

Corporate social responsibility and human rights law in Africa

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Summary

This article investigates corporate social responsibility and its importance for human rights law. It outlines the international trend of multinational corporations to conform to human rights and other international law standards set by the international community. Corporations, especially multinationals, are increasingly responsible for human rights on the African continent. The author stresses that, while multinational corporations must accept responsibility for their increased power and privilege in international law, the prime responsibility remains that of the state to protect and fulfil human rights.

1 Introduction

Many within the international community are confused by the concept 'corporate social responsibility', believing it to be referring to merely good business ethics. It is apparent that different countries and organisations in Africa are at varying stages of understanding and engaging with the concept and practice of corporate social responsibility. However, the concept is increasingly important, particularly in the area of human rights law. Corporate social responsibility (CSR) refers to the trend by multinational corporations (MNCs) to conform to the wishes of the international community. This paper outlines the developments in the attempt since the 1970s to regulate these powerful organs of

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society. In doing so, it examines the foundations for an evolving legal framework, which has gained momentum due to the international community's outrage at blatant violations by MNCs of human rights, particularly in the African context. It presents CSR as a vital first step in this evolution, representing a compromise which reveals that MNCs recognise their position of influence. With this influence must come responsibility for human rights and development.

CSR is concerned with how a company runs its core business, interacts with its business partners and how it invests in its host communities.¹ However, great confusion surrounds the exact definition, with many insisting CSR is voluntary and concerned only with the corporation's direct sphere of influence. Meanwhile, others insist on legal accountability and CSR extending to a wider sphere of influence. The problem with vague definitions is that they allow those who have vested interests to adapt the trendy CSR acronym to whatever activity they prefer. Likewise, corporations can be held responsible in the media for failing to enact CSR when the activities in question are clearly outside of their area of responsibility. Rather than searching for a universally applicable definition, it is more productive to think in terms of the purposes of corporate responsibility. These are: to act as a prerequisite for investment in developing countries; to help overcome market inefficiencies and gaps in governance; and to provide a means for public and private sectors to co-operate in order to overcome social challenges. Moreover, CSR may become essential for the retention of a corporation's licence to operate in the future.

This voluntary regime of self-regulation has increased the awareness within the international community of the problems it addresses and

¹ A good definition for CSR is as follows: (a) The basic 'non-negotiables' — obey the law and stay in business: taking the actions necessary to remain a viable business entity and to protect legal licence to operate in order to avoid major fines, litigation, reputation damage and, in serious cases, even imprisonment of executives; in short, being profitable and legally compliant; (b) the complex non-negotiables — manage risk and minimise harm; protecting existing corporate value and reputation, managing risks and protecting societal license to operate; clear standards on corporate governance, implementation of internationally accepted standards on human and environmental safety in company processes and products and identification of new risks that may have a material effect on corporate value, such as climate change, HIV/AIDS and security risks; (c) the 'negotiables' — create positive solutions beyond what is required by law, risk management and protection of short-term value, 'going beyond business as usual', creating new societal value as well as corporate value and taking a leadership position on crucial development issues; it involves delivering creative and innovative solutions to practical problems and projects or to public policy issues; in short, taking actions that are not required by law or to stay in business, but which have beneficial impacts for host countries and communities, as well as the company. See *Human rights and the private sector: An International Symposium Report* (Novartis Foundation for Sustainable Development and The Prince of Wales International Business Leaders Forum) http://www.stiftung-novartis.com/pdf/symposium_human_rights_report.pdf (accessed 31 August 2005).

has allowed a greater consensus on regulation to be forged. Shareholders and chief executive officers should be commended for their efforts to change business attitudes. CSR should provide a complement to the developing framework of enforceable international law. This paper concludes, however, that human rights promotion, protection and realisation remain the responsibilities of states under international law and should not be allowed to be completely shifted to the private sector. A combination of voluntary initiatives, directly binding regulation on MNCs and the adherence by states to their duties under international law, are the only ways to ensure the realisation of a human rights-based development in Africa. The international community is rapidly moving towards the allocation of legal duties to MNCs. On 13 August 2003, the United Nations (UN) Sub-Commission on the Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.² These norms embody a crystallisation of international law concerning corporations. In this case, it is very important to maintain the distinction between human rights law put forward by the Universal Declaration of Human Rights (Universal Declaration), and the market-friendly approach to human rights³ that is apparent in CSR discourse.

2 The African context of corporate social responsibility

International business in Africa has a poor record for social responsibility. There is certainly no shortage of examples of corporate complicity in political corruption, environmental destruction, labour exploitation and social disruption in the last century. However, international business is necessary to bring capital investment, job creation, skills transfer, infrastructure development, knowledge sharing and social responsibility programmes to Africa. The private sector is crucial and well-positioned towards making a positive contribution towards improving social conditions in Africa.

Corporate social responsibility in Africa involves a full spectrum of issues concerning business responsibility and its interaction with human rights law. Many questions prevail. When does involvement in governance become an intrusion on the political process? How are local

² Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³ U Baxi *The future of human rights* (2002) 153.

cultural traditions to be prioritised in reference to global standards and policies? How far do companies' responsibilities extend in dealing with HIV/AIDS? How can business avoid creating a culture of dependency? Are Western ideas of ethics appropriate in African societies that have their own, often different, sets of values? Issues concerning CSR, such as poverty, governance, corruption, labour and human rights standards and business ethics are prevalent in human rights and business discourse. However, they appear to be facts of everyday life in many African countries and a part of the daily business routine.

Academia has an important contribution to make in examining the complexities of corporate responsibility in Africa. Its discourse must include both the positive and negative consequences of corporate involvement in developing nations. The pursuit of social, economic and cultural development must be highlighted at all times. However, academic institutions and researchers focusing specifically on corporate responsibility in Africa remain few.

MNCs attract concern in Africa, as they are active in the most dynamic sectors of the economy. They control employment, capital and technology. This gives them tremendous influence on development. However, this influence can be utilised in a positive or negative manner. Many MNCs have been accused of disregarding the development of human rights in Africa. They have been implicated in abuses such as child labour, discrimination, unsafe working conditions, repression of trade unions and collective bargaining, of limiting technology transfer, and environmental destruction.⁴ This affects marginalised and impoverished groups disproportionately and exacerbates prominent human rights concerns in the African context.⁵

⁴ D Weissbrodt & M Kruger 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003) 97 *American Journal of International Law* 901.

⁵ Some examples from the large amount of literature concerning human rights in Africa include SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2003) 5 *Yale Human Rights and Development Law Journal* 177; A Aidoo 'Africa: Democracy without human rights?' (1993) 15 *Human Rights Quarterly* 703; A Armstrong *et al* 'Uncovering reality: Excavating women's rights in African family law' (1993) 7 *International Journal of Law and the Family* 314; NKA Busia Jr 'The status of human rights in pre-colonial Africa: Implications for contemporary practices' in E McCarthy-Arnolds *et al* (eds) *Africa, human rights, and the global system* (1994); R Carver 'How African governments investigate human rights violations' (1988) *Third World Legal Studies* 161; S Gutto 'Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79; W Langley 'The rights of women, the African Charter, and the economic development of Africa' (1987) 7 *British Columbia Third World Law Journal* 215-21; J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa' (1997) 26 *California Western International Law Journal*; J Oloka-Onyango & S Tamale "'The personal is political", or why women's rights are indeed human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691; J Oloka-

The rapid expansion of global markets and the dominance of MNCs are the key features of globalisation in Africa. This phenomenon resulted from the movement towards deregulation, privatisation and market liberalisation as centrally-run economies adapt to market-based policy. Before this, regulation was considered economically and socially beneficial.⁶ Nowadays, African nations are to develop within a system that affords them little control over public economic policy making.

