal standing.”⁷

The Commission mandated the Office of the High Commissioner for Human Rights to prepare a report on the scope and legal status of existing initiatives and standards targeting responsibility of transnational corporations and related business enterprises with regard to human rights. As statements by business lobby groups and certain governments have shown, the debate on the legal status of the Norms biases the discussion instead of focusing on existing binding standards for corporate behaviour.⁸ Focusing on the legal status of the Norms tends to narrow the view to only one aspect of human rights standards. Human rights have a broader vision: They involve legal claims that may be made by victims and disadvantaged groups for reparation. Furthermore, human rights entitle concerned stakeholders – such as NGOs and civil action groups – to work for their fulfilment. But human rights are also political commitments and moral standards. What is common to all perspectives is the normative demand to respect, protect, and fulfil human rights as universal, interdependent, interconnected and indivisible values.⁹

The discussion about the relationship between corporate conduct and human rights is unfolding in the context of a broader debate on globalization, power shifts, and the role of the sovereign nation-state in the 21st century. Therefore one has to examine first the challenge posed by globalization and its main engine – transnational corporations – to the ability of states to fulfil their human rights obligations.

2.1 The Role of Corporations in Globalization

“Companies, both national and transnational, make an important contribution to the social dimension of globalization. They shape the world of work and influence the social and economic environment in which people live.”¹⁰

Globalization – a fact and a process

For the purpose of this analysis, it is not necessary to judge the globalization process or to single out a general agreed version of reasons, impacts, and issues of globalization as such. For this investigation it is less important to argue whether globalization is a process or a result than it is to focus on its main characteristics. These are economic liberalization and international deregulation, expansion of foreign direct investment, and increased cross-border financial flows. It is further important to note that these characteristics go back to national decisions made by governments in order to eliminate obstacles to a coherent world economy, based on new technologies and greater competition in global markets.¹¹ In other

6 Resolution 2001/3 of Sub-Commission of August 15, 2001, U.N. Doc. E/CN.4/Sub.2/RES/2001/3.

7 Lit. a) of Commission on Human Rights Decision 2004/116, see Footnote 1.

8 See for, example, the contribution to the OHCHR by the U.S. and the U.K. as well as by the International Chamber of Commerce or the International Organization of Employers (available at: <http://www.ohchr.org/english/issues/globalization/business/contributions.htm> – January 17, 2005 / also on file with the author).

9 Chapter I, Article 5, Vienna Declaration and Programme of Action, adopted by World Conference on Human Rights, Vienna, June, 14.-25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), U.N. Doc. A/CONF.157/23.

10 World Commission on the Social Dimension of Globalization: A Fair Globalization: Creating Opportunities for All, International Labour Office, Geneva 2004, p. 121.

11 World Commission on the Social Dimension of Globalization, see Footnote 10, p. 24.

words, globalization can be seen as a political choice rather than an economic necessity. This leads to the assumption that the unequal international distribution of the benefits and disadvantages of globalization, being results of political objectives, can be challenged politically, legally, and morally. If globalization is shaped by decisions, these choices can be influenced.

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Transnational Corporations – an emerging global actor

Corporations are legal persons, endowed with certain legal and civil rights, such as privacy, free speech, and the ability to limit their liability. These aspects of corporations led to concerns that such firms might could acquire significant power, which they could exercise with limited liability.¹² Transnational corporations are seen as the main actors and engine of global competition.¹³ The United Nations Conference on Trade and Development (UNCTAD) estimates the number of transnational corporations to be almost 64,000, 90 percent of which are based in the European Union, the U.S. or Japan, with approximately 870,000 regional or local subdivisions.¹⁴ Their – locally and globally – increasing socio-economic influence is widely described as a power shift¹⁵, a fact illustrated by United Nations Development Programme (UNDP) figures that show that among the 100 largest economic entities worldwide 29 are transnational corporations.¹⁶ The *Cardoso Panel* stated that the increased power of corporations was able to threaten people's participation, political accountability, the rule of law, and transparency.¹⁷ In order to counter these threats, human rights standards should be used as guiding principles. In this regard, the options are either to increase the role played by the state or to place corporations under direct obligations.¹⁸

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2.2 The Impact of Transnational Corporations on State Sovereignty

“There is mounting anxiety that the integrity of cultures and the sovereignty of states may be at stake. Even in the most powerful countries, people wonder who is in charge, worry for their jobs and fear that their voices are drowned out in globalization’s sweep.”¹⁹

Changing Concept of Sovereignty in a Globalized World

Sovereignty is the core concept of international law.²⁰ It can be described as entailing a monopoly over fundamental political decisions as well as over legislative, executive, and juridical powers, based on consolidated, durable institutions and

12 Bendell, Jem: *Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement*, Technology, Business and Society Programme Paper Number 13, United Nations Research Institute for Social Development, June 2004, p. 8.

13 Zammit, Ann: *Development at Risk – Rethinking UN-Business Partnerships*, South-Centre / UNRISD, Geneva 2003, p. 191; World Commission on the Social Dimension of Globalization, see Footnote 10, p. 124.

14 United Nations Conference on Trade and Development (UNCTAD): *World Investment Report 2003 “Policies for Development: National and International Perspectives”*, United Nations, Geneva 2003, pp. 5f., and Annex A.I.15, pp. 222f.

15 World Commission on the Social Dimension of Globalization, see Footnote 10, p. 37.

16 United Nations Conference on Trade and Development (UNCTAD): *World Investment Report 2002 “Transnational Corporations and Export Competitiveness”*, United Nations, Geneva 2002, Box IV.1., p. 90.

17 Paragraph 3, 8, 11 of the Report „We the peoples: civil society, the United Nations and global governance” of the Panel of Eminent Persons on United Nations-Civil Society Relations of June 11, 2004, U.N. Doc. A/58/817

18 United Nations Development Programme (UNDP): *Human Development Report 1999*, UNDP, New York 1999, p. 44.

19 Paragraph 24 Report “We the peoples: the role of the United Nations in the twenty-first century” (Millennium Report), U.N. Doc. A/54/2000.

20 Haass, R.N.: *Sovereignty – Existing Rights, Evolving Responsibilities*, Remarks at the School of Foreign Service and the Mortara Center for International Studies’, Georgetown University 2003, available at: http://www.georgetown.edu/sfs/documents/haass_sovereignty_20030114.pdf – last visit on 30 October 2004.

From a human rights perspective, sovereignty can be explained as the legitimate assignment and control of power, exercised over people's daily lives.

organized economic and financial means.²¹ From a human rights perspective, sovereignty can be explained as the legitimate assignment and control of power, exercised over people's daily lives.²² In other words, power is accountable. And therefore the protection and provision of human rights legitimises sovereignty and can be seen also as an attempt to abstract the definition of human rights standards from the sovereignty of states and their domestic jurisdiction²³ to the international level.

Furthermore, exercised power is not only linked with human rights, it is moreover linked with participation of people in political, social, and economic affairs. The *Vienna Declaration of the World Conference on Human Rights* strongly stated that "*Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing*".²⁴ According to this interpretation, there is no democracy without human rights and there are no human rights without democracy. With regard to social and economic affairs, the UN Commission on Human Rights underlined that the principle of democracy encompasses the need for of people's participation in all aspects of political, economic, and social life, particularly the planning and implementation of policies that affect them, thus enabling them to become genuine partners in development.²⁵ This leads to the conclusion that a system may be called democratic if there is proper participation of people in decision-making processes on political, economic, social, and cultural matters that affect them, be this at the local, regional, national, or international level. Finally, human rights call for a legal structure that combats impunity.

Impact of Transnational Corporations

Due to their immense economic power and influence, transnational corporations would be able to contribute to a better social and political environment, but in reality not a small number of them are actually involved in human rights violations or even themselves commit human rights abuses. Business contributes to development through foreign direct investment, creation of jobs, improvement of education facilities and medical services.²⁶ However, this progress in people's daily lives is more the result of philanthropy than rooted in a general acceptance of regulations on human rights.²⁷ Apart from these positive contributions, corporate conditions for investment may also serve to lower labour, social, and economic standards. Considering the well-known examples of Shell in Nigeria, Nike in export processing zones, or Unocal in Myanmar (Burma) one can recognize patterns of human rights abuses that are noticeable in many business activities, such as the oil or pharmaceutical industry.²⁸

21 Brownlie, I.: *Principles of Public International Law*, 1990, p. 78.

22 Sassen, Saskia: *Losing Control? – Sovereignty in an Age of Globalization*, 1996, p. 65; T.M. Franck, 'The Emerging Right to Democratic Governance', *AJIL* Vol. 86, No. 1 (1992), pp. 46f.; Jackson, J.H.: 'Sovereignty-Modern – A New Approach to an Outdated Concept', *AJIL* Vol. 97, No. 4 (October 2003), pp. 782f. 9 (783, 790).

23 Charter of the United Nations, UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119, Article 2, Para. 7.

24 Paragraph 8 Vienna Declaration; Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

25 Resolution "Human Rights and Extreme Poverty" of April 23, 2001, U.N. Doc. E/CN.4/RES/2001/31.

26 UN Millennium Project, Report 2005 "Investing in Development – A Practical Plan to achieve the Millennium Development Goals", London / Sterling 2005, pp. 110f. (118).

27 UNDP: Human Development Report 2003 "Millennium Development Goals: A compact among nations to end human poverty," Oxford University Press, New York / Oxford 2003, with general references at pp. 23, 81; and with regard to education at p. 75 and health at p. 113.

28 Centre for Public Integrity: *The Politics of Oil - How one of the world's richest industries influences government and policy*; Washington 2004 (<http://www.publicintegrity.org> – 2004-07-14); Onishi, Norimitsu: *As Oil Riches Flow, Poor Village Cries Out*; in: *New York Times* of December 22, 2002.

Furthermore, human rights abuses are not only a spin-off of economic activities but also a possible business objective. The trade in small arms (see Box “Small Arms Trade and Business Activities”), interrogation services of private security and military forces, and day-to-day corruption violate human rights globally and hinder people’s development. And furthermore, corruption constitutes a severe threat to democracy. According to World Bank estimates, 7 percent of business-based cash flows – approximately USD 2.3 trillion yearly – bypass public accountancies. This is evasion of accountability and is becoming a direct violation of people’s right to participate in political and economic affairs.²⁹ This lack of accountability can, finally, result in impunity. Recent examples of private security firms involved in torture during interrogation in Iraq are illustrations of the impunity of business.³⁰

Lack of accountability can result in impunity.

2.3 Less Functions of State – New Roles for Corporations

“Alone, business can’t change the world. But together with public partners, business can make decisive contributions in the struggle against violence, against anarchy and against terrorism – and for civilization, for freedom and for prosperity. We have certain projects under way. And we are ready to do more.”³¹

Box “Small Arms Trade and Business Activities”

The world witnessed 101 local and regional wars between 1989 and 1996 in which small arms were almost the only resource for battle and killing. It is estimated that there exist 640 million small arms world-wide which are used to kill, every year, some 300.000 people in warlike situations as well as some additional 200.000 people in other violent conflicts. Annual legal and illegal sales are estimated to be up to USD 5-7 billion. This is the reason why small arms are referred to as the real weapons of mass destruction. The unlawful use of small arms leads to torture, disappearances, and illegal killings; moreover, small arms are generally recognized as a threat to peace and security. Corporations not only produce small arms but are also involved in their sale, trafficking, and supply to combatants. The lack of national regulation along with the global impacts of this business led to the adoption of an international Arms Trade Treaty. The Treaty set out the principle that arms exports are in breach of international law if the exporter has knowledge, or ought reasonably to have knowledge, of the fact that these arms will be used for violations of international human rights or humanitarian law. But this treaty is not in force yet.

Resources & References: International Committee of the Red Cross: Arms Availability and the Situation of Civilians in Armed Conflict, Geneva 1995; Graduate Institute of International Studies: Small Arms Survey 2001 – Profiling the Problem, Oxford University Press, Oxford 2001; Graduate Institute of International Studies: Small Arms Survey 2002 – Counting the Human Cost, Oxford University Press, Oxford 2002; Frey, Barbara: Progress report by Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons, U.N. Doc. E/CN.4/Sub.2/2004/37; Oxfam / Amnesty International: Shattered Lives – the case for tough international arms control, Oxford / London 2003.