The consensus on beneficial regulation unravelled in the 1970s with the rise of a neo-liberal theory, proclaiming that such regulation impeded the smooth functioning efficiency of the free-market.⁷ Proponents of this position insisted that the free market would provide equality, growth and improved living conditions more efficiently and effectively in Africa. The neglect of human rights would be temporary and be worthwhile as the long-term growth of the economy would raise living standards for all. The result was massive deregulation. Regulation was replaced with a system of voluntary ethical compliance and free markets.

The shift to voluntary regulation of global trade is a direct result of the rise of corporate power in the 1980s. Voluntary private codes are considered attractive to the powerful MNCs who dominate the agendas of the world trade and development organisations.⁸ Corporations were the driving force behind vast increases in profits and economic growth. However, the global economy, unfettered, has increased national and international inequalities Africa. This had a negative impact on sustainable development and human rights law development on the continent. Furthermore, the apartheid regime in South Africa attracted the world's attention to the practice of corporations profiting within that regime. It is in this context that the world witnessed a renewed outpouring of support for CSR. During the 1990s, every sector of the international community to some degree recognised the responsibility and impact of private operations on the enjoyment and realisation of

Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review*; B Rwezaura 'Concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 82; M Shaw 'International law and intervention in Africa' (1984) 8 *International Relations* 341; SI Skogly 'Structural adjustment and development: An agenda for change' (1993) 15 *Human Rights Quarterly* 751.

⁶ B Hepple 'Papers on the joint Japan-US-EU project on labour law in the 21st century: A race to the top? International investment guidelines and corporate codes of conduct' in (1999) 20 *Comparative Labour Law and Policy* 353.

⁷ S Deakin & F Wilkinson *Labour standards — Essential to economic progress* (1996) 1.

⁸ N Kearney 'Corporate codes of conduct: The privatised application of labour standards' in S Picciotto & R Mayne (eds) *Regulating international business beyond liberalisation* (1999) 239.

human rights.⁹ A subject basically unheard of has vaulted to the top of the agenda within human rights law discourse and even in boardrooms of MNCs. Faced with this scenario, the international community had to find ways, other than binding regulation, to persuade business to become socially responsible. The CSR movement was born.

Human rights disasters in Africa garnered publicity for the problems associated with MNC activity and human rights.¹⁰ However, only as a global civil society emerged in the 1990s did the international business community concede responsibility and accept that human rights are not the sole concern of governments. Human rights are rapidly entering the mainstream corporate agenda due to increasing demands of civil society, ethical investors and demands from the knowledgeable and sceptical public for accountability and transparency.¹¹ Unfortunately, the lack of institutional capacity among organs of civil society, especially indigenous African non-governmental organisations (NGOs), has created a barrier in the development of a concept and practice of CSR that is relevant to Africa. While the NGOs played a critical, even a leading, role in some cases in the struggle for independence from colonialism and apartheid, their post-independence role has been reduced. African civil society suffers from a complex set of social, political and economic circumstances that have greatly reduced access to material, technical and information resources. This problem must be addressed in order to develop CSR initiatives that are useful in the African context.

The renewed support for the interdependence of all human rights has brought the full range of human rights to the table when addressing global trade and CSR. The outcome has been a piecemeal attempt at accountability, with civil society calling for legal liability, while governments and MNCs cling tightly to the voluntary nature of CSR. Despite this anti-regulation position, MNCs have increasingly adopted these CSR initiatives, such as private voluntary codes of conduct designed to regulate their own behaviour. This movement towards accountability is generally a reaction to the tremendous pressure from civil society and anger over exploitation in Africa. Global communication has ensured public knowledge of human rights abuse and has resulted in demands

⁹ See, generally, 'The realisation of economic, social and cultural rights: 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' *Report of the Secretary-General, UN ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities* UN Doc E/CN4/Sub2/1996/12 (1996).

¹⁰ For a plethora of examples, see: Human Rights Watch Publications: Africa http://www.hrw.org/doc/?t=africa_pub (accessed 31 August 2005).

¹¹ D Kinley 'Human rights as legally binding or merely relevant?' in S Bottomley & D Kinley (eds) *Commercial law and human rights* (2002) 69.

for responsibility.¹² Companies want to appear to be morally responsible in order to avoid negative publicity, and even worse, boycotts. The result has been the rapid growth of CSR initiatives.

3 Changing business attitudes

The development of CSR indicates that the international business community accepts their responsibility for more than just the bottom line of profit maximisation. Many leading companies now understand the strategic value of a robust CSR strategy that is translated into tangible action programmes and taken to the forefront of commercial transactions. Greater human rights responsibility leads to sustainability in emerging markets in Africa.¹³ They are the engines of growth in the modern economy and have direct and indirect effects on the enjoyment of human rights. MNCs have accepted responsibility through participation in national and international CSR schemes, the adoption of private codes of conduct and through positive involvement with local communities. In doing so, MNCs have taken the first steps towards fulfilling their roles as influential organs of society in the absence of binding regulation.¹⁴

Many corporations now make reference to various social issues, including human rights and sustainable development in their policy or codes of conduct.¹⁵ This is in sharp contrast to the traditional corporate ethos that was dominated by Friedman's premise that 'the one and only social responsibility of business is to increase profits'.¹⁶ Giants such as General Electric have recognised that 'these times will not allow for companies to remain aloof and prosperous while the surrounding communities decline and decay'.¹⁷ Instead of sticking to an insular

¹² K Piepel 'The ethics deficit in corporate trade: Social labelling and codes of conduct' in (1999) *Trocaire Development Review* 170.

¹³ A large-scale study of evidence from developing countries found that emerging market companies gain financially from stability. IFC (International Finance Corporation) Sustainability, ethos institute, groundbreaking report challenges conventional wisdom on role of business in emerging markets, Press Release 02/0098 (17 July 2002) <http://www.sustainability.com/news/press-room/DevelopingValue-press-release.pdf> (accessed 31 August 2005).

¹⁴ Kearney (n 8 above) 239.

¹⁵ For examples relevant to Africa, see 'Shell: General business principles' <http://www.shell.com/static/media-en/downloads/sgbp.pdf> (accessed 31 August 2005); Coca Cola Africa 'Reinventing business in Africa' <http://www.africa.coca-cola.com/> (accessed 31 August 2005); British Petroleum 'Code of conduct' http://www.bp.com/liveassets/bp_internet/globalbp/STAGING/global_assets/downloads/C/coc_en_full_document.pdf (accessed 31 August 2005).

¹⁶ M Friedman 'The social responsibility of business is to increase its profits' *New York Times Magazine* 13 September 1970.

¹⁷ J Welsh 'A CEO forum: What corporate social responsibility means to me; Wanted teachers and leaders' (1992) 81 *Business and Society Review* 88.

view, corporations have recognised the interdependence between them and the community. They realise the critical importance of obeying human rights law and achieving sustainable development.

Corporate reputation has become an important but increasingly fragile commodity in the era of global communication and increased consumer activism.¹⁸ This bolsters a company's public image as well as their ability to attract and retain good employees.¹⁹ Consumers are increasingly aware of the human rights records of corporations. Boycotts have become a more abundant tool of consumer activism.²⁰ Moreover, financial institutions, investment banks, credit-rating agencies, insurers and pension funds all recognise the potential for companies with poor human rights records to negatively affect the value of their investments.²¹ Furthermore, in the absence of a good human rights environment, which is typical in Africa, the situation can deteriorate to one in which the company is forced to abandon its operations. This phenomenon has frequently occurred in Africa.²² Pressure is building on business to respond before they are compelled to respond.²³

Additionally, a good human rights environment promotes worker productivity, opens markets, promotes stability through the rule of law and promotes international trade. Major MNCs recognise the value of human rights discourse. Private CSR initiatives, such as the

¹⁸ C Fombrum *Reputation: Realising the value from the corporate image* (1996) 10.

¹⁹ See CL Avery 'Business and human rights in a time of change' (Amnesty International Report 2000), <http://www.business-humanrights.org/Avery-Report.htm> (accessed 31 August 2005); see also United Nations High Commissioner for Human Rights 'Business and human rights' <http://www.unhchr.ch/global.htm> (accessed 31 August 2005).

²⁰ See RJ Liubicic 'Corporate codes of conduct and product labelling schemes: The limits and possibilities of promoting international labour rights standards through private initiatives' (1998) 30 *Law and Policy in International Business* 111; NE Zelman 'The Nestle infant formula controversy: Restricting the marketing practice of multinational corporations in the third world' (1990) 3 *Transnational Law* 697.

²¹ See D Doane 'Taking flight: The rapid growth of ethical consumerism' (2001) http://www.neweconomics.org/gen/z_sys_publicationdetail.aspx?pid=88 (accessed 31 August 2005); FTSE Good Index Series raises the hurdle on human rights, FTSE News and Views, http://www.ftse.com/about_ftse/newsandviews/humanrights.jsp (accessed 31 August 2005).

²² For background, see, generally, Amnesty International 'Nigeria: A travesty of justice: Secret treason trials and other concerns' (26 October 1995) <http://www.amnestyusa.org/regions/africa/document.do?id=2F6789997B756A3B802569A50071588E> (accessed 31 August 2005); Press Release, Amnesty International, Nigeria 'Are human rights in the pipeline?' (9 November 2004) <http://web.amnesty.org/library/print/ENGAFR440312004> (accessed 31 August 2005); Bloomberg 'Unrest has big impact on Nigeria oil output' *International Herald Tribune* 11 June 2004 <http://www.ihf.com/articles/524461.html> (accessed 31 August 2005) (stating 'Shell group may have to quit onshore production in Nigeria . . . because of escalating civil strife').

²³ Kinley (n 11 above) 72.

Publish What You Pay campaign,²⁴ the Extractive Industry Transparency campaign²⁵ and the Global Reporting Initiative,²⁶ provide frameworks of best practice for such endeavours.

CSR is defined by the Conference Board of Canada,²⁷ an independent CSR monitor, as involving human resource issues such as diversity in hiring practices; environmental issues such as management of greenhouse gas emissions; community issues such as use of local suppliers in procurement; human rights issues such as consideration of human rights practices in investment and procurement; and governance issues such as whether the company audits its social and environmental practices and whether it has a formal code of ethics.²⁸ However, CSR may also involve responsibility within their 'sphere of influence' for human rights; abiding by the law in letter and spirit, not just the bare minimum. This could mean institutionalising the value of attaining and maintaining higher standards. Moreover, it could imply the recognition of an interactive existence with society, which implies contributing to the global community as well as extracting from it.²⁹

The approach to human rights realisation promoted by CSR is one of a 'race to the top'. This concept advances the theory that the operations of MNCs that utilise the various CSR initiatives provide better human rights standards than domestic firms in African nations. Their advanced technological, managerial and operational techniques should result in a spill-over of best practice to these domestic firms. This vast international MNC production chain employs 73 million people. This chain provides links for new human rights regulation to occur through engagement within and between MNCs and African countries.³⁰ Furthermore, the discerning glare of an active Western civil society that accompanies large MNCs ensures that they cannot act with impunity in Africa. Companies will be forced to adopt models of best practice or risk costly damage to their reputation. Corporate social responsibility, says the US Council for International Business (USCIB), is 'good

²⁴ Publish What You Pay Campaign <http://www.publishwhatyoupay.org/> (accessed 31 August 2005).

²⁵ 'Extractive industry transparency' http://www.transparency.org/pressreleases_archive/2003/2003.06.17.Statement_g8_revenues.html (accessed 31 August 2005).

²⁶ Global Reporting Initiative <http://www.globalreporting.org/> (accessed 31 August 2005).

²⁷ Conference Board of Canada <http://www.conferenceboard.ca/> (accessed 31 August 2005).

²⁸ J McFarland 'Start spreading the good news, conference board tells business: Many companies not publishing the progress in corporate social responsibility practices' *Globe and Mail* 27 May 2004 B5.

²⁹ MK Addo (ed) *Human rights standards and the responsibility of transnational corporations* (1999) 20.

³⁰ Hepple (n 6 above) 350.

business' helping to maintain 'the competitiveness of companies over time and in highly diverse parts of the world'.³¹

4 The legal dynamic concerning regulation

4.1 The gap in international law

The traditional approach to human rights law regulates the conduct of states towards individuals within its jurisdiction. In this context, the state is the only duty-bearer. This doctrine was relevant at a time when international business and economic interdependence was less prominent. Although there has been an emphasis on individual responsibility for serious human rights abuses, insufficient attention has been allocated to MNCs. This is unacceptable, as MNCs are some of the most powerful non-state actors in Africa in the field of human rights development.³² Since international business is mobile enough to avoid stringent national regulations or influential enough to persuade against the adoption of such regulation, the traditional doctrine no longer appropriately regulates the international community. The international community is pushing for legal responsibility in line with the ability to affect human rights.³³ MNCs are international entities which transcend national jurisdictions in terms of economic resources and decision-making responsibility. MNCs have ignored the international legal system.

The vast economic and geographic expansion of global trade led by MNCs poses further difficulties for regulation and accountability. Famously, MNCs have now become larger economies than most African states. One outstanding example is that of General Motors having larger revenues than all but seven nations.³⁴ International and national law must adapt effectively if there is to be any hope of regulating an increasingly dynamic globalised world. Inherently, the law is evolutionary and is formed in reaction to the needs of the international community. This is intrinsically problematic when dealing with the MNCs' extraordinary influence. National laws that concern corporations are often watered down in order to attract essential MNC investment.³⁵ It is difficult to garner consent for the regulation of MNCs. International

³¹ United States Council for International Business, Position Paper on Codes of Conduct (1998) <http://www.uscib.org/index.asp?documentID=1358> (accessed 31 August 2005).

³² Weissbrodt (n 4 above) 901.

³³ M Robinson Second Global Ethic Lecture, University of Tübingen, Germany (21 January 2002) <http://www.ireland.com/newspaper/special/2002/robinson> (accessed 31 August 2005).

³⁴ In 1998-1999, only the United States, Germany, Italy, the United Kingdom, Japan, France and the Netherlands had larger revenues than General Motors. See Global Policy Forum 'Comparison of revenues among states and TNCs' <http://www.globalpolicy.org/soecon/tncstat2.htm> (accessed 31 August 2005).

³⁵ C Stone *Where the law ends. The social control of corporate behaviour* (1975) 95.

law, although a key avenue for defining the role and responsibility of MNCs within society, has been overwhelmed by the free market doctrine, relegating it to a marginal role.³⁶ However, law is continuously evolving and over the last 30 years has begun to reflect and answer the concerns of society. This has implications for the CSR movement, which is rapidly becoming mandatory business practice. Moreover, it seems as though the human rights aspects of CSR are moving towards accountability. It is therefore within the best interest of MNCs operating in Africa to implement an operational policy that includes the norms of international law.

4.2 The development of regulation

The international community began to react at the domination and seeming unaccountability of MNCs in the 1970s as major scandals began to surface.³⁷ With the emergence of the New International Economic Order,³⁸ put forward by the leaders of newly independent developing nations in Africa, came political impetus for binding regulation. It was these developing nations that were shouldering the brunt of corporate human rights abuse and social irresponsibility. The United Nations (UN) created a Commission on Transnational Corporations (UNCTC),³⁹ responsible for binding regulations on MNCs, stating that 'transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate'.⁴⁰ Moreover, it prohibited discrimination while ensuring that MNCs did not interfere with domestic politics and respected fundamental human rights.⁴¹ The UNCTC issued drafts in 1978,⁴² 1983,⁴³ 1988⁴⁴ and 1990.⁴⁵ However,

³⁶ Addo (n 29 above) 9.