²⁹ Mbonu, Christy: Preliminary report of the Special Rapporteur on Corruption and its impact on the full enjoyment of human rights, in particular economic, social and cultural rights, paragraph 7, 27; U.N. Doc. E/CN.4/Sub.2/2004/23.

³⁰ Borger, J.: “Dirty” war for profit evades reach of law’, in: Guardian Weekly, May 6-12, 2004, page 6, with references to CACI International, a military and intelligence contractor of the Pentagon and the CIA.

³¹ Pierer von, Heinrich: The Role of Business in Conflict Prevention, Peacekeeping and Post-Conflict Peacebuilding, Statement as President and Chief Executive Officer Siemens AG, at the Security Council of the United Nations’ Public Meeting on the Role of Business in Conflict Prevention, Peacekeeping and Post Conflict, April 15, 2004 (available at: <http://www.germany-un.org/peace/council/presidency/Statement%20SIEMENS%20im%20VN-Sicherheitsrat%2015.04.04.pdf> – June 18, 2004).

UNDP recognized in 1999 that the lack of enforcement mechanisms for human rights obligations has led to a structural benefit for corporations.

Governments are constructing legal loopholes in order to enlarge the profitability of business, e.g. in export processing zones, or legal impunity, e.g. for US business in Iraq.

Transnational corporations serve as the main engines of globalization and gain the bulk of its benefits. In its *World Investment Report 2002* UNCTAD compared growth rates of states and corporations between 1990 and 2001. The former only rose by 1.5 percent while the 100 largest corporations raised their market value by 50 percent. UNDP reported in 2004 that (within the same period) the population of 46 nations became poorer and that people experienced more hunger in 25 states.³² Deregulation and liberalization, with its perspective of the lean state, have reduced the ability of states to meet their international human rights obligations and to define their socio-economic objectives independently. These developments are not without consequences for human rights. UNDP recognized in 1999 that the lack of enforcement mechanisms for human rights obligations has led to a structural benefit for corporations. With regard to states' obligations to protect the human rights of the individual from corporate influence, governments committed themselves at the World Summit on Sustainable Development (Johannesburg 2002) to "[actively] promote corporate responsibility and accountability, based on Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures [...]".³³

But weak states and the political objectives involved in further deregulation on the one side and corporate irresponsibility on the other side make these political commitments less effective. On the one hand, business need not act unaccountably once it has received the investment deregulation it has been demanding. On the other hand, governments are constructing legal loopholes in order to enlarge the profitability of business, e.g. in export processing zones, or legal impunity, e.g. for US business in Iraq. Moreover, there are regions in the world where no public authority exists at all. "Failing or failed states" is the new slogan used to address the absence of governance, and consequently of regulation, accountability, rule of law, or any kind of governmental or legal structure. But these conflicts are financed by corporate money, from extractive business, illicit movements of goods and natural resources, precious stones, timber, and other assets. In the 1990s, some 5 million people died and between 15 and 20 million were forced away from their homes by armed conflicts over natural resources.³⁴ Very often these conflicts have a background in economic quarrels over market access or shares of international capital.³⁵ Transnational corporations participate as contractors, and their hunger for commodities, and consequently their cash flows, fuels the conflicts.³⁶ The role of transnational corporations is therefore regularly discussed in the Security Council of the United Nations when it addresses conflicts in central Africa.³⁷

32 United Nations Development Programme / UNDP: Human Development Report 2004 "Cultural liberty in today's diverse world; UNDP, New York 2004, p. 132.

33 Para. 49 of Plan of Implementation of the World Summit on Sustainable Development, adopted in Johannesburg on September 4, 2002 (available at www.johannesburgsummit.org – November 4, 2002).

34 Francis, David R.: Fuelling War, in: The Christian Science Monitor, December 5, 2002 (<http://www.global-policy.org/security/natres/oil/2002/1211nat.htm> – December 9, 2002).

35 International Peace Academy: Program on Economic Agendas in Armed Conflicts, Report on Symposium UN Role in Addressing Economic Dimensions of Armed Conflict, 2002 (http://www.ipacademy.org/PDF_Reports/eacw_diplotimes.pdf – July 20, 2004).

36 Pleuger, Günter: Speech of the German Ambassador to the United Nations at the Security Council of the United Nations' Public Meeting on the Role of Business in Conflict Prevention, Peacekeeping and Post Conflict, April 15, 2004 (http://www.germany-un.org/archive/speeches/2004/sp_04_15_04.html – June 18, 2004).

37 High-level Panel on Threats, Challenges and Change: Report "A more secure world: Our shared responsibility," United Nations, New York, 2004, Para. 91.

3. The Issue of Corporate Responsibility in International Law

“Decision-making on international economic matters, particularly in the areas of finance and trade, has long left the United Nations and no amount of institutional reform will bring it back. (...) And yet the United Nations does have potential assets in the areas of economic and social development. First, the United Nations is the only place where the issues of peace, security and development can be addressed together at the global level. Second, the United Nations has an unrivalled convening power, on the basis of which the General Assembly and the major conferences and summits it has convened in the last three decades have generated consensus around internationally accepted goals, especially in the social field. Third, the United Nations shows that it has strong grass-roots support for its goals and can thus mobilize public opinion in their favour.”³⁸

As shown above, globalization has changed the role of the state and its ability to determine its socio-economic objectives in order to meet its human rights obligations. Additionally, activities of transnational corporations are extended by governmental policies and international organizations like the World Trade Organization and the International Monetary Fund, without simultaneously setting accountability mechanisms. Since the United Nations can be seen as the main body for addressing responsibilities for human rights abuses, it is seen as a focal point for linking the trade regime and the human rights regime. A human rights approach to development is seen within the United Nations as *“[the] potential bridge between the normative framework of human rights and the liberal model of trade and development.”*³⁹ At this point, it is argued, neither the trade regime nor the human rights regime is able, on its own, to solve the dilemma of increased power without accountability.

Business is market-driven and the question of corporate accountability in general is often seen from the market perspective. According to this view, human rights become an issue if they have a market value. If they don't, human rights – as political, social, environmental, or moral standards – become the subject of voluntary principles. The view of voluntary selectivity is in contradiction to the universal claim of human rights for respect, protection, and fulfilment.

If we look for standards that address the gap between corporate power and influence on human rights and corporate accountability, the first step has to be to clarify the means of corporate accountability in general and corporate responsibilities for human rights in particular. If we are to replace market forces with normative criteria such as human rights, it will also be necessary to clarify the different moral, political, and legal dimensions of business' human rights obligations and to distinguish them from other concepts of corporate social responsibility.

³⁸ Ibid. High-level Panel on Threats, Challenges and Change: Report “A more secure world: Our shared responsibility”, United Nations, New York, 2004, Paragraph 274f.

³⁹ Para. 18 lit (u) and (v) of Report of “High-level seminar on the right to development: Global partnership for development (Geneva, 9 and 10 February 2004)” by Report of the Working Group on the Right to Development at its fifth session, U.N. Doc. E/CN.4/2004/23/Add.1.

Neither the trade regime nor the human rights regime is able, on its own, to solve the dilemma of increased power without accountability.

3.1 The Normative Compulsion of Human Rights

According to a well-known theory, human rights obligations can be seen as the institutionalization and codification of three obligations: to respect, protect, and fulfil human rights.⁴⁰ Among others, one of the United Nations main aims is the promotion of human rights and fundamental freedoms. In order to meet this objective, the General Assembly and its sub-organs, such as the Economic and Social Council and its functional Commission on Human Rights, have the general mandate to contribute to a better human rights environment by making recommendations, undertaking studies and research as well as by identifying spheres of international law that need further development.⁴¹ In conjunction with this general mandate special institutions and procedures are set up by human rights treaties.

With regard to corporate conduct, states have the obligation to protect individuals and groups from violations of their rights by business behaviour.

With regard to corporate conduct, states have the obligation to protect individuals and groups from violations of their rights by business behaviour. Mainly, these obligations can be seen as an indirect human rights protection from corporate human rights violations via legal and procedural enforcement. In order to address, outlaw, and regulate human rights abuses by corporations, a state has to be willing and able to do so. Since standards of human rights protection are a part of international law, states have already conceded that indirect protection from corporate human rights abuses call for international standard-setting and coordination. Such a commitment was stated at the World Summit on Sustainable Development (Johannesburg 2002), where states committed themselves to “[actively] promote corporate responsibility and accountability, based on Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures [...]”.⁴²

As recently stated by the UN Human Rights Committee in its General Comment on Article 2 of the International Covenant on Civil and Political Rights, the obligations of the Covenant are binding on States Parties and do not, as such, have direct horizontal effect as a matter of international law.⁴³ Nevertheless, the Covenant rights will only be fully discharged if individuals are protected by the state, including against acts committed by private persons or entities. The failure of states to take appropriate measures or to exercise due diligence to prevent, punish, investigate, or redress the harm caused by such acts by private persons or entities would consist a violation of the Covenant’s rights.⁴⁴ This statement acknowledges that states are the single creator of international law, but they are not the only subject and object either of international relations or of international law.

40 See as theoretical background for many General Comments of treaty bodies: Eide, Asbjørn: “Realization of Social and Economic Rights and the Minimum Threshold Approach” in: Richard, Pierre Claude / Burns, H. Weston (Ed.) *Human Rights in the World Community, Issues and Action*, Philadelphia 1992, pp. 158f. (159).

41 Article 1 Para. 3, 55 lit c), 13 lit. a), 62 Para. 2, 68 Charter of the United Nations (adopted on June 26, 1945 and entered into force on October 24, 1945) 557 U.N.T.S 143.

42 Para. 49 of Plan of Implementation of the World Summit on Sustainable Development, adopted in Johannesburg on September 4, 2002 (available at www.johannesburgsummit.org – November 4, 2002).

43 For the Mandate of the Human Rights Committee, see: Part IV (Para.28ff.) of International Covenant on Civil and Political Rights (ICCPR) adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966 and entered into force on March 23, 1976; U.N. Doc. A/RES/2200 A (XXI).

44 Human Rights Committee: General Comment on Article 2 “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,” adopted at the 2187th meeting on March 29, 2004, U.N. Doc. CCPR/C/74/CRP.4/Rev.6.

Imposing direct human rights obligations on business entities differs greatly from indirect protection against corporate human rights abuses by means of state regulation. Introducing a concept of corporate responsibilities means applying normative human rights obligations at the international level. This would strengthen the sovereignty of those states unable to implement these obligations at the national level. In addition, factually exercised power, whether economic or political, is re-framed by human rights principles with a universal claim to implementation. Finally, the lack of accountability of economic actors with factual power may be resolved in this way.

Such a concept of direct business responsibilities for human rights protection, as introduced by the Sub-Commission via the Norms, implies that existing human rights obligations are formalized and implemented as procedural responsibilities at the international level. It also responds to the demand made by civil society and NGOs that corporate human rights abuses be addressed and that powerful non-state actors be included in the human rights agenda.

3.2 Search for Accountability

The call for greater corporate accountability to human rights standards has come from many quarters and various stakeholders. Different steps and initiatives have the same motivation expressed by UN Secretary-General Kofi Annan at the 1999 World Economic Forum, when he called on business leaders to *“embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices” in order “[to] choose between...a selfish free-for-all in which we ignore the fate of the losers, and a future in which the strong and successful accept their responsibilities, showing global vision and leadership.”*⁴⁵ A shift of perspective is proposed to the extent that the increased power of corporations is able to limit states’ sovereignty to define their own socio-economic objectives with regard to state human rights obligations. This change is manifest in the need for a new and elaborate system of corporate accountability in general and corporate responsibility in particular. This was also clearly expressed by the General Assembly which *“[stresses] the need to promote corporate responsibility and accountability, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships and appropriate national regulations, and to support continuous improvement in corporate practices in all countries”*.⁴⁶

These political commitments and objectives for further development of international law are also laid out in the rationale for the Norms, which take note, in their Preamble, of *“[global] trends which have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacity of any one national system”*.⁴⁷

Imposing direct human rights obligations on business entities differs greatly from indirect protection against corporate human rights abuses by means of state regulation.

This change is manifest in the need for a new and elaborate system of corporate accountability in general and corporate responsibility in particular.

45 Kofi Annan, UN Press Release SG/SM/6881 of February 1, 1999, at <http://www0.un.org/News/Press/docs/1999/19990201.sgs6881.html> – March 8, 2000.

46 Article 11 of General Assembly Resolution 58/225 “Role of the United Nations in promoting development in the context of globalization and interdependence” of December 23, 2003; U.N. Doc. A/RES/58/225.

47 Preamble-Paragraph 10 of Norms, see Footnote 2.

3.3 Business' Human Rights Obligations

Apart from the obligation of states to indirectly protect human rights against corporate abuses, corporations have the direct obligation to respect the human rights of others as well as to contribute to the protection and fulfilment of human rights within their respective spheres of influence.

Arising from Article 29 of the Universal Declaration of Human Rights⁴⁸, which states that “[everyone] has duties to the community in which alone the free and full development of his personality is possible,” these duties were first considered as moral obligations⁴⁹. However, a major shift took place with the codification of international human rights standards into treaty law. The Preambles of both Covenants state: *that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.*⁵⁰ These obligations are addressed in numerous authoritative interpretations by both treaty committees.⁵¹ Furthermore, recent developments – such as the two Optional Protocols to the International Convention on the Rights of the Child – address direct obligations of non-state actors with regard to child soldiers⁵², child pornography, and sexual exploitation.⁵³

The Norms themselves assert, in the Preamble, that business entities are “[obliged] to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments”⁵⁴ and “[have], *inter alia*, human rights obligations and responsibilities”⁵⁵. Since this general obligation is seen as the foundation of all other articles of the Norms, consideration of this principle is highly important.⁵⁶

3.4 Human Rights Obligations as part of Corporate Social Responsibility and Accountability

Human rights obligations for corporations are mandatory in legal and moral terms.

Human rights obligations for corporations are mandatory in legal and moral terms. The “secondary responsibility” of business as outlined in the Norms distinguishes itself from existing standards of corporate social responsibility that are based on the voluntary principle of corporate conduct. On the other hand, the different

48 Universal Declaration of Human Rights, adopted by General Assembly Resolution 217A (III) of December 10, 1948; U.N. Doc A/810 at 71 (1948).

49 See Discussion over Article 29 (Draft Article 27) of Universal Declaration on Human Rights, November 20, 1948; U.N. Doc. A/C.3/304/REV2 as well as the exemplary statement of Cuba; U.N. Doc. A/C.3/261.

50 Adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966; ICescR entered into force on January 3, 1976 and ICcpR, see Footnote 43; U.N. Doc. A/RES/2200 A (XXI).

51 Among others, see General Comment 12 (food), 14 (health) and 15 (water) by the Committee on ICescR and General Comment 24 and 26 by the Human Rights Committee under ICcpR; U.N. Doc. HRI/Gen.1/Rev.5.

52 Preamble, Paragraph 11 1st OP (Child Soldiers) expresses concerns about the power and influence of armed groups, and Article 4 1st OP (Child Soldiers) states that non-state actors “should” respect the human rights of children under 18 in their recruitment practices. (Adopted and opened for signature, ratification and accession by General Assembly resolution 54/263 of 25 May 2000, entered into force on 18 January 2002), U.N. Doc. A/RES/54/263.

53 Preamble, Paragraphs 3 and 4, 2nd OP (child pornography) are concerned with as well as aware of the problem and need for international regulation as a reaction to the power and influence of private actors. Article 2 lit. (b) 2nd OP (child pornography) addresses groups and persons and Article 3 Para. 4 and 7 establishes the obligation to provide compensation and make punitive payments. (Adopted and opened for signature, ratification and accession by General Assembly resolution 54/263 of 25 May 2000 entered into force on 18 January 2002), U.N. Doc. A/RES/54/263.

54 Preamble Paragraph 4 of the Norms, see Footnote 2.

55 Preamble Paragraph 14 of the Norms, see Footnote 2.

56 See Commentary lit b) to Article 1, see Footnote 4.

dimensions of corporate social responsibility, such as obedience to the law, self-interest, and philanthropy must be used to implement human rights obligations as long as proper mechanisms are lacking. As with any other human rights standard, the idealistic part of human rights obligations for business entities – such as the general obligation to protect and fulfil the human rights of others – does not fall under the legal enforcement mechanisms and is addressed within patterns of moral, ethical, and so-called social accountability. The question that needs to be addressed is how to bring existing regimes of corporate accountability – as means of self-restraint – into congruence with the normative demand of business human rights obligations for direct responsibility.

Accountability in international law can be seen as a system of power control⁵⁷ which is – according to Article 25, International Covenant on Civil and Political Rights⁵⁸ – exercised in a democracy via elections. In terms of its semantic use, *accountability* means ‘to furnish substantial reasons or a convincing explanation’⁵⁹ or ‘explaining one’s actions’.⁶⁰ This perception was followed in the *Corfu Channel Case*, where ‘a state on whose territory an act contrary to international law has occurred, may be called upon to give an explanation’.⁶¹ The theoretical background of this notion is that the misuse of transferred, delegated, or assumed power will be prevented by accountability within a juridical or quasi-juridical framework.⁶² In other words, the use of power is justified if it is exercised in accordance with existing law, be it codified in national or international acts or generally recognized as international human rights standards. With regard to human rights, *accountability* describes a system of legal, quasi-juridical, and political responsibilities concerning principles and standards which are internationally defined and implemented.

Accountability in international law can be seen as a system of power control.

In speaking of *corporate accountability*, that term is blurred. In order to structure the following considerations, we will introduce a system of four dimensions or levels of corporate compliance with human right standards.⁶³ The first dimension is *legal compliance*, e.g. compliance with existing tax, labour, environmental, or human rights law. No one denies the need for rules and regulations, especially with regard to accounting rules financial professionals snowed under by new regulations from the US and the EU.⁶⁴ If a state has incorporated human rights into its law on corporate charters and activities, corporations are accountable at the national level and within domestic jurisdiction. The second dimension may be called *strategic corporate responsibility*, since its main aim is a modern structure of the corporation and its sustainable presence in the market. In the second dimension it is mainly labour relations and security within the production process as well as risk management that are applied. This dimension is important for human

57 Committee on Economic, Social and Cultural Rights: 19th session (1998), Para. 2 General Comment No. 9: “Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.” UN Doc. HRI/GEN/1/Rev.5.

58 ICpR, see Footnote 43.

59 *Webster’s Third New International Dictionary*, 1981.

60 *Little Oxford English Dictionary of Current English*, 1984.

61 ICJ Reports 1949, p. 18.

62 Ann-Marie Slaughter: “The Accountability of Government Networks,” (2001) 8, *Indiana Journal of Global Legal Studies* 349, 360, 361; 347-367.

63 Developed borrowing on Swift & Zadek: “Corporate Responsibility and the Competitive Advantage of Nations,” The Copenhagen Centre & AccountAbility, 2002, p. 14, who speak of ‘generations’.

64 Among others, the Ahold Scandal in the Netherlands and the Enron Scandal in the United States led to new legislation on individual accountability – in the latter case, the so called Sarbanes-Oxley Act.

rights in the work process and labour related human rights such as health and education. Thirdly, the dimension of *remoulding competitive advantage* aims to secure and enlarge market performance via public relations, incorporation of general codes of conduct, and institutionalisation of cooperation with governmental authorities and civil society. In this dimension consumer interests concerning production conditions and normative obligations by non-governmental organisations play a major role.

Since the first three dimensions have mainly to do with risk management, one can argue that whenever a human right has a market value or is covered by domestic law, it can be enforced by the one side or the other. In addition, a fourth dimension, *philanthropy*, can be found where corporations contribute to a better human rights environment without any side effects for their own business. But one thing all dimensions have in common is that the implementation of human rights obligations is a question of selectivity by governments, corporations, or civil society because they are voluntary in nature. Even extension of extraterritorial jurisdiction in the case of domestic international jurisdiction under the *American Tort Claims Act of 1789*⁶⁵ or common law tradition⁶⁶ is highly contested.

Voluntary initiatives may work for the well-intentioned, but the overwhelming majority of companies have no human rights policy, and few have made explicit commitments.

One can say that business' human rights obligations are – if at all – addressed as moral duties that are part of voluntary concepts of corporate social responsibility. The legal parts of these obligations lack the possibility of an international operative application under any juridical or quasi-judicial procedure. Domestic standards of corporate human rights obligations – if not implemented in the form of mandatory rules – are voluntary. They very often lack international legitimacy, while they create an uneven playing field due to differing standards, limited adoption, and inconsistent implementation and monitoring. Voluntary initiatives may work for the well-intentioned, but the overwhelming majority of companies have no human rights policy, and few have made explicit commitments. As Amnesty International noted in a report, “*many codes are very vague in regard to human rights commitments. As far as AI is aware, fewer than 50 companies even refer explicitly to human rights in their codes.*”⁶⁷

65 28 U.S.C. § 1350: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”; See: P. I. Blumberg, ‘Asserting Human Rights Against Multinational Corporations under United States Law: Conceptual and Procedural Problems’, 50 Am. J. Comp. L. 493 (2001); C. Shaw, “Uncertain Justice: Liability of Multinationals under the Alien Tort Claims Act” (2002) 54 *Stan. L. Rev.* 1359, 1365-1366.

66 See: R. Meeran, ‘Liability of Multinational Corporations: A Critical Stage in the UK’, in: M.-T. Kamminga, S. Zia-Zarifi (Eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International 2000, pp. 251-264; S. Joseph, *Corporations & Transnational Human Rights Litigation*, 2004, Chapter 6.

67 Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability*, 2004, available at: [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/\\$File/IOR4200204.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/$File/IOR4200204.pdf) – October 30, 2004, p. 5.

4. Existing Models of Corporate Conduct in International Regimes

As shown, the provisions in international law that address corporate behaviour are formulated either as recommendations for regulation by states or normative demands for business compliance. Since there is no mechanism to implement these principles directly, the detour via states is still needed. Direct engagement with corporations is therefore required. Starting from the attempt to construct a *New International Economic Order*⁶⁸ (see the box “Corporate Regulation under the New International Economic Order”) corporate conduct was first framed as a direct obligation within the human rights protection mechanism of the United Nations. Called upon to do so by the General Assembly, the Economic and Social Council (ECOSOC) requested the Secretary General to appoint a group of experts; it concluded in its final report that it was necessary to set up a permanent commission on transnational corporations, assisted by a research centre.⁶⁹ Both institutions were founded in 1974, and an intergovernmental working group worked out, between 1976 and 1990, a *Draft Code of Conduct on Transnational Corporations*.⁷⁰ The *Draft Code of Conduct on Transnational Corporations* was never adopted and fell into oblivion after the Commission on Transnational Corporations and the research centre were dissolved and what was left of them was transferred to the United Nations Conference on Trade and Development (UNCTAD).⁷¹

While the universal approach of the United Nations failed, other voluntary standards were developed within other regimes. Among others, these voluntary standards of corporate behaviour include the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*⁷² and the *Declaration on Fundamental Principles and Rights at Work*⁷³ of the International Labour Organization, the *Guidelines for Multinational Enterprises* of the Organization for

68 The notion of a *New International Economic Order* goes back to an initiative at a meeting of the Non-Allied Movement in Algiers in 1973 that led to a special session of the UN General Assembly in 1974, which adopted, on May 01, 1974, the *Declaration* (U.N. Doc. A/RES/3201 (S-VI)) and the *Programme of Action for the establishment of a New International Economic Order*, U.N. Doc. A/RES/3202 (S-VI). The General Assembly adopted, on December 12, 1974, the related *Charter of Economic Rights and Duties of States*, U.N. Doc. A/RES/3281 (XXIX). The aim of the *New International Economic Order* was to assess and restructure the international trade and development regime as well as to serve as a vehicle for political aims. See: Cox, Robert W.: *Ideologies and the New International Economic Order: Reflections on Some Recent Literature*, in: *International Organization*, 33 (2): Spring 1979, pp. 257-302.

69 See ECOSOC Resolution 1721 (LIII) of July 28, 1972; U.N. Doc. E/RES/1721 (LIII) and Report of May 22, 1974; U.N. Doc. E/5500.

70 See ECOSOC Resolution 1908 (LVII) of August 2, 1974, U.N. Doc. E/RES/1908 (LVII); and 1913 (LVII) of December 5, 1974, U.N. Doc. E/RES/1913 (LVII); as well as *Draft Code of Conduct on Transnational Corporations*, Annex to the letter of the chairman of the special session of the Commission on Transnational Corporations of May 31, 1990; U.N. Doc. E/1990/94.