³⁷ A notable example is the ITT interference with the government in Chile. Kinley (n 11 above) 27.

³⁸ See Declaration on the Establishment of a New International Economic Order, GA Res 3201 (S-VI), UN GAOR, 6th Special Session Agenda Item 6, 2229th plen mtg 1, UN Doc A/RES/3201 (S-VI) (1974); see also Programmes of Action on the Establishment of a New International Economic Order, UN GAOR *Ad Hoc* Comm 6th Session 2229th Mtg, UN Doc A/RES/3202 (S-IV)(1974).

³⁹ Economic and Social Council Resolution 1913 (LVII) (5 December 1974).

⁴⁰ See Development and International Economic Co-operation: Transnational Corporations, UN Economic and Social Commission, 2nd Session, Agenda Item 7(d) 1, UN Doc E/1990/94 (1990).

⁴¹ S Joseph 'Taming the Leviathans: Multinational enterprises and human rights' (1999) 46 *Netherlands International Law Review* 181.

⁴² CTC Transnational corporations: Codes of conduct, formulations by the Chairman, UN Doc E/C 102/8 (1978).

⁴³ CTC Draft Code of Conduct on Transnational Corporations, UN Doc E/1983/17/rev 1 (1983).

⁴⁴ CTC Draft Code of Conduct on Transnational Corporations, UN Doc E/1988/39/add 1 (1988).

⁴⁵ CTC Draft Code of Conduct on Transnational Corporations, UN Doc E/1990/94 (1990).

despite years of debate, these never materialised before the voluntary era took hold.⁴⁶

Simultaneously, the Organisation for Economic Co-operation and Development (OECD) issued a set of voluntary Guidelines for Multinational Corporations which were a follow-up to the International Chamber of Commerce's Guidelines for International Investment.⁴⁷ They are designed to strike a balance between national interests and foreign direct investors. The guidelines affirm that every country, subject to international law, has the right to determine the conditions under which MNCs operate within its jurisdiction. They spell out guidelines for a wide range of MNC activity, mostly commercial, but with some relating to human rights, such as collective rights, freedom of association and labour and environmental conditions.⁴⁸ The Guidelines represented supplementary standards of behaviour of a non-legal and non-binding nature.⁴⁹ However, the Guidelines are now almost three decades old and are considered standard practice for corporate operations.

The International Labour Organisation (ILO)'s Tripartite Declaration of Principles Concerning Multinational Enterprises⁵⁰ addresses the social conduct of governments, workers and employers organisations and MNCs. The Declaration calls on all parties to respect national law and regulation, to give consideration to local practices and to obey relevant international legislation.⁵¹ These principles deal specifically with human rights issues, such as employment equality, treatment and security, the conditions of work, including wages, working conditions, safety and health, as well as industrial relations, such as freedom of association and the right to organise and to collective bargaining. The guidelines of conduct in these areas are informed mainly by the relevant ILO Conventions, which apply to states only. However, they can be applied to MNCs through the Declaration's Framework of

⁴⁶ B Stephens 'The amorality of profit: Transnational corporations and human rights' (2002) 20 *Berkeley Journal of International Law* 64.

⁴⁷ Organisation for Economic Co-operation and Development 'Guidelines for multinational enterprises 21 June 1976' (1976) 15 *International Legal Materials* 969. The OECD updated these guidelines in 2000. For the current version, see OECD 'Guidelines for multinational enterprises (31 October 2001) <http://www.oecd.org/> (accessed 31 August 2005) (OECD Guidelines).

⁴⁸ R Blanpain 'Review of the OECD Guidelines for Multinational Enterprises: Possible revisions of the chapter on employment and industrial relations' in R Blanpain (ed) *Multinational enterprises and the social challenges of the XXIst century* (2000) 37.

⁴⁹ Blanpain (n 48 above) 31.

⁵⁰ ILO 'Tripartite declaration concerning multinational enterprises and social policy <http://www.ilo.org/public/english/standards/norm/sources/TNC.htm> (accessed 31 August 2005).

⁵¹ JM Diller 'Social conduct in transnational enterprise operations: The role of the ILO' in Blanpain (n 48 above) 20.

Voluntary Compliance.⁵² This tripartite system has become a measurement of CSR accepted by all members.

The increased interest in the responsibility of corporations declined as the developed world witnessed unprecedented economic growth. Global trade was at the forefront, with the MNC as its locomotive. The only type of controls concerning CSR put forward against private interests were centred on politically acceptable conflict situations, such as Northern Ireland and South Africa. The most renowned of these early concepts were the Sullivan Principles,⁵³ which constituted an attempt to regulate corporations in South Africa during apartheid, and the MacBride Guidelines in Northern Ireland.⁵⁴ However, corporations in the rest of Africa continued to operate with human rights impunity and out of the view of civil society.

Rapid economic growth came with a price. Massive inequality and exploitation were a direct result of unbridled neo-liberal economic policy. The backlash against this unfair development led to the rise of an active, global civil society, which advocated the regulation of the world's economy in order to ensure social equality, human rights and sustainable development. This movement culminated in the now infamous 'Battle of Seattle' in 1998, at which thousands of protesters from all walks of life voiced their disapproval of the prevailing system. The international community responded in kind as human rights discourse and environmental regulation surged to the top of the political agenda. Once again, a concerted effort to regulate human rights responsibilities within the global trade system was underway.

An important recognition of CSR development was the launch of the UN's Global Compact.⁵⁵ It has come to represent the embodiment of the voluntary CSR regime. It lists some of the world's largest and most influential companies as members. It has two key aims. First, the Global Compact attempts, through a multi-stakeholder dialogue approach, to identify problems and find solutions. Second, it attempts to reinforce dialogue through examples and identifying best practice, while providing outreach networks for action at the country, regional or sectoral level. This initiative is an offspring of the failed efforts of the UN to provide a system of direct binding regulation. However, the multi-sta-

⁵² As above.

⁵³ 'Sullivan Principles for US corporations operating in South Africa' (1985) 24 *International Legal Materials* 1496 (citing 'The (Sullivan) Statement of Principles' (Fourth Amplification), 8 November 1984).

⁵⁴ *MacBride Principles* <http://www1.umn.edu/humanrts/links/macbride.html#principles> (accessed 31 August 2005).

⁵⁵ UN Secretary-General Kofi Annan Address at the World Economic Forum in Davos, Switzerland (31 January 31 1999), UN Doc SG/SM/6448 (1999); UN Secretary-General Kofi Annan 'A compact for the new century' <http://www.un.org/globalcompact.org/un/gc/unweb.nsf/content/thenine.htm> (accessed 14 April 2001).

keholder approach in voluntarily endorsing the Global Compact's principles has helped to create a standard of what the international community considers customary practice. The Global Compact's nine principles in the areas of human rights, labour and the environment enjoy universal consensus, being derived from the Universal Declaration, the ILO's Declaration on Fundamental Principles and Rights at Work, as well as the Rio Declaration on Environment and Development. The nine principles concern human rights, labour standards and the environment.⁵⁶ The Global Compact has helped to increase awareness of the concept of corporate social responsibility around the world. It is an innovative, consent-based response to the challenges of globalisation and is founded on universally recognised values.

There is a broad set of regional CSR guidelines and regulations. The European Union (EU) and the North American Free Trade Area (NAFTA) both set out well-established principles for conduct within their jurisdictions. The EU has enacted plenty of legislation governing the conduct of MNCs within its territory. Such initiatives include the Maastricht Agreement on Social Policy of 1991, the Treaty of Amsterdam of 1997,⁵⁷ as well as the initiatives taken by the European Parliament.⁵⁸ The Council of Europe has been active in this field as well, with plenty of updates to the European Social Charter of 1961.⁵⁹ North America is also covered by NAFTA that includes a Labour Side Agreement of 1993, which ensures the promotion of domestic laws within NAFTA.⁶⁰ However,

⁵⁶ The nine principles are:

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence.