71 See ECOSOC Resolution 1994/1 of July 14, 1994, U.N. Doc. E/RES/1994/1; General Assembly Resolution 49/130 of December 19, 1994; U.N. Doc. A/RES/49/130.

72 International Labour Organisation: *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, adopted November 16, 1997, 17 ILM 422 (1978) and revised by November 17, 2000, 41 ILM 186 (2002), available at www.ilo.org; Para. 2: “The aim of this Tripartite Declaration of the Principles is to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise, taking into account the United Nations resolutions advocating the establishment of a New International Economic Order.”

73 International Labour Organisation: *Fundamental Principles and Rights at Work and its Follow Up*, adopted June 18, 1998, available at www.ilo.org.

Economic Cooperation and Development⁷⁴, the *Global Compact* of the United Nations,⁷⁵ or the Initiative by the European Parliament on Corporate Social Responsibility of the European Union.⁷⁶

“Corporate Regulation under the New International Economic Order”

“The New Economic order should be founded on full respect for the following principles: [...] regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such corporations operate on the basis of the full sovereignty of those countries.” Paragraph 4 (lit g) General Assembly Resolution 3201 (S-VI) *Declaration for the establishment of a New International Economic Order* of May 1, 1974, U.N. Doc. A/RES/3201 (S-VI)

“All efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations:

- (a) To prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations;
- (b) To regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements;
- (c) To bring about assistance, transfer of technology and management skills to developing countries on equitable and favourable terms;
- (d) To regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned;
- (e) To promote reinvestment of their profits in developing countries.”

Paragraph V General Assembly Resolution 3202 (S-VI) *Programme of Action for the establishment of a New International Economic Order* of May 1, 1974, U.N. Doc. A/RES/3202 (S-VI)

4.1 OECD

The OECD Guidelines for Multinational Enterprises have been adopted by governments of all thirty member countries as well as by eight non-members.

The OECD Guidelines for Multinational Enterprises have been adopted by governments of all thirty OECD member countries as well as by eight non-members.⁷⁷ The OECD’s Guidelines are the only comprehensive rules that governments have endorsed and which commit them to help solve problems arising with corporations.

⁷⁴ Organisation for Economic Co-operation and Development: Guidelines for Multinational Enterprises, adopted June 21, 1976, 15 ILM 967 (1976), and revised on June 27, 2000, 40 ILM 237 (2001), available at www.oecd.org; See for voluntary nature: Article 1 (Preface) of The OECD Guidelines for Multinational Enterprises, in: OECD: OECD Guidelines for Multinational Enterprises, Global Instruments for Corporate Responsibility, Annual Report 2001, Paris 2001, page 127f. (127).

⁷⁵ Issued by Secretary-General Kofi Annan in his address at the World Economic Forum in Davos (Switzerland) on January 31, 1999, U.N. Doc. SG/SM/6448 (1999).

⁷⁶ European Commission: Green Paper – Promoting a European Framework for Corporate Social Responsibility, EU Doc. COM (2001)366, final of July 18, 2000, available at www.europa.eu.int.

⁷⁷ Organisation for Economic Co-operation and Development: Guidelines for Multinational Enterprises, adopted June 21, 1976, 15 ILM 967 (1976), and revised on June 27, 2000, 40 ILM 237 (2001), available at www.oecd.org; See for voluntary nature: Article 1 (Preface) of The OECD Guidelines for Multinational Enterprises, in: OECD: OECD Guidelines for Multinational Enterprises, Global Instruments for Corporate Responsibility, Annual Report 2001, Paris 2001, page 127f. (127). The member countries of the OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the UK, and the US. Eight non-member countries – Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia – have also declared their adherence to the Guidelines.

The Guidelines represent the commitment of signatory governments to make recommendations to multinational companies operating in or from their territories.⁷⁸ They cover up to 85 per cent of total foreign direct investment flows. The Guidelines encompass almost all fields of corporate activities, with chapters covering general policies, disclosure of information, employment and industrial relations, the environment, combating bribery, consumer interests, science and technology, competition and taxation.

The Guidelines were first agreed upon in 1976 as a side effect of the New International Economic Order. These Guidelines were revised in the aftermath of the failed negotiations on the Multilateral Agreement on Investment at the OECD in 1999. Among other initiatives, the Guidelines have subsequently raised corporate awareness about the need to establish voluntarily codes of conduct. Another effect observed in this respect was a new wave of company codes and other corporate social responsibility initiatives in the late 1990s. The development of company codes and other corporate social responsibility initiatives in the late 1990s entailed a new surge of awareness about corporate power.

As governmental recommendations for good corporate behaviour, the Guidelines are addressed directly to companies. Nevertheless, they are not binding in a strict legal sense, but they do call for observance wherever a company operates.⁷⁹ Their application depends not on endorsement by companies but on enforcement by governments. The Guidelines are implemented through a dual system of National Contact Points in each signatory country and the Investment Committee made up of National Contact Points at the intergovernmental level, which oversees the process.⁸⁰ Unlike other codes governing the conduct of companies, the Guidelines have an apparent threefold advantage: Firstly, they are more detailed; secondly, the National Contact Points are publicly accountable government officials, and thus implementation does not rely on self-reporting by companies. Thirdly, they include a complaints mechanism open to unions and NGOs.

In addition, the Guidelines are endorsed by a corpus of multinational companies, represented by the OECD's Business and Industry Advisory Committee (BIAC) as well as by the corresponding Trade Union Advisory Committee (TUAC).

Finally, the Guidelines are used in other international organizations as a tool to examine and address corporate violations of human rights. The *Kassem Panel*, mandated by the United Nations Security Council to investigate the illegal exploitation of natural resources in the Democratic Republic of Congo, used the Guidelines as a benchmark.⁸¹ The Kassem Panel concluded that violations of the Guidelines had led to human rights abuses and prolonged the conflict itself.⁸²

The OECD-Guidelines are used in other international organizations as a tool to examine and address corporate violations of human rights.

78 Article 1 (Preface) of The OECD Guidelines for Multinational Enterprises, in: OECD Guidelines for Multinational Enterprises, Global Instruments for Corporate Responsibility, Annual Report 2001, Paris 2001, page 127f. (127).

79 Guidelines, op. cit., I. Concepts and Principles, 1 & 2.

80 Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Paris: OECD, 2000, p. 4.

81 Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, Security Council Resolution 1457 (2003) of January 24, 2003, U.N. Doc. S/RES/1457 (2003); and 1499 (2003) of August 13, 2003, U.N. Doc. S/RES/1499 (2003).

82 Paragraph 10, 12 Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo of October 23, 2003; U.N. Doc. S/2003/1027.

The problem within the Guidelines is that they address quite comprehensively various fields of core corporate activities but fail to address these issues in a balanced manner from a human rights perspective. With regard to human rights, the Guidelines are weakly phrased. True, the revised Guidelines include an important provision specifying that enterprises should: “*Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.*”⁸³ However, this human rights provision is very general and makes no explicit reference to rights critical to the protection of life, liberty, and security.

4.2 ILO

The second important set of intergovernmental instruments which address corporate commitments to human rights are those of the International Labour Organisation (ILO). Amended in 2000, the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* calls for direct acceptance of the fundamental labour standards by corporations and aims at “*encouraging the positive contribution which multinational enterprises can make.*”⁸⁴ These fundamental labour standards include the prohibition and abolishment of forced labour (ILO Conventions 29 and 105), prohibition of discrimination and unequal remuneration (ILO Conventions 100 and 111), a ban on child labour (ILO Conventions 138 and 182), an affirmation of the freedom of association and the right to collective bargaining (ILO Conventions 87 and 98).⁸⁵ ILO conventions and recommendations are only binding upon member states, yet due to its tripartite composition, employers’ and employees’ interest groups, as participants in decision-making processes, bear a moral obligation to include principles adopted by the ILO into their own policies.

While the ILO lacks the power to bring the policies of other international organizations into coherence with its standards, it does play a critical role in advising governments on steps that can be taken to comply with core labor standards.

While the ILO lacks the power to bring the policies of other international organizations – such as the Bretton Wood institutions – into coherence with its standards, it does play a critical role in advising governments on steps that can be taken to comply with core labor standards.⁸⁶ It has various supervisory mechanisms for dealing with complaints about failures of member states to apply ILO Conventions. It has also established the Committee on Freedom of Association to examine complaints against member states that are not respecting basic principles of freedom of association, even when the country concerned has not ratified the relevant ILO Conventions. In June 2000, the ILO took an unprecedented step in adopting a resolution which called upon its constituents to review all links with Burma (See box: “Burma”) and cease any relations that might aid its military junta to abet forced labor.⁸⁷

⁸³ *Guidelines*, op. cit., II. General Policies, 2.

⁸⁴ Paragraph 2 Tripartite Declaration, see Footnote 72.

⁸⁵ International Labour Organisation: *Fundamental Principles and Rights at Work and its Follow Up*, adopted June 18, 1998, available at www.ilo.org – November 22, 2004.

⁸⁶ With regard to the Bretton Wood Institutions see: Hagen, Katherine A.: *Policy Dialogue between the International Labour Organization and the International Financial Institutions: The Search for Convergence*, FES Dialogue on Globalization No. 9, October 2003, pp. 19f.

⁸⁷ ICFTU, *Practical Contents of the 88th ILO Conference Resolution on Burma*.

“Burma / Myanmar”

The case of Burma / Myanmar is an example of corporate involvement in governmental human rights violations and corporate human rights abuses as well as for an international reaction to them. These reactions also show the lack of implementation of human rights as universal standards within a formalized international procedure.

Firstly, the International Labour Conference, at its 88th Session (May-June 2000), adopted a resolution on Burma under Article 33 of its constitution, which, *inter alia*: “*recommend[ed] to the Organization’s constituents as a whole – governments, employers and workers – that they: (i) review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with [Burma] and take appropriate measures to ensure that [Burma] cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labor (...) and to contribute as far as possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body*”.

Secondly, the European Union launched an initiative banning all European companies from investing in Burmese firms controlled by or linked to the military dictatorship. The EU was convinced that the sanctions hit the military authorities and their „cronies” in state-run firms rather than the Burmese people. In order to re-approve private investment and contributions by international financial institutions such as the World Bank and IMF, the EU has called for reforms on democratic and human rights and called on the government to free opposition leader Aung San Suu Kyi from house arrest. This consideration of sanctions within the European Union goes back to the Burma Campaign UK, which published, in August 2004, a „dirty list” of 95 companies directly or indirectly helping to finance the regime, including Rolls-Royce, the aero-engine maker, operating through a Singaporean subsidiary, and Lloyd’s of London. Others, including British American Tobacco, the accountants Pricewaterhouse Coopers, and the advertising group WPP, ended their involvement in the past year, the campaign has stated.

Thirdly, the UNOCAL case in the United States sought to use the Alien Tort Claims Act to hold a corporation directly responsible for involvement in human rights violations. The Alien Tort Claims Act, a 215-year-old law revived in the late 1970s, is mainly used by victims of human rights violations abroad to sue foreign dictators and multinational corporations in the United States over alleged abuses. In December 2004 Unocal Corp. announced it would settle landmark human rights lawsuits brought by 15 villagers from Myanmar who claimed it was responsible for forced labour, rapes, and a murder allegedly committed by soldiers along the route of a natural gas pipeline in Burma.

Sources: ICFTU: Practical Contents of the 88th ILO Conference Resolution on Burma; Gow, David: Burmese ban for European firms, in: The Guardian Weekly of October 15, 2004; Girion, Lisa: Unocal to Settle Rights Claims, in: Los Angeles Times of December 14, 2004.

Since the ILO’s core mandate concerns labor rights and relations, the Tripartite Declaration has – from a general human rights perspective – a narrow focus on employment, training, working conditions and relations. However, its standard setting regarding human rights in the work process is comprehensive as such. Moreover, the Declaration contains a general policy that encourages respect for national laws and relevant international standards, including the Universal Declaration of Human Rights and the corresponding Covenants.⁸⁸ But again, these recommendations are only commended as guidelines, which ILO constituents and multinational enterprises are “recommended to observe on a voluntary basis.”⁸⁹

88 Article 8, Tripartite Declaration, see Footnote 72.

89 Article 7, Tripartite Declaration, see Footnote 72.

4.3 EU

In July 2001, the Commission presented the Green Paper ‘Promoting a European Framework for Corporate Social Responsibility’.