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

Labour Standards

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

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

Principle 5: the effective abolition of child labour.

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

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges.

Principle 8: undertake initiatives to promote greater environmental responsibility.

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

⁵⁷ The Treaty of Amsterdam, 2 October 1997, entered into force on 1 May 1999 <http://www.eurotreaties.com/amsterdamtreaty.pdf> (accessed 31 August 2005).

⁵⁸ Blanpain (n 48 above) 46.

⁵⁹ European Social Charter <http://conventions.coe.int/treaty/en/treaties/html/035.htm> (accessed 31 August 2005).

⁶⁰ North American Free Trade Agreement http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?CategoryID=42 (accessed 31 August 2005).

European business is also guided by the EU's standards for operation in the developing world.⁶¹ International trade and aid agreements have begun to adopt 'social clauses'. They are standard features in many bilateral and multilateral agreements and almost all EU agreements.⁶²

By contrast, the control of corporate activity in Africa remains underdeveloped. Human rights protection is fully integrated into the objectives of the Constitutive Act of the African Union.⁶³ This is based on state responsibility to protect and fulfill the African Charter on Human and Peoples' Rights (African Charter), but does not directly provide for regulation of corporations. The regional economic organisations⁶⁴ are extremely dependent upon fostering investment in order to promote much needed economic growth. This position makes the regulation of corporations difficult. The New Partnership for Africa's Development (NEPAD) was implemented in 2002,⁶⁵ endorsing the NEPAD Progress Report and Initial Action Plan (Action Plan).⁶⁶ This encouraged the adoption of the Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG)⁶⁷ and the accession to the African Peer Review Mechanism (APRM).⁶⁸ The APRM would promote adherence to the fulfilment and protection to the commitments contained in the Declaration. It was put forward that human rights are central to NEPAD as it was incorporated into the AU structure.⁶⁹ The dual objectives of this Action Plan are to eradicate poverty and the fostering of socio-economic development through good governance.⁷⁰ This notion transcends the World Bank model of merely economic management and includes responsibility for the protection of interdependent human rights as well as democratisation. The APRM, which is voluntary, includes limited areas of corporate governance.⁷¹ It focuses on the

⁶¹ Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, European Parliament, Resolution A4-0508/98.

⁶² Kinley (n 11 above) p.31.

⁶³ Arts 3(g), (h), (k) & (n) AU Constitutive Act.

⁶⁴ Regional economic organisations concentrate on creating conditions conducive to economic growth through liberalisation. See eg Arab Maghreb Union (AMU) <http://www.maghrebarabe.org/> (accessed 31 August 2005); the Common Market for Eastern and Southern Africa <http://www.comesa.int> (accessed 31 August 2005); East African Community; Economic Council of Central African States (ECCAS); Economic Community of Western African States (ECOWAS); Southern African Development Community (SADC).

⁶⁵ Assembly/AU Doc AHG/Decl1 (1).

⁶⁶ Doc AHG/235 (XXXVIII).

⁶⁷ Doc AHG/235 (XXXVIII) Annex I.

⁶⁸ Doc AHG/235 (XXXVIII) Annex II.

⁶⁹ Doc AHG/235 (XXXVIII) paras 3(a)-(1).

⁷⁰ Doc AHG/235 (XXXVIII) para 5.

⁷¹ The African Peer Review Mechanism (APRM) 38th ordinary session of the Assembly of Heads of State and Government of the OAU (8 July 2002, Durban, South Africa AHG/235 (XXXVIII)).

responsibility of member states to uphold the principles. This allows for the continuation of the problems concerning the relative influence of corporations on developing states and regulation. For this reason, the African corporate monitoring regime is insufficient.

The global economic and development regulatory bodies have adopted limited human rights agendas for the conduct of business. The World Bank,⁷² the Asian Development Bank,⁷³ the International Monetary Fund⁷⁴ and the World Trade Organisation (WTO) have all addressed the main issues relevant to development, economic growth and human rights, which invariably address the role of corporations. This acknowledgment helps to build a case for their universal recognition. Further proof of the significance of human rights to the international community concerning global trade and corporations was the end of the OECD's Multilateral Agreement on Investment (MAI), which failed to be adopted due to concerns over unregulated investment and human rights.⁷⁵

Private codes of conduct have become key elements in the debate over improving international labour standards and upholding international human rights. The ILO defines such codes as 'a written policy, or statement of principles, intended to serve as a basis for a commitment to particular enterprise conduct'.⁷⁶ Initiatives have been promoted by individual corporations and on the industry-wide level.⁷⁷ There is an important role for these private codes of conduct to play in Africa. However, corporate codes of conduct are often extremely limited in human rights terms. Often they make only rhetorical reference to human rights discourse or contain no reference at all.⁷⁸

In an ideal situation, corporate codes of conduct would play a complimentary role to international regulation, supplementing

⁷² World Bank Group issue brief: Development, human rights and judicial reform <http://www.worldbank.org> (accessed 31 August 2005).

⁷³ Asian Development Bank <http://www.adb.org/documents/> (accessed 31 August 2005).

⁷⁴ See eg IMF Fact Sheet, The IMF's poverty and growth facility (1 September 2000) <http://www.imf.org/external/np/exr/facts/prgf.htm> (accessed 31 August 2005); also see IMF Fact Sheet, Social dimensions of the IMF's policy dialogue (30 March 2000) <http://www.imf.org/external/np/exr/facts/social.htm> (accessed 31 August 2005).

⁷⁵ Kinley (n 11 above) 32.

⁷⁶ ILO Working Party on the social dimensions of the liberalisation of international trade, November 1998, ILO, 1998, No 26 11.

⁷⁷ See eg the proliferation of apparel, mining and petroleum industry codes available at Bureau of National Affairs, Inc Voluntary 'Model Business Principles' Issued by the Clinton Administration, 26 May 1995, Daily Rep. For Executives, 31 May 1995, <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/usmodel.htm> (accessed 31 August 2005). See also Kimberley Process Certification Scheme <http://www.kimberley-process.com:8080/site/content/KPCS.pdf> (accessed 31 August 2005).

⁷⁸ For examples of prominent company codes of conduct in Africa, see n 15 above.

implementation and enforcement mechanisms with private initiatives.⁷⁹ These codes could be the catalysts for a new regime of human rights protection that penetrates the corporate veil. Until then, they should at least serve as guidelines for industry best practice and of performance evaluation.⁸⁰ Codes could indicate a tacit acknowledgment of human rights responsibility. They could promote awareness and acceptance of international responsibility and can end some of the worst forms of abuse. If implemented properly, they may foster an environment conducive to human rights protection, which is a step in the right direction.⁸¹

These initiatives demonstrate that governments and international business are taking the issue of regulating the international economy seriously with regard to factors other than increasing economic profit.⁸² These agreements all attempt to ensure that certain standards of behaviour are maintained despite the lack of regulation. All of these initiatives indicate a recognition of the MNC's significant role in international trade, domestic economies and social welfare. The increased influence of MNCs on domestic policy has ensured that they must recognise their role in promoting human rights as well as favourable economic conditions. MNCs and the international community have indicated corporate responsibility for human rights, related to the power and influence that they wield through the initiatives outlined above. These various initiatives, however, failed to bind all businesses to follow minimum human rights standards.⁸³

The failure of the CSR movement to ensure human rights accountability has resulted in a renewed interest for regulation as displayed by

⁷⁹ Diller (n 51 above) 26.

⁸⁰ WM Hoffman *et al Emerging global business ethics* (1994) 94.

⁸¹ ICFTU-ITS Paper 'Labour and business in the global market' in Blanpain (n 48 above) 109.

⁸² Eg, see discussions on CSR and human rights in the following forums relevant to Africa: African Business Roundtable <http://www.abrnet.org/> (accessed 31 August 2005); Sustainable futures <http://www.nbi.org.za/sustainablefutures/> (accessed 31 August 2005); African Investor <http://www.africaplc.com/> (accessed 31 August 2005); H Daly & J Cobb *For the common good* (1989); International Business and Law Forum (IBLF) *Business and poverty: Bridging the gap* (2002) <http://www.iblf.org> (accessed 31 August 2005); IBLF & WBCSD (2004) *A business guide to development actors* <http://www.wbcsd.org> (accessed 31 August 2005); CK Prahalad & A Hammond 'Serving the world's poor, profitably' (2002) 80 *Harvard Business Review* 48-57; SAGA (2004) *A nation of givers?* Johannesburg SAGA <http://www.donors.org.za> (accessed 31 August 2005); Trialogue *Corporate social investment handbook*. (2004); UNDP & IBLF (2004) *Business and the millennium development goals: A framework for action* http://www.undp.org/business/docs/mdg_business.pdf (accessed 31 August 2005); WBCSD *Doing business with the poor* (2004) <http://www.wbcsd.org> (accessed 31 August 2005).

⁸³ Weissbrodt (n 4 above) 903.

the UN Norms for Business.⁸⁴ Some notable initiatives included the UN Special Task Force's recommendations regarding human rights law⁸⁵ and the human rights code for business,⁸⁶ adopted by the UN Sub-commission on the Promotion and Protection of Human Rights. Mary Robinson, the then acting High Commissioner for Human Rights, presented *Business and Human Rights: A Progress Report*⁸⁷ at the Davos World Economic Forum, outlining necessity, challenges, opportunities and achievements of corporate human rights protection by promoting accountability and responsibility for business.⁸⁸ Progress was made in this regard by the 1995 Copenhagen World Summit for Social Development Report⁸⁹ and the UN Development Programme's *Human Development Report 2000*.⁹⁰

The UN Human Rights Norms for Business (Norms)⁹¹ represents a major step forward in the process of establishing a common global framework for understanding the responsibilities of business enterprises with regard to human rights. These Norms are the first non-voluntary initiative accepted at an international level in any capacity.⁹² The Working Group of the Sub-Commission for the Promotion and Protection of Human Rights developed these through an open process of consultation over a period of nearly four years with governments, businesses, NGOs and unions.⁹³ They provide coherence to human rights obligations of non-state economic actors. The Norms do not create new legal obligations, but simply codify and restate existing obligations under international law as they apply to transnational corporations.⁹⁴ The

⁸⁴ See, generally, D Weissbrodt 'The beginning of a sessional working group on transnational corporations within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' in M Kamminga & S Zia-Zarifi *Liability of multinational corporations under international law* (2000) 119-38.

⁸⁵ Report of the Task Force of the Executive Committee on Economic and Social Affairs of the United Nations (Final Version UN Geneva, 21 January 1999) 6; http://www.discerningtoday.org/members/Analyses/new_international_financial_architecture.htm (accessed 31 August 2005).

⁸⁶ n 2 above.

⁸⁷ Available at the UNHCHR website <http://www.unhcr.ch/busines.htm> (accessed 31 August 2005).

⁸⁸ Report of the United Nations High Commissioner for Human Rights, E/1999/96 (UN, Geneva 29 July 1999).

⁸⁹ Copenhagen + 5 Review: 24th special session of the United Nations General Assembly (Geneva 26 June to 1 July 2000) <http://www.un.org/esa/socdev/geneva2000/index.html> (accessed 31 August 2005).

⁹⁰ United Nations Development Programme *Human Development Report 2000* <http://www.undp.org/hdro/HDR2000.html> (accessed 31 August 2005).

⁹¹ Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (n 2 above).

⁹² Weissbrodt (n 4 above) 903.

⁹³ Weissbrodt (n 4 above) 904-908.

⁹⁴ On the definition of transnational corporations in this regard, see Weissbrodt (n 4 above) 908-910.

Norms clearly state that companies have only responsibilities 'within their respective spheres of activity and influence'. By bringing together voluntary initiatives, universal human rights law and labour standards, the Norms have set a solid foundation for binding law to develop. It is difficult to seriously oppose these Norms if companies and governments are already in principle adhering to the Norms through other initiatives. The Norms have been welcomed and encouraged by NGOs involved in human rights advocacy. They have already begun to use the Norms as a benchmark for accountability and a measurement of human rights compliance for businesses.⁹⁵

The Secretary-General of the UN has appointed a Special Representative on the issue of human rights and transnational corporations and other business enterprises.⁹⁶ The creation of this mandate was requested by the UN Commission for Human Rights in its resolution 2005/69, and approved by the Economic and Social Council on 25 July 2005. The mandate includes identifying and clarifying standards of corporate responsibility and accountability with regard to human rights. An interim report presenting views and recommendations for consideration by the Commission on Human Rights is due at its 62nd session in 2006 and a final report in 2007. All of this points towards further development of legal responsibility for MNCs.

Aside from this development, domestic legal systems have begun to adapt to the threats to human rights posed by a lack of international law. It is now accepted that MNCs violate international law when they directly violate or are complicit in contravening international law applicable to individuals.⁹⁷ Principles that apply to individuals clearly regulate MNCs. The concepts outlined above apply to corporations (legal persons),⁹⁸ as well as private individuals (natural persons).⁹⁹ This complements the widespread recognition of corporate accountability in domestic legal systems.¹⁰⁰ When taking into consideration that international law has been applied to corporations since the Nuremberg Tribunals,¹⁰¹ the case for corporate as well as individual regulation through international law seems solid. So far, there has not been a

⁹⁵ Weissbrodt (n 4 above) 907.

⁹⁶ UN Doc SG/A/934 (28/07/2005).

⁹⁷ JJ Paust 'Human rights responsibilities of private corporations' (2002) 35 *Vanderbilt Journal of International Law* 803.

⁹⁸ Various international and national documents use the terms 'juridical person', 'legal person', 'juristic persons' and 'corporations' to refer to the organisations recognised as having legal status. A Clapham 'Liability of non-state actors: Lessons from the International Criminal Court in Addo (n 29 above) 152 n 24.

⁹⁹ Addo (n 30 above) 8-9.

¹⁰⁰ It is a general principle of law that corporations are subject to domestic law. Paust (n 97 above) 803.

¹⁰¹ Clapham (n 98 above) 160-71.

single case in the US holding that a corporation is 'legally incapable of violating the law of nations'.¹⁰²

Moreover, the English courts have relaxed *forum non conveniens* rules in certain cases, allowing for plaintiffs to bring cases against British corporations in England rather than in the place where the violation took place.¹⁰³ This has opened the door for numerous cases concerning health and labour standards.¹⁰⁴ This has drawn international attention and has permanently damaged some MNCs' reputations. The directors of MNCs must sacrifice short-term profits in order to build stable local communities that enjoy human rights. The value of accepted universal regulation is obvious, in that it could help avoid nasty situations such as the ones previously mentioned, where the TNC's reputation is dragged through the mud.

4.3 International law formulation

The developments outlined in the previous section made the international community aware of the issue. However, the significance of these developments lies in the formulation of international law. The inclusion of human rights law in national, bilateral, regional and international agreements between states and international organisations legitimises human rights law and sets valuable precedents in the field. This is especially so when they refer to established human rights instruments. Furthermore, such agreements recognise the primacy of human rights law over domestic and other forms of international law. The legal basis for the development of human rights norms applicable to corporations derives from their sources in treaty and customary international law.¹⁰⁵ The UN has developed a plethora of declarations, codes, conventions and treaties that interpret general human rights obligations based on articles 55 and 56 of the Charter of the United Nations. The most prominent is the Universal Declaration of Human Rights (Universal

¹⁰² *Presbyterian Church of Sudan v Talisman Energy Inc* 244 F Supp 2d 308-309.