In order to balance people’s concerns for a healthy and human environment with economic objectives, the European Union introduced the concept of Corporate Social Responsibilities (CSR). In July 2001, the Commission presented the Green Paper *“Promoting a European Framework for Corporate Social Responsibility.”*⁹⁰ The aims of this document were, firstly, to launch a debate about the concept of CSR and, secondly, to identify how to build a partnership for the development of a European framework for the promotion of CSR. The green paper defined CSR as *“a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”* as they are increasingly aware that responsible behaviour leads to sustainable business success.⁹¹ The underlying perception is that if companies succeed in managing changes in a socially responsible manner, this will have a positive impact at the macro-economic level.

Furthermore, the European Union considers CSR as a competitive advantage and defines the strategic goal of becoming, by 2010, *“the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.”* Within this *Lisbon Framework*, the European Council referred directly to the business community for the very first time with *“a special appeal to companies’ sense of corporate social responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development.”*⁹²

These first steps were followed in June 2001 by another significant step, the publication of the European Commission’s Green Book, launching a round of consultations on a European approach to corporate social responsibility. Following this round of consultations, the Commission initiated the European Multistakeholder Forum in October 2002. It brought together a range of stakeholders (primarily business, unions, and NGOs) in a series of round tables aiming at (1) improving knowledge about CSR by exchanging experience and good practice and (2) exploring the appropriateness of common guiding principles on CSR. This forum provided a platform for dialogue among the business community, trade unions, social organisations, and other stakeholders up to 2004. The results of the Multistakeholder Forum, together with work at the national and European level, form the basis of European policy on CSR. However, this policy is still based on the objective of a merely voluntary contribution of corporations.

Apart from this, the European Union applies human rights principles in trade agreements and development assistance.⁹³ But the directly obliged contracting parties in these cases are solely the corresponding governments; apart from that these stipulations in trade agreements do not entail any legally binding obligations for private business.

90 Commission of the European Communities, COM (2001) 366.

91 Commission of the European Communities, COM (2002) 347 final.

92 Declaration of Lisbon, Adopted by the Lisbon Summit of March 2000.

93 Cotonou Agreement on ACP-EU Cooperation (2000).

4.4 United Nations

The General Assembly of the United Nations has stressed “*the need to promote corporate responsibility and accountability, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships and appropriate national regulations, and to support continuous improvement in corporate practices in all countries*”.⁹⁴ Due to new concerns about the power shift from state to non-state actors – a result of globalization – the United Nations is, in the 21st century, referring back to ideas from the New International Economic Order of the 1970s.

Global Compact

It took the United Nations a decade to recover from the failure to establish links between trade, finance, and human rights regimes within the New International Economic Order. However, in 2000 a new initiative was launched, directly addressing private business. The United Nations Global Compact is a voluntary corporate citizenship initiative which was launched by the United Nations Secretary-General in 1999.⁹⁵ The initiative attempts to bring together companies, United Nations agencies, civil society, and labour organizations in support of ten principles drawn from international declarations. These principles offer general guidelines for corporate behaviour related to human rights, labour standards, the environment, and the fight against corruption. However, in terms of human rights, the principles are extremely vague, offering minimal guidance in terms of content, interpretation, and application of human rights responsibilities. While companies are asked to mainstream the ten principles within their spheres of influence, the United Nations Global Compact explicitly denies that it is a regulatory initiative. Instead, it claims to offer a values-based platform for voluntary peer review and institutional learning.

Participants are encouraged to share case studies of good practices and to participate in policy dialogues. However, the Global Compact has rarely encouraged companies to consider or pilot specific models related to the principles. The Global Compact has at best led to small individual examples of adherence to the related principles, but it has failed to deliver changes in corporate behaviour across the board.

Based on a revised policy which was effected in October 2002, names of participating companies are now published, a step which allows for greater public scrutiny. However, there is no clear means to contest a company’s membership, even when it allegedly violates the ten principles. Due to the lack of a more transparent process for evaluating participation, there is a danger that companies will be able to use their affiliation for public relations purposes only. In May 2004, McKinsey and Company published the findings of their external review of the UN Global Compact, entitled *Assessing the Global Compact’s Impact*, which had been requested by the

⁹⁴ Article 11 Resolution “Role of the United Nations in promoting development in the context of globalization and interdependence” of December 23, 2003: U.N. Doc. A/RES/58/225.

⁹⁵ See Footnote 75.

Global Compact Office in preparation for their Leaders' Summit in June 2004. While their impact assessment discovered that the Global Compact "has had a noticeable, incremental impact on companies, the UN, governments and other civil society," their findings also noted that "inconsistent participation and divergent and unmet expectations limit the impact on companies and continue to threaten the Compact's long-term credibility with participants."⁹⁶

"Amnesty International: Colombia – Laboratory of War"

Amnesty International highlighted, in its 2004 report "Colombia – A Laboratory of War: Repression and Violence in Arauca," that executions, disappearances, arbitrary detentions, and harassment, particularly of human rights activists and trade unionists, are ongoing, in particular in Arauca, and that the conflict had reached an international dimension. In 1983, Occidental Petroleum discovered the Caño Limón oil deposit and began operating the connected pipeline a couple of years later through an association contract with Ecopetrol, the state oil company that owns 50 percent of the pipeline, and Repsol-YPF, which holds a small share but has other substantial interests in the department. While the US government approved USD 99 million in 2003 for the protection of the pipeline, primarily by the 18th Brigade, Amnesty International also notes, "Occidental Petroleum, Ecopetrol and Repsol-YPF, which own and manage Arauca's Caño Limón oil field, have reportedly provided funding for the 18th Brigade through the Cravo Norte Association's security agreements with the military." The report again states that the 18th Brigade "has been accused of human rights violations and collusion with paramilitary forces." Citing its participation in the Global Compact, Repsol quickly reacted to Amnesty International's report, stating that it possessed only a minority share of six percent in the Caño Limón pipeline and that it had no 'direct activities' in the region. Repsol's membership in the Global Compact has not been investigated or challenged by the United Nations, nor have the memberships of other corporations that have been widely accused of environmental and human rights violations.

Sources: *Colombia – A Laboratory of War: Repression and Violence in Arauca*, Amnesty International, 20 April 2004, at: <http://web.amnesty.org/library/index/ENGAMR230042004>;

España/Colombia. – Repsol YPF responde a Amnistía que no tiene „actividades directas“ en el oleoducto de Arauca, Europa Press, April 27, 2004, at:

<http://www.europapress.es/europa2003/noticia.aspx?cod=20040427161940&tabID=1&ch=107>

Cooperation between United Nations and its agencies and private business could serve as an important tool for implementing human rights in business operations.

Guidelines for Cooperation

Apart from the criticism of the Global Compact, human rights still have an undiscovered value for the United Nations and its agencies. The cooperation between United Nations and its agencies and private business could serve as an important tool for implementing human rights in business operations. Within the Guidelines of Cooperation between the United Nations and the business community,⁹⁷ partners who are operating with or on behalf of the United Nations have to share the core values of the Charter of the United Nations. It must be argued that human rights, as generally outlined in the Universal Declaration of Human Rights and the various treaties and specifically defined by the Norms, are specifications of these core values.

⁹⁶ Assessing the Global Compact's Impact, McKinsey and Company, 11 May 2004, p. 2, at: <http://hrca01.iffy.us/humanrightsandbusiness/globalcompact7/McKinsey%20Rapport.pdf> – 13 January 2005.

⁹⁷ Guidelines for Cooperation between the United Nations and the Business Community, Issued by the Secretary-General of the United Nations on 17 July 2000 (<http://www.un.org/partners/business/guide.htm> – 17 June 2002).

4.5 Other Initiatives

Other initiatives of standard setting for corporate conduct are either developed by corporations or are adopted guidelines drafted by NGOs and other stakeholders. Such voluntary codes of conduct and corporate social responsibility initiatives have been adopted by a number of corporations. While these are undoubtedly beneficial for public relations – particularly as an increasing number of shareholders are eager to invest in socially and environmentally responsible companies – voluntary codes of conduct are welcome if they lead to positive changes in company policies and activities.

These initiatives either have a sector approach, focussing on specific industries such as timber, diamonds, or coltan or they focus on specific groups of victims like children, women, and indigenous people. Worth mentioning is the Global Reporting Initiative, the Sullivan Principles, ISO 21000, SA 8000, and AA 1000. With regard to the role of corporations in conflict zones, the international community was able to initiate the Kimberly Process Certification Scheme as an industry-specific initiative, negotiated by governments, NGOs, and the diamond industry. The Kimberly Process was launched in January 2003 following a civil society campaign and a unanimous UN General Assembly Resolution on the role of diamonds in fuelling conflict (see Box: “Kimberly Process”).⁹⁸

“Kimberly Process”

The Kimberly Process requires governments and the diamond industry to implement import/export controls for rough diamonds in national legislation, in order to prevent the sale of ‘conflict diamonds’ tied to ongoing conflict and human rights violations, primarily in Africa. Among other serious weaknesses, one can note that a system of impartial monitoring was not incorporated into the formal agreement due to strong resistance from certain governments. Due to ongoing pressure from NGOs, together with several major jewellery retailers concerned about the legitimacy of the Process, the World Diamond Council continued to press for regular monitoring. At the Kimberly Process Plenary Meeting in South Africa in October 2003, participants agreed to annual reports and voluntary peer review visits, yet they failed to approve a compulsory, regular, and impartial monitoring process that members had adopted. This continuing weakness is exacerbated by a lack of penalties for member countries that are found to be in violation of the agreement.

Source: Amnesty International: *The true cost of diamonds – Kimberly Process*, See homepage and press releases at <http://web.amnesty.org/pages/ec-diamonds-eng>.

⁹⁸ Resolution of the General Assembly 55/56 of December 1, 2000; U.N. Doc. A/RES/55/56.

5. Advantages and Failures of Existing Standards

The main advantage of all standards addressing corporate impacts on human rights is their commitment to human rights as a possible standard for business operations.

The main advantage of all standards addressing corporate impacts on human rights is their commitment to human rights as a possible standard for business operations. Since there is no single standard and no single mechanism, one has to assess the advantages and failures of existing standards by addressing their core principles: voluntary requirement for implementation via regulation and a lack of monitoring systems.

5.1 Pros and Cons of the Voluntary Approach – The Issue of Implementation and Regulation

The liberal approach to corporate conduct with regard to human rights prefers the position that voluntary standards and self-regulation will lead to better human rights protection as long as this serves the main aim of business: to make profit.⁹⁹ According to this perspective, human rights have to have a market value. However, the market value of human rights is controversial since child labour, oppression of unions, unhealthy working conditions, and underpaid workers are seen as a competitive advantage. Voluntary approaches – such as codes of conduct and initiatives like the *Global Compact* – have proven that they are not an obstacle to human rights violations.¹⁰⁰

Voluntary instruments can only be a complement to and not a substitute for national law and its effective implementation.

Position of business

The position of business and its lobby groups such as the International Chamber of Commerce and the International Organization of Employers is that business obligations with regard to human rights are two-fold: reliance on and observance of national law¹⁰¹ and domestic jurisdiction on the one hand and on the other voluntary commitments to human rights protection that go beyond the requirements by law. Such voluntary initiatives serve many constructive and useful purposes, including setting goals, coordinating policies, and sharing knowledge among various business sectors, and providing guidance to corporations seeking to improve their own performance. But nevertheless: voluntary instruments can only be a complement to and not a substitute for national law and its effective implementation. Therefore, the role business has to play with regard to national implementation is to support governments in their efforts to improve the enjoyment of human rights.

⁹⁹ Friedman, Milton: *Capitalism and Freedom*, Chicago 1962, p. 12.

¹⁰⁰ The *Global Compact* developed from a principle-based “membership” to a participatory forum of discussion and learning about best practices. See: Zammit, Ann: *Development at Risk, Rethinking the UN-Business Partnerships*; South Centre & UNRISD Geneva 2003; As regards the *Global Compact*, see: www.globalcompact.org.

¹⁰¹ Business positions with regard to the Norms can either be found at the homepage of Business & Human Rights Resource Centre (www.business-humanrights.org) or the Office of the High Commissioner for Human Rights (www.ohchr.ch).

Position of civil society

Civil society organizations such as NGOs or trade unions are questioning the voluntary approach mainly because of its failure to address the increased power of corporations and its inability to regulate and enact human rights obligations at the national level.¹⁰² But beside the general criticism of business' voluntary commitments, they also contest voluntary international mechanisms such as the ILO standards or the OECD Guidelines.