¹⁰³ R Meeran 'The unveiling of transnational corporations: A direct approach' in Addo (n 18 above) 162.

¹⁰⁴ Eg, see: *Ngcobo & Others v Thor Chemical Holdings Ltd* TLR 10 November 1995; *Sithole & Others v Thor Chemical Holdings Ltd & Another* TLR 15 February 1999; *Connelly v RTZ* [1996] 2 WLR 251; *Lubbe & Others v Cape PLC*; *Afrika & 1539 Others v Cape PLC* [1999] A No 40; *Mphahlele & 336 Others v Cape PLC* [1999] M No 146.

¹⁰⁵ For similar examples of such draft norms, see International Law Commission Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission on its Sixth Session in [1954] 2 Year Book of the International Law Commission 150, UN Doc A/CN.4/SER.A/1954/Add.1; Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its 53rd Session, UN GAOR, 56th Sess, Supp No 10 at 43, UN Doc A/56/10 (2001).

Declaration).¹⁰⁶ One of the principle obligations of the UN Charter is that states observe international human rights law standards, recognised in article XXI of the General Agreement on Trade and Tariffs (GATT), now enshrined in WTO regulations.¹⁰⁷

When the developments as outlined in this paper are viewed holistically, it is apparent that the drive for CSR is simultaneously developing a framework for international law on the subject. The evolving nature of international law ensures that mutually agreed upon norms become customary and binding over time. Although the evolution and interpretation of customary and treaty law are complex subjects, the concept of the differentiation between hard and soft law is informative in the context of evolving norms for MNCs. While hard law creates legally binding regimes, soft law begins as recommendations but may evolve into custom. A plethora of universally agreed upon voluntary instruments and associations,¹⁰⁸ when combined with universal human rights law applied over time, become a solid indicator of what behavior constitutes customary practice regarding MNCs. Voluntary initiatives may be necessary for consensus in the present, but over time, those voluntary norms will become law. Stephens draws an analogy as follows:¹⁰⁹

It is interesting to note, however, that the United Nations at the time of its foundation made a similar 'peace with power' with surprising results, drafting an aspirational human rights code that has since evolved into a powerful human rights platform. The Universal Declaration of Human Rights was drafted as a non-binding document because the States belonging to the United Nations refused to agree to binding norms.

¹⁰⁶ Universal Declaration of Human Rights, adopted 10 December 1948, GA Res 217A (III), UN GAOR 3d Sess, (Resolutions, part 1) 71, UN Doc A/810 (1948).

¹⁰⁷ See H Hannum 'The status of the Universal Declaration of Human Rights in national and international law' (1995/96) 25 *Georgia Journal of International and Comparative Law* 287.

¹⁰⁸ Prominent non-treaty human rights instruments include the Standard Minimum Rules for the Treatment of Prisoners, ESC Res 663 C (XXIV) and 2076 (LXII) (May 13, 1977); the Declaration on the Rights of Disabled Persons, GA Res 3447 (9 December 1975); the Code of Conduct for Law Enforcement Officials, GA Res 34/169 (17 December 1979); the Declaration on the Right to Development, GA Res 41/128 (4 December 1986); the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, GA Res 43/173 (9 December 1988); the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ESC Res 1989/65 (24 May 1989); the Declaration on the Protection of All Persons from Enforced Disappearance, GA Res 47/133 (18 December 1992); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res 47/135 (18 December 1992); the Declaration on the Elimination of Violence Against Women, GA Res 48/104 (20 December 1993); the Vienna Declaration and Programme of Action, UN Doc A/CONF 157/23 (1993); and the Beijing Declaration and Platform for Action, UN Doc A/CONF 177/20 & Add 1 (1995).

¹⁰⁹ Stephens (n 46 above) 68.

While the Universal Declaration was originally a manifesto with primarily moral authority, half a century later, the document is considered binding.¹¹⁰ What is significant about this development is that the regulations concerning global trade and human rights are no longer confined to academic theory, but are appearing in domestic judgments, views and comments of international human rights courts and committees and even the manifestos of corporations. Nevertheless, no one predicts treaty norms regarding human rights standards and MNCs in the near future. There is nowhere near consensus internationally for such a development. The Norms are an indication of the formulation of soft law.¹¹¹ Such a first step is required for consensus building and eventual codification. This process often takes years to complete. However, the sources of the Norms applicable to business commend great respect. This is certainly an indication of the direction that the international community is heading regarding this issue.

5 Human rights law and corporate social responsibility

The advance of regulation through CSR initiatives has been welcomed. However, it remains paramount that human rights discourse is not left to the private sphere alone. The UN Commission on Human Rights and, particularly, the Sub-Commission on the Promotion and Protection of Human Rights, remain adamant in their criticism of progress in terms of human rights and globalisation.¹¹² The Commission on Human Rights and the Sessional Working Group on the Working Methods and Activities of Transnational Corporations¹¹³ stressed the relationship between transnational corporations and the state. The Commission recalled the fact that the international covenants on human rights and the Declaration on the Right to Development established that states are the primary duty bearers of human rights and that each state needed to regulate foreign investment within its jurisdiction through the horizontal application of human rights law. The International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR) are ratified by the majority of African states. They impose obligations on African governments to regulate the conduct of MNCs within their jurisdiction in order to

¹¹⁰ See Hannum (n 107 above) 287 317-39.

¹¹¹ Weissbrodt (n 4 above) 914.

¹¹² See 'Globalisation and its impact on the full enjoyment of human rights' 15 August 2001, E/CN.4/Sub.2/2000/13.

¹¹³ UN Doc E/CN.4/Sub.2/2002/13 15 August 2002 para 12.

uphold the principles contained within them.¹¹⁴ CSR and direct regulation binding corporations under human rights law should only be used as a complimentary system to the established international human rights law incorporated and enforced domestically.

CSR has been formulated in human rights terms concerning the legal liability of business entities, and not in terms of human rights responsibilities.¹¹⁵ However, human rights law, particularly in developing states, requires positive obligations. Positive obligations are essential to the fulfilment of economic, social and cultural rights, which are of vital importance to African peoples.¹¹⁶ Human rights law must not only be promoted, but it must be protected and fulfilled as well. Few argue against MNC responsibility for human rights law. Nevertheless, it is ethically controversial as to whether MNCs are the correct agents for the protection and fulfilment of human rights law. Perhaps their responsibility is only limited to their sphere of influence.¹¹⁷ This sphere certainly does not correspond with universal human rights law. Moreover, it is questionable whether human rights law is even the correct framework for CSR discourse.

CSR has evolved from corporate philanthropy to social responsibility, minimising the negative side-effects of MNC activity.¹¹⁸ From there it has engulfed concepts of sustainable development and good governance.¹¹⁹ Despite the rapid advance of such language and its value to business ethics discourse, it does not directly relate to or address fundamental human rights law responsibility. It is founded upon voluntarism and minimal duties for the private sphere. The danger with including human rights discourse, but not necessarily law, within CSR initiatives is that rights and entitlements can become factors of production. Such a development may have consequences for the interdependence and universality of human rights laws. Therefore, CSR should not be the basis of human rights development in African states.

Development in Africa must be facilitated, utilising existing international human rights law implemented and enforced nationally. CCPR

¹¹⁴ As above.

¹¹⁵ P Muchlinski *Multinational enterprises and the law* (1995) 592-97.

¹¹⁶ See SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 177.

¹¹⁷ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) art 1.

¹¹⁸ L Bomann-Larsen & O Wiggen 'Towards improved business practices: Implementing the principles of double effect' in L Bomann-Larsen & O Wiggen (eds) *Responsibility in world business: Managing harmful side-effects of corporate activity* (2004) 273.