This challenge is partly shared by organizations which recognize that the existing principles are not enough.¹⁰³ The same criticism is addressed to the OECD Guidelines, whose implementation procedures fall far short of being a core standard of corporate behaviour.¹⁰⁴ Unions furthermore stress that the OECD Guidelines are not an alternative to an effective human rights-based regulation of companies.¹⁰⁵ With regard to the Global Compact, the criticism is even broader, and NGOs speak of a "blue wash" of corporate human rights abuses (See Box "Global Compact Member Royal Dutch/Shell Group").

"Global Compact Member Royal Dutch/Shell Group"

The Royal Dutch/Shell Group has repeatedly and publicly affirmed its commitment to corporate social responsibility, including principles of sustainable development and human rights. However, Shell remains the subject of an ongoing lawsuit in US Courts under the Alien Tort Claims Act, alleging its complicity in human rights abuses in Nigeria, including the execution of leaders of the Movement for the Survival of the Ogoni People (MOSOP). On 20 August 2004, MOSOP published a press release protesting "the unprecedented posting of Mobile Police to a Shell facility in Ogoni and their partisan involvement in violence from one part of a community against others." In the press release, MOSOP President Ledum Mitee stated, "We also firmly believe that the continued presence of these mobile police would not be possible without the financial assistance of Shell, whether direct or indirect. This actually comes in addition to prior destabilisation of the K Dere community from illegal and inappropriate payments made through one of its contractors, Casella Nigeria." In June 2004, an internal Shell report compiled by a Conflict Expert Group of WAC Global Services and titled Peace and Security in the Niger Delta was leaked to the public. Highlighting problematic policies and actions, ranging from questionable land acquisitions and oil spill compensation policies to inconsistent and divisive interactions with communities, the report warned: "Shell Companies in Nigeria cannot ignore Niger Delta conflicts and its role in exacerbating these."

Sources: *Peace and Security in the Niger Delta: Working Paper for Shell Petroleum Development Company of Nigeria Limited*, WAC Global Services, December 2003.

102 NGO positions with regard to the Norms addressing mainly the failures of the voluntary approach can either be found at the homepage of Business & Human Rights Resource Centre (www.business-humanrights.org) or the Office of the High Commissioner for Human Rights (www.ohchr.ch).

103 World Commission on the Social Dimension of Globalization, see Footnote 10, pp. 37, 42, 77, 79.

104 See submission by escr-Net to the OHCHR in September 2004, available at the homepage of Business & Human Rights Resource Centre (www.business-humanrights.org) or the Office of the High Commissioner for Human Rights (www.ohchr.ch).

105 Evans, John (General Secretary Trade Union Advisory Committee to the OECD/TUAC): OECD Guidelines – one tool for corporate social accountability; available at <http://www.ilo.org/public/english/dialogue/actrav/publ/130/4.pdf>.

Civil society groups are calling for a clear-cut framework of human rights obligations, complemented by independent monitoring and other mechanisms for strengthening accountability. They argue that this seems beneficial to all stakeholders, particularly to companies that value corporate social responsibility.

5.2 The Need for Independent Monitoring

Independent monitoring of governmental human rights commitments is widely called for in UN Charter-based and treaty-based human rights protection mechanisms.

Independent monitoring of governmental human rights commitments is widely called for in UN Charter-based and treaty-based human rights protection mechanisms. But with regard to the duty to regulate business conduct with impacts on human rights, only a few treaty bodies address these issues. With regard to business' normative human rights obligations and its voluntary commitments under codes of conduct and other principles, there is as good as no independent monitoring. Also, recent developments such as the *WHO Convention on Marketing Breast Milk Substitutes*¹⁰⁶ or the *Kimberley Process*¹⁰⁷ on the sale of blood diamonds are criticized for their overly general principles and lack of independent monitoring.

Fortunately, some companies have moved towards greater transparency and independent monitoring. Examples like Gap Inc. (see Box: "Gap's Commitment to Transparency and Independent Monitoring") or a number of new business groupings, like the International Business Leaders Forum (IBLF), the World Business Council for Sustainable Development (WBCSD), and the Business Leaders Initiative on Human Rights (BLIHR) have agreed on the need for independent monitoring.

Box "Gap's Commitment to Transparency and Independent Monitoring"

Gap Inc. was forced by a shareholder decision to release a social responsibility report that detailed the problems found in the 3,000 factories with which it contracted. This report included persistent wage, health, and safety violations, as well as physical and psychological abuse. Following the release of this report on 12 May 2004, unprecedented in the garment industry, Gap Inc. pulled its business out from more than 100 factories, and it has committed to external reviews of its monitoring. In this way, Gap Inc. has become a front runner for greater transparency and better information.

Sources: Dahle, Cheryl: Gap's New Look: The See-Through, in: *Fast Company*, Issue 86, 1 September 2004, p. 69, or available on the World Business Council for Sustainable Development website, at: <http://www.wbcscd.org/plugins/DocSearch/details.asp?MenuId=ODQ&ClickMenu=RightMenu&doOpen=1&type=DocDet&DocId=NzlzNA>.

¹⁰⁶ For an historical analysis of *Nestlé's* resistance to binding regulation and its violations of the *International Code of Marketing of Breast-Milk Substitutes*, see Judith Richter, *Holding Corporations Accountable: Corporate Conduct, International Codes, and Citizen Action*, London & New York, Zed Books.

¹⁰⁷ See joint Press Release by (among others) Action Aid, amnesty international, Global Witness, Oxfam, World Vision "Kimberley Process Finally Agrees Membership List But Lack Of Monitoring Undermines Credibility by July 31, 2003 (on file with author); for Kimberley Process see: www.kimberleyprocess.com.

6. The Need for a New Concept – Elaboration of the Norms

NGOs and progressive business leaders have recognized the need to set a common standard on corporate human rights obligations, national and international implementation, and monitoring. In addition, many international organizations have addressed the need for further reforms of the multilateral system in order to make international (economic) relations more democratic, participatory, transparent, and accountable.¹⁰⁸ Finally, new political objectives like the Millennium Development Goals call for the inclusion of human rights principles within public-private partnerships and foreign direct investment.¹⁰⁹ While referring to and reflecting existing standards, the UN Norms constitute an important step in this direction, offering a comprehensive outline of the human rights responsibilities of states and corporations.

New political objectives like the Millennium Development Goals call for the inclusion of human rights principles within public-private partnerships and foreign direct investment.

The focus of this assessment is on the general principle of the Norms as regards the shared responsibility of corporations and states. The standing of this “secondary corporate responsibility” with regard to human rights has legal, political, economic, and moral implications which have to be understood in terms of the mandate of the Sub-Commission and its working group as well as in terms of the sources of the Norms and the Norms themselves.

6.1 Work and Mandate of the 2nd Sub-Commission

The above-mentioned awareness of increased corporate power led to the revival of attempts to engage business directly in human rights protection. In 1994 the UN Sub-Commission on the Promotion and Protection of Human Rights requested the Secretary General to prepare a background document examining the relationship between the enjoyment of human rights, in particular international labour and trade union rights, and the working methods and activities of transnational corporations.¹¹⁰ This background document, together with a second report, was directed to the Sub-Commission, which transmitted both documents for consideration and action to the Commission on Human Rights and proposed that the Commission should set up a working group.¹¹¹ However, neither did the Commission transmit the documents nor did it establish a working group. Therefore, in 1997, the Sub-Commission entrusted one of its members with the preparation of another background document, which was submitted in 1998.¹¹² In 1998 the Sub-Commission decided to establish its own working group for a period of three years;¹¹³ its mandate was renewed in 2001.¹¹⁴ The mandate of the Sub-Commis-

108 World Commission on the Social Dimension of Globalization, see Footnote 10, pp. 95, 122ff, 133.

109 Sachs, Jeffrey: United Nations Millennium Project Report 2004 – A Practical Plan to Achieve the Millennium Development Goals; available at <http://unmp.forumone.com>, pp. 142, 185.

110 Article 8 lit. c of Sub-Commission Resolution 1994/37 “Measures towards the full realization of economic, social and cultural rights” adopted on August 26, 1994, U.N. Doc. E/CN.4/Sub.2/RES/1994/37.

111 Background document “The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations” prepared by the Secretary-General, U.N. Doc. E/CN.4/Sub.2/1995/11; Report “The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter” of the Secretary-General; U.N. Doc. E/CN.4/Sub.2/1996/2; Sub-Commission Resolution 1996/39 of August 30, 1996, U.N. Doc. E/CN.4/Sub.2/RES/1996/39 and Note of the Secretariat, U.N. Doc. E/CN.4/1997/110.

112 See Para. 3 of Sub-Commission Resolution 1997/39 of August 22, 1997, U.N. Doc. E/CN.4/Sub.2/RES/1996/39 and Working Document “Impact of the activities of transnational corporations on the realization of economic, social and cultural rights” prepared by Mr. El Hadji Guissé, U.N. Doc. E/CN.4/Sub.2/1998/6.

113 Sub-Commission Resolution 1998/8 of August 20, 1998, U.N. Doc. E/CN.4/Sub.2/RES/1998/8.

114 Sub-Commission Resolution 2001/3 of August 15, 2001, U.N. Doc. E/CN.4/Sub.2/RES/2001/3.

sion working group was to examine, receive and gather information, and compile a list of the various relevant instruments and norms concerning human rights and international cooperation that are applicable to transnational corporations. The working group was further to contribute to the drafting of such relevant norms and analyse the possibility of establishing a monitoring mechanism designed to apply sanctions and obtain compensation for infringements committed and damage caused by transnational corporations. Finally, the working group was directed to contribute to the drafting of binding norms for that purpose and to consider the scope of the obligation of states to regulate the activities of transnational corporations.

6.2 Content and Sources of the Norms

In terms of their language and the structure, the Norms raise a claim to be imperative and compulsory, and the working group considers the Norms as binding standards.

In terms of their language and the structure, the Norms raise a claim to be imperative and compulsory, and the working group considers the Norms as binding standards.¹¹⁵ As explained above, in the drafting process “shall” was used with regard to legally binding minimum guidelines that reflect mainly the negative duty to restrain from human rights violations, while “should” is used with regard to positive obligations of lesser legal standing.¹¹⁶ With regard to the Norms all principles use “shall” in respect to business entities and “should” in respect to state obligations.¹¹⁷ This would lead to the conclusion that the general obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights is already binding on business entities. On the other hand – and contrary to this possible conclusion – the Sub-Commission itself approved the Norms together with a Commentary as a reflection of current trends in the field of international law.¹¹⁸ In addition, the Commission on Human Rights decided that the Norms themselves had no legal standing and requested the Office of the High Commissioner to undertake a study in order to define the scope and legal status of the Norms.¹¹⁹ Finally, some first commentators on the Norms argued that since the Norms can be seen as a restatement of existing human rights obligations, one has to analyse the sources of the Norms to find what legal standing they possess.¹²⁰

With regard to the general principle in Article 1 concerning the shared responsibility of states and corporate entities, the above-mentioned human rights standards (plus sources cited in the Preamble of the Norms as well as in previous documents) are only binding in addressing states’ obligation to protect. On the other hand, business obligations are derived from statements of NGOs, business and consumer initiatives, and voluntary codes of conduct.¹²¹

115 See Report of the 3rd Session of the Working Group, Para. 24, U.N. Doc. E/CN.4/Sub.2/2001/9.

116 See Report of the Seminar to discuss U.N. Human Rights Guidelines for Companies (Geneva, March 29-31, 2001), Para. 53, U.N. Doc. E/CN.4/Sub.2/WG.2/WP.1/Add.3; Report of the 4th Session of the Working Group, Para. 14, U.N. Doc. E/CN.4/Sub.2/2002/13; For the use of language in the drafting of recent international legal texts see: Para. 8 of Report “International Consultation on the Draft basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (September 30 – October 01, 2002)”, U.N. Doc. E/CN.4/2003/63; also Para. 16 Report “Second Consultative Meeting on the basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (October 20, 21, 23, 2003)”, U.N. Doc. E/CN.4/2004/75 (Annex).

117 For another example of corporate obligations see: Article 10 “[Transnational] corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.”; For state obligations see Norm 17: “[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.” See Footnote 3.

118 Preamble Paragraph 4 of Resolution 2003/16, see Footnote 4.

119 Lit. b) and c) of Decision 2004/116, see Footnote 1.

120 Kruger & Weissbrodt, p. 913, see Footnote 3.

121 See Preamble Paragraph 4 of Norms, see footnote 3; Draft human rights codes of conduct for companies with source materials, Para. 6, U.N. Doc. E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1; Draft Universal Human Rights Guidelines for Companies with Source Materials, U.N. Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.2.

7

Potential of the Norms

The dilemma of the Norms is that their standards come from different sources. The underlying principles emerge either from international treaties or customary law, which are legally binding upon states while only morally applicable to business entities. Since the Norms are also derived from voluntary standards, they lack legal authority. In addition, the Norms themselves can be seen either as a statement regarding the necessary inclusion of voluntary standards of corporate behaviour or as a restatement of normative obligations of states and corporations with regard to business impacts on human rights. Due to the Norms' hybrid nature as a recommendation and a clarification of states' obligations on the one hand and an identification of the need for further development of business' direct obligations on the other hand, a look at the potential of the Norms has to consider both natures.

The dilemma of the Norms is that their standards come from different sources.

Although the Norms have already been addressed in the Commission on Human Rights, and although the Office of the High Commissioner on Human Rights has been requested to undertake research on a broader concept of corporate human rights responsibilities, it is recommendable to judge the potential of the Norms from the perspective of the Sub-Commission. What is needed to judge these findings is a second look at the mandate of the Sub-Commission with regard to human rights protection. The Sub-Commission serves as an independent expert body to the Commission,¹²² and as a think tank the Sub-Commission makes recommendations for increased human rights protection via restatements, clarifications, and specifications of existing international law. The introduction of a general concept of direct corporate responsibility with regard to human rights has no foundation in existing binding principles of international human rights law. Since a second mandate of the Sub-Commission is to encourage the progressive development of international law, the "secondary responsibility" of business entities with regard to human rights is part of this mandate.¹²³

In this regard the Norms are a first step towards normative principles "[becoming] generally known and respected,"¹²⁴ and the Working Group which drafted the Norms has already acknowledged that standard setting and implementation needs time.¹²⁵ Like other international law regulations, the Norms have been developed in response to certain concerns and human rights violations. It is a process that started with the identification of a need for regulation and common international standards, followed by the formulation and adoption of such principles, and finally their implementation. Improvement of human rights protection mechanisms evolves very often from a response to people's needs as well as from recovery from concrete human rights violations. Recent examples would include the introduction

122 For the formal mandate of the Sub-Commission as an advisory body and think tank, see: Commission-Resolution 2003/59, U.N. Doc. E/CN.4/RES/2003/59 and 2004/60, U.N. Doc. E/CN.4/RES/2004/60.

123 Article 13 lit. (a) Charter, see Footnote 41.

124 See Preamble Paragraph 15 of the Norms, see Footnote 2.

125 See Preamble Paragraph 11 of the Norms, see Footnote 2.

of individual criminal responsibility for gross violations of human rights by the Security Council in setting up the ad hoc tribunals for Rwanda and Yugoslavia under Chapter VII of the UN Charter.¹²⁶

It would be misleading to judge the Norms only as non-binding soft law. The Norms are able to develop their own system of obligations by the ways in which they are used and referenced.

If the Norms are seen as a point of departure for future developments of international law, one conclusion could be that labelling the Norms as “*soft law*” means that they have no legal standing at all. Soft law is artificially distinguished from binding “*hard law*” principles as “law in development” or law that comes into effect in a non-formalized way.¹²⁷ But the argument should be that because of the normative obligation of human rights, human rights principles such as the Norms should recognize the hybrid character of human rights obligations as legal, political, and moral imperatives. Under this consideration it would be misleading to judge the Norms only as non-binding soft law. The Norms are able to develop their own system of obligations by the ways in which they are used and referenced. They have their own political and moral standing, and the potential for independent legal standing as well.

As explained above, the Norms are a restatement of existing law as well as an identification of needs for further developments of international human rights law. The recognition of such requirements is on the one side the beginning of law-making processes and on the other side a political statement with a value of its own right. Therefore, before attaining a legal standing the Norms have a political and social as well as economic value that could be implemented inside and outside existing human rights protection mechanisms.

7.1 The Norms as a Specification of a State’s Duty to protect Human Rights

The Norms have the potential to clarify the evolving system of shared responsibilities between state actors and non-state actors with regard to human rights.

The Norms have the potential to clarify the evolving system of shared responsibilities between state actors and non-state actors with regard to human rights.¹²⁸ A better understanding of these different spheres of human rights protection should go hand in hand with a clear distinction in the use of the terminology for legal duties, obligations, and responsibilities. First of all, a duty reflects a particular action or omission required under a general obligation¹²⁹ (or the concept of concrete duties under the general obligation to respect, protect, and fulfil human rights)¹³⁰. Both

126 See Security Council Resolution 825 of May 25, 1993, U.N. Doc. S/RES/825 (1993), and 955 of November 11, 1994, U.N. Doc. S/RES/955 (1994).

127 The author pleads for a repeal of the theoretical dichotomy between soft law and hard law (as defined in Article 38 Statute of the International Court of Justice, available at www.icj-cij.org) by focussing more on the practical binding character of a Norm than on its development. Hard law therefore is developed by the formal processes that lead, among others things, to customary and treaty law obligations. Accordingly, soft law consists of principles of less formal legal standing. For the discussion, see, among others: Lubbers, Ruud: Definition of Soft Law (<http://globalize.kub.nl/lexicon.asp?term=Soft%20Law> – 2003-08-07) and Hillenberg, Hartmut: A Fresh Look at Soft Law, *European Journal of International Law*, Vol. 10, No. 3, pp. 499-516.

128 For an overview of the discussion see: Randelzhofer, Albrecht: The Legal Position of the Individual under Present International Law, in: Randelzhofer, Albrecht; Tomuschat, Christian: *State Responsibility and the Individual*, Kluwer Law International 1999, pp. 231-242; see also: Joseph, Sarah: An Overview on the Human Rights Accountability of Multinational Enterprises, in: Kamminga, Menno T., Zia-Zarif, Suman, *Liability of Multinational Corporations under International Law*, Kluwer Law International 2000, pp. 75-93.

129 On concrete duties, see: Committee on Economic, Social and Cultural Rights: 11th session (1994), Para. 12 General Comment No. 5; 21st session (1999), Para. 51 General Comment No. 13; Human Rights Committee: 52nd session (1994), Para 13 General Comment No. 14; Committee on the Elimination of Discrimination Against Women; 20th session (1999), Para. 17 General Comment No. 24; UN Doc. HRI/GEN/1/Rev.5.

130 See, for instance, Committee on Economic, Social and Cultural Rights: 22nd session (2000), Para. 35f. General Comment No. 14; UN Doc. HRI/GEN/1/Rev.5; 29th session (2002), Para. 17ff. General Comment No. 15; UN Doc. E/C.12/2002/11.

the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights use the words “duty” in respect of individuals and “obligations” when addressing the parties of the Covenants. Instead of the imperative language of “*shall*,” the Norms are designed to address existing, concrete requirements for corporate conduct towards human rights as “duties.” The use of “obligation” should be even more precise in that it distinguishes between procedural obligations of a contractual party – such as the state’s obligation to report¹³¹ – and substantive obligations, such as commitments vis-à-vis the rights holder.¹³² With regard to obligations of business entities, it has to be stated again that there are no direct and procedural obligations. However, the Covenant on Civil and Political Rights shows that “obligation” may also address any binding human rights commitment.¹³³ Since human rights law has to be seen from the perspective of the rights holder, victims¹³⁴ or vulnerable groups, direct human rights obligations for business have to be recognized as soon as they are defined by these groups.¹³⁵ Human rights standard setting is in the hand not of the perpetrator but of the victim. This distinction should be made in the Norms with a view to using the explicit term “obligations” instead of the imperative “shall” in addressing existing human rights provisions in general and “should” in addressing the need for further direct business obligations.

Finally, a clear distinction has to be drawn between existing obligations and the normative obligation of responsibility. “Responsibility” has two different usages: it is used in connection with a sanction or self-restriction and in the application of a conduct with regard to any duty. But in using “responsibility” within a body of international law, one is bound to its meaning within the specific discourse. In international law there is first and foremost the concept of state responsibility¹³⁶ and individual responsibility.¹³⁷ Under these concepts “responsibility” has a procedural meaning, referring to the new relationship between perpetrator and rights holder in order to re-establish the situation prior to the failure to respect a duty as well as to find means of satisfaction. Responsibility emerges as a new relationship of accountability between perpetrator and victim, and is of concern to the international community in general in the protection of human rights. These new relationships are mainly formalized in litigation procedures, which, in terms of

Responsibility emerges as a new relationship of accountability between perpetrator and victim, and is of concern to the international community in general in the protection of human rights.

131 Committee on Economic, Social and Cultural Rights: 3rd session (1989), General Comment No. 1; Human Rights Committee: 13th session (1981), General Comment No. 1; Committee on the Elimination of Racial Discrimination: 5th session (1972), General Recommendation No. II; Committee on the Elimination of Discrimination Against Women: 8th session (1989), General Recommendation No. 11; Committee on the Rights of the Child.

132 Committee on Economic, Social and Cultural Rights: 5th session (1990), General Comment No. 3; Human Rights Committee: 57th session (1997), General Comment No. 25; Committee on the Elimination of Racial Discrimination: 5th session (1972), General Recommendation No. I.

133 Article 8, 11, 14 ICpR, see Footnote 43.

134 See, for instance, Comment 2 of Explanatory comments to the revised text of the principles and guidelines, dated 24 October 2003, in: Report of the Second Consultative Meeting on the Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law (Geneva, October 20, 21 and 23, 2004) submitted by Alejandro Salinas, Chairperson-Rapporteur, U.N. Doc. E/CN.4/2004/75 (Appendix I).

135 See, for instance, Para. 3 of the Norms, see Footnote 3, and Articles 2 and 10 of “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms” adopted by General Assembly Resolution 53/144 of December 09, 1998: “[Each] State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedom [...]” but “[No] one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms [...]”, U.N. Doc. A/RES/53/144 (Annex).

136 See Principles of Responsibility of States for internationally wrongful acts state responsibility (adopted by General Assembly Resolution 56/83 on December 12, 2001) U.N. Doc. A/RES/56/83 (Annex).

137 See Article 25 of Rome Statute of the International Criminal Court (adopted on July 17, 1998 and entered into force on July 2, 2002); U.N. Doc. U.N. Doc. A/CONF.183/9.

business obligations, exist only within domestic jurisdiction, such as tort claims.¹³⁸ With regard to domestic jurisdiction, the United Nations can only make recommendations for their international protection.¹³⁹ The concept of “shared and partial responsibility”¹⁴⁰ can therefore only be seen as a recommendation. The Norms should clarify whether they are speaking about the procedural responsibilities of business entities, which so far exist only at the national level or of the procedural responsibilities of states towards corporate conduct, which already exist at the international level.

7.2 The Norms as a Specification of Business’ Duty to Respect, Protect and Fulfil Human Rights

The Norms can be seen as an attempt to make powerful international actors accountable. By reintroducing accountability the Norms reinforce sovereignty.

Moreover, the Norms can be seen as an attempt to make powerful international actors accountable. By reintroducing accountability the Norms reinforce sovereignty which is the core concept of international law. Sovereignty can be described as entailing a monopoly over fundamental political decisions as well as over legislative, executive, and juridical powers, based on consolidated, durable institutional, organized economic and financial means.¹⁴¹ In absence of governmental power, rule of law, and political accountability, such as in export processing zones or failed states, corporations are able to exercise *de facto* sovereignty, either through collaboration with armed forces or by exercising overwhelming economic power. In this regard the Norms clarify the responsibility already outlined by the General Assembly that, “[the] conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”¹⁴² Human rights protection is keyed to state authority and accountability. If entities with *de facto* governmental power, such as corporations in certain circumstances, fail to exercise this power, they should be held responsible in the same way states are. If the Norms are taken as a tool to identify these circumstances, they might become a source for the reinforcement and protection of sovereignty. In addition, the call for information and participation in corporate policies with possible impacts on human rights, as set out in the Norms, introduces a principle of participation and democracy in people’s social and economic affairs. In this way, the Norms could help to compensate for the imbalance between corporations and civil society as well as to gain influence on international trade negotiations, where the latter are for the most part marginalized.¹⁴³ Furthermore, the Norms might become a condition for public-private partnerships and business cooperation for development activities because of the special responsibility of

138 Among others, jurisdiction under the American Tort Claims Act in the United States as well as in the Netherlands and United Kingdom and Northern Ireland (for details see www.business-humanrights.org).