¹¹⁹ S Zadek *The civil corporation: The new economy of corporate citizenship* (2001).

and CESCR have been ratified by the majority of these states.¹²⁰ They impose an obligation on state parties to regulate in order to uphold the principles contained within them. Moreover, the Declaration on the Right to Development is directly applicable to the African context and maintains that the prime duty bearer for human rights law is the state.¹²¹ The UN Committee on Economic, Social and Cultural Rights is clear that the realm of state responsibility extends not only to the actions of agents of the state, but also to third parties over whom the state has or should have control.¹²² Africa has formulated extensive human rights law. States should concentrate their efforts on fulfilling the obligations entailed within that body of law.

The case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,¹²³ before the African Commission on Human and Peoples' Rights (African Commission or Commission), provides an excellent example of state responsibility. Significantly, the Commission concluded that collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.¹²⁴ The Commission determined that governments are expected to respect, protect, promote, and fulfill human rights. Moreover, according to the Commission, '[t]hese obligations universally apply to all rights and entail a combination of negative and positive duties'.¹²⁵ The Commission found that the Nigerian government had failed to fulfill these obligations guaranteed by the African Charter on Human and Peoples' Rights (African Charter).¹²⁶

These obligations were elaborated on by the Commission. The duty to respect human rights entails refraining from interference with the 'enjoyment of all fundamental rights'.¹²⁷ The protection of rights

¹²⁰ One hundred and forty-six states have ratified the International Covenant on Economic, Social and Cultural Rights as of 2 May 2003. See <http://www.unhchr.ch/pdf/report.pdf> (accessed 31 August 2005).

¹²¹ Declaration on the Right to Development (41/128) of 4 December 1986, art 10.

¹²² M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 113.

¹²³ (2001) AHRLR 60 (ACHPR 2001).

¹²⁴ n 123 above, para 68.

¹²⁵ n 123 above, para 44 (citing A Eide 'Economic, social and cultural rights as human rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 21.

¹²⁶ Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5. Nigeria was found to have violated the right to non-discrimination (art 2); the right to life (art 4); the right to property (art 14); the right to health (art 16); the right to housing (implied in the duty to protect the family, art 18(1)); the right to food (implicit in arts 4, 16 & 22); the right of peoples to freely dispose of their wealth and natural resources (art 21); and the right of peoples to a 'general satisfactory environment favourable to their development' (art 24). The violations were the result of actions involving the Nigerian National Petroleum Development Company (NNPC) in a consortium with Shell Petroleum Development Corporation (SPDC).

¹²⁷ n 123 above, para 45.

requires legislation and provision of effective remedies to ensure that rights holders are protected 'against other subjects' and 'political, economic and social interferences'.¹²⁸ Human rights law promotion requires actions such as 'promoting tolerance, raising awareness, and ... building infrastructures'.¹²⁹ The fulfilment of human rights law requires the state to enact policy and take action toward the actual realisation of rights. This may even include the provision of 'basic needs, such as food or resources that can be used for food (direct food aid or social security)'.¹³⁰

The African Commission came to the important conclusion that the Nigerian government was in breach of its obligation to protect its peoples from damaging acts done by private parties contrary to the African Charter.¹³¹ Nigeria therefore could be held accountable under international law for failing to ensure that private actors and state actors together provide a setting in which human rights-based development can be achieved. To prove this substantive law connection, the plaintiffs cited the cases of *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,¹³² *Velasquez Rodriguez v Honduras*¹³³ and *X and Y v Netherlands*.¹³⁴ Governments must take action to uphold, protect and promote human rights as part of a domestic rights-based development process. They must ensure an environment conducive to the fulfilment of human rights commitments by regulating the activities of private parties that affect the enjoyment of these rights in order to ensure a rights-based development of society. This requires the maintenance of the governmental regulatory function in the face of mounting pressure to deregulate and remove economic decision making from domestic jurisdiction. Voluntary initiatives and CSR, while beneficial in their own right, cannot fill this developing regulatory void.

6 Conclusion

CSR has played a positive role in the development of a legal framework for human rights regulation in the private sphere. Additionally, it has raised awareness throughout the international community about this problem. CSR can be an excellent complement to a system of human rights regulation that is enforceable in either domestic or international

¹²⁸ n 116 above, para 46.

¹²⁹ n 116 above, para 46.

¹³⁰ n 116 above, para 47.

¹³¹ n 116 above, paras 57-58.

¹³² (2000) AHRLR 66 (ACHPR 1995).

¹³³ *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights, judgment of 19 July 1988, Series C, No 4.

¹³⁴ *X & Y v the Netherlands* 91 ECHR (1985) (Ser A) 32.

courts. CSR will help ensure that MNCs have the tools at their disposal to avoid such litigation. Moreover, it can afford governments knowledge on what is acceptable international practice.

Unfortunately, some members of the international community would prefer that compliance with such a system remained on a voluntary basis. They claim that the many positive contributions MNCs make are overlooked or purposely ignored. The evidence is clear that MNCs have helped raise living standards around the world, for some. MNCs have acted as engines of development and growth through the economic activity they generate, their transfer of technology and skills, and improved labour, health, safety, and environmental conditions.¹³⁵ Proponents of voluntarism insist that, taken together, the voluntary regime initiatives provide an adequate standard for business. However, this influential lobby does not recognise the problems related to the implementation, monitoring and enforcement of such a voluntary regime. There is a real danger that this type of regulation can be used as a public relations scheme, while business as usual is conducted in practice. For companies legitimately interested in CSR, a universal set of regulations and guidelines would only be beneficial. Such progressive MNCs would not lose their competitive advantage in the short run to companies who cut corners in terms of human rights responsibility.

Most businesses now recognise that CSR is vital for long-term sustainable growth. Many MNCs have become public relations proponents of human rights after suffering major controversies resulting from human rights-related disgraces. Shell, Nike and Rio Tinto now readily cite the Universal Declaration in their corporate policies. Shell, in doing so, provides an excellent example of the detrimental effects of civil instability and political uncertainty on investment, reputation and operations. They advocate the use of their commercial leverage to promote social as well as financial ends.¹³⁶ Nike claims to actively engage with NGOs to aid in human rights matters such as development and employment initiatives.¹³⁷

The primary responsibility for human rights law must remain with states. The involvement of civil society in human rights realisation is similarly paramount. However, the dynamic world economic system has altered the power balance and international law must adjust in order to regulate for the good of the international community. MNCs must accept responsibility for their increased power and privilege, afforded through law. A creature of law, such as a multinational limited

¹³⁵ United States Council for International Business Position Paper on Codes of Conduct, 1998 <http://www.uscib.org/index.asp?documentID=1358> (accessed 31 August 2005).

¹³⁶ See The Shell Report 1998 under 'Issues and dilemmas' <http://www.shell.com/download/2872/pages/issues06html> (accessed 31 August 2005).

¹³⁷ See <http://www.nikebiz.com/labor/faq.shtml> (accessed 31 August 2005).

liability corporation, must be subject to the very international law that creates it. The ability of states to implement and enforce human rights law must be strengthened.

This human rights law scenario is similar to the environmental struggle with corporations one generation ago. No one would have anticipated environmental issues being discussed in the boardrooms of the international business community 20 years ago. However, they are very much a part of daily business. Today human rights law is in a similar formative phase within the international business community. Trends point to its inevitable development along parallel lines. It is time for human rights advocates and civil society to work with the business community within the established and enhanced framework of the international community and solve these pressing issues. The prominence of this concern within human rights discourse, and indeed the international community in general, indicates the gravity of the matter. All of the international community, including corporations, but with the primary focus on states, must live up to its responsibility to regulate through international law for the good of society as a whole. In that regard, human rights must be the basis for the development of an equitable and just society. CSR is an important step in such a process, but is not the panacea to the problem.