139 Article 2 Para. 7 Charter, see Footnote 41.

140 This concept finds expression in the formulation of “prime responsibility” such as in Article 2 Para. 1 of “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,” see Footnote 46, as well as in Preamble Paragraph 4 of Optional Protocol to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly Resolution 57/199 on December 18, 2002 and available for signature, ratification and accession as from February 4, 2003, U.N. Doc. A/RES/57/199.

141 Brownlie, Ian: Principles of Public International Law, 4th Edition 1990, Clarendon Press Oxford, page. 78.

142 Article 9 of Principles of Responsibility of States for internationally wrongful acts, see Footnote 81.

143 Hartmann, Eva / Scherrer, Christoph: Negations on Trade in Services – The Position of the Trade Unions on GATS, Friedrich-Ebert-Stiftung (FES) , Dialogue on Globalization, No. 6 May 2003, p. 10.

transnational corporations to promote transparency when engaged in low-income countries.¹⁴⁴ Again, the Norms would have the potential to bring about coherence between standards based on human rights and trade liberalization standards and might lead to partnerships of a new multilateralism and global democracy.¹⁴⁵

The Norms can therefore serve as a tool for further regulation and corporate observance, once implemented in law. On the other hand, the Norms are more concrete than the above-mentioned voluntary approaches proposed by UN, OECD, ILO, and EU. The Norms could for instance – in regard to existing voluntary but general initiatives such as the *Global Compact*¹⁴⁶ – come to be seen as a concretisation of human rights principles and a tool used to learn about contributions to a better human rights environment in areas that are not part of business spheres of activity and influence.

Finally, if the Norms are adopted by business itself, they might be used to address and regulate the informal economic sector, which is not addressed by all other regulations.¹⁴⁷ Trade unions in particular are concerned about the creation of these law-free areas where corporations can produce under the veil of free trade but in the absence of basic labour standards and rights.¹⁴⁸ With an internationally applicable principle, export processing zones or sweatshops would be covered by labour rights and other human rights standards.

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7.3 The Role of the Norms as a Lobbying Instrument

Lobbying for human rights is one of the core principles of NGOs and other concerned groups involved in the discursive human rights protection mechanisms, such as the Commission on Human Rights. Firstly, the Norms could become an instrument within the existing mandates of Independent Experts, Special Rapporteurs and Working Groups of the Commission on Human Rights. The Sub-Commission decided in its Resolution 2003/16 to transmit the Norms to the Commission for consideration and adoption in conjunction with the recommendation to invite governments, United Nations bodies, specialized agencies, NGOs, and other interested parties to submit their comments on the Norms and Commentary at its 61st session in 2005.¹⁴⁹

Furthermore, the Sub-Commission recommends that the Commission, having received comments on the Norms, consider the establishment of an open-ended working group to review the Norms and the Commentary.¹⁵⁰ In addition, the Com-

144 UN Millennium Project, Report 2005 “Investing in Development – A Practical Plan to achieve the Millennium Development Goals”, London / Sterling 2005, p. 185.

145 With regard to the concept of the new multilateralism and global democracy see: Martens, Jens: The Future of Multilateralism after Monterrey and Johannesburg, FES Dialogue on Globalization, No. 10 October 2003, pp. 27f. (31).

146 John G. Ruggie (Special Adviser to the Secretary-General United Nations) and Georg Kell, (Executive Head of the Global Compact): Voluntary and regulatory approaches needed in establishing business case for human rights, in: Financial Times, April 14, 2004.

147 For gender-based discrimination in the informal sector, see: Young, Brigitte/Hoppe, Hella: The Doha Development Round, Gender and Social Reproduction, FES, Dialogue on Globalization, No. 7 July 2003, p. 14.

148 International Confederation of Free Trade Unions (ICFTU): A Trade Union Guide to Globalization, Brussels 2001, pp. 36f.

149 Articles 2, 3 of Sub-Commission Resolution 2003/16, see Footnote 4.

150 Article 4 of Sub-Commission Resolution 2003/16, see Footnote 4.

The omission of any procedural request for action to the Commission was the trade-off for getting the Norms and their commentaries adopted indirectly.

mentary on the Norms suggests that country rapporteurs and thematic procedures of the Commission should monitor implementation by “[using] the Norms and other relevant international standards for raising concerns about actions by transnational corporations and other business enterprises within their respective mandates”, and that the Commission should consider “[establishing] a group of experts, a special rapporteur, or working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms.”¹⁵¹

The fact that the Norms were merely “transmitted” to the Commission without any draft resolution or decision can be seen as an effort to keep the discussion as open as possible. On the other hand – taking into account other controversial issues where the Sub-Commission drafted procedural proposals for action to be taken by the Commission¹⁵² – one can ask why the Sub-Commission did not agree on such a draft with regard to the Norms. A convincing interpretation is that the Sub-Commission Resolution on the Norms¹⁵³ was the lowest agreeable term. The omission of any procedural request for action to the Commission was the trade-off for getting the Norms and their commentaries adopted indirectly.

The lack of guidance in the discussion led merely to the recognition of the Norms as a point of departure for another report by the Office of the High Commissioner for Human Rights. This failure led to the selective references by Special Mechanisms of the Commission to the conduct of corporations in general and a few to the Norms in particular. The incorporation of the Norms into the mandate of the Commission’s Special Mechanisms could again be a clarification concerning business obligations. As such the Norms could come to serve as a justification of the recognized duty of states to cooperate to achieve effective policies at the national level and favourable economic environment at the international level, the idea being to come up with a fair and rules-based trading system in which globalization benefits development.¹⁵⁴

In addition, the Norms could be seen as a clarification of the corporate duty to include certain vulnerable groups “[in] economic, cultural and social decision-making at all stages, particularly in the development and implementation of poverty-alleviation strategies, development projects, and trade and market assistance programmes”.¹⁵⁵ The Norms are also a contribution to the recognized need for corporate accountability as a fundamental principle to balance development, human rights, and environmental concerns¹⁵⁶ as well as a clarification of the general recommendation that “[transnational] corporations respect regulatory frame-

151 Commentary b) on Principle 16, see Footnote 4.

152 See for instance HRE (59th CHR no Resolution but Draft for 60th CHR) for globalization as well as OP ICesCR.

153 See Footnote 1.

154 With regard to the right to development, see: Para. 28, Report “The Right to Development” by the High Commissioner for Human Rights, U.N. Doc E/CN.4/2004/22.; Para. 5 of Commission Resolution 2004/7 (adopted as Draft Resolution 2004/L.17 on April 13, 2004); U.N. Doc. E/CN.4/RES/2004/7 in connection with conclusion and recommendation 42, 43 lit (f) and (j) of Report of the Working Group on the Right to Development on its fifth session (Geneva, 11-20 February 2004), U.N. Doc. E/CN.4/2004/23.

155 Para. 8 of Commission Resolution 2004/23 (adopted as orally amended Draft Resolution 2004/L.32 on April 16, 2004); U.N. Doc. E/CN.4/RES/2004/16.

156 See, for instance, Para. 60, 62 and 117 of Report “Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights” submitted by Ms. Fatma-Zohra Ouhachi-Vesely, Special Rapporteur, U.N. Doc. E/CN.4/2004/46.

*works set by Governments, as well as respecting their direct obligations towards the right to food (including water) under international human rights law, national legislation, intergovernmental instruments and voluntary codes of conduct.*¹⁵⁷

Secondly, the Norms shape a common understanding of business conduct with regard to human rights outside the human rights protection mechanism of the United Nations. This understanding is usually framed by selectivity of states, corporations, and NGOs as regards which standard should be applied or what corporations should be addressed. As a common standard, the Norms could serve as the main tool for monitoring and judging corporate conduct in respect of human rights. This will be important not only for states in fulfilling their obligation to protect human rights but furthermore for corporations to facilitate competition on an equal footing and to eliminate the possibility of using a bad human rights record as a competitive advantage. The Norms are therefore already a concept rooted in human rights and international law, and do not depend on the moral and ethical conduct of business.

The Norms shape a common understanding of business conduct with regard to human rights outside the human rights protection mechanism of the United Nations.

7.4 The Norms as a Tool for Further Development

Furthermore, the Norms can become a common standard for defining business misconduct as regards human rights obligations. International bodies, such as the Security Council, could take the Norms as a benchmark to address business human rights abuses instead of referring to voluntary principles such as the OECD guidelines.¹⁵⁸ In addition, the Norms could enable the United Nations human rights protection mechanism to discuss their relationship to existing standards, including those of the ILO, the OECD, and the European Union as well as to own UN activities like the *Global Compact* and other cooperation of policies with private actors in procurement, development assistance, and investment. Finally, the *Global Compact* could use the Norms as an interpretation of its general human rights principles, contained in Principles 1 and 2, and should furthermore provide a learning forum for best practices on how to make corporate human rights obligations more concrete.

¹⁵⁷ Para. 35ff., Para. 54 lit. (g) and (h) of Report “The right to food” submitted by Jean Ziegler, Special Rapporteur, U.N. Doc. E/CN.4/2004/10.

¹⁵⁸ Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, U.N. Doc. S/2003/1027.

8 Conclusion

The Norms have a legal standing as a restatement of binding principles as well as a political, social, and economic value which can be enforced inside and outside the United Nations.

Hans Corall said in his Lunchtime Lecture on the eve of his departure as Under Secretary General for Legal Affairs and Legal Counsel of the United Nations: “*Sometimes international law is violated because of lack of resources. But all too often violations are intentional and committed with contempt. However, today there is also a threat to our common endeavour of a different kind: the attempts by some to belittle our efforts at the international level. There are those who even maintain that international law does not exist unless it suits their interests to invoke it in a particular situation. [If] they [these opinions – remark by the author] are not emphatically rebutted, they risk damaging all that the United Nations stands for.*”¹⁵⁹

The Norms reflect a common standard of obligations, both for states and for corporations, that have to be implemented at the national and international level. The first step in implementing these human rights benchmarks is to raise awareness in general and make gain acceptance for them in particular. As *Alan Greenspan* said recently: “*Corporate scandals of recent years have clearly shown that the plethora of laws of the past century have not eliminated the less savoury side of human behaviour. Rules cannot substitute for character.*”¹⁶⁰ But rules are necessary if a business character fails to regulate its human rights behaviour on its own.

The Norms have the potential to find endorsement, sooner or later, within the United Nations human rights protection mechanism. They have a legal standing as a restatement of binding principles as well as a political, social, and economic value which can be enforced inside and outside the United Nations. First of all, at the national level the Norms can serve a lobbying tool for NGOs, customer interest groups, and other stakeholders in calling for a human rights-oriented regulation of the activities of corporations. Secondly, – and among others – business initiatives¹⁶¹, institutional investors, pension funds and accounting firms can use the Norms for risk management and ethical investment. Thirdly, corporations themselves should use the Norms as a solid foundation for their activities and contractual partners. Fourthly, national legislation should use the Norms for interpreting general terms of national civil, tort, and criminal law.

Most obviously, there *is* need and a broad scope for an intelligent, useful, and necessary application of the Norms. And undoubtedly their recognition and active implementation would represent an important piece of the puzzle involved in achieving a human being-centred globalisation.

159 Corall, Hans: Prospects for the Rule of Law among Nations; Lunchtime Lecture on the eve of his departure as Under Secretary General for Legal Affairs and Legal Counsel of the United Nations, Vienna, February 24, 2004 at United Nations Vienna International Centre; available at: http://www.un.org/law/counsel/english/Vienna_24_2_04final.doc – May 3, 2004.

160 Greenspan, Alan, United States Federal Reserve Chairman, Chicago Tribune: April 17, 2004.

161 See, for instance, Business Leader Forum on Human Rights. Initiated by Mary Robinson’s Ethical Globalisation Initiative and launched by ABB, Barclays, MTV Europe, National Grid Transco, Novartis, Novo Nordisk and The Body Shop International, the Business Leader Initiative on Human Rights endorsed the Norms and will road test it. See: Press Release of December 09, 2003 “Defining a role for business in human rights: Business Leaders announce a three-year initiative” (on file with author; more details at www.business-humanrights.org).

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