If the multinational enterprise poses a threat to human freedom it is because of its peculiar effectiveness. Its capacity to pursue a centralized and coordinated strategy removes decision-making power far from the people affected by it.¹

(1) INTRODUCTION

The notion and crystallization of human rights is one of the most unique contributions to the evolution of human civilization. It is recognized as universal, indivisible and inalienable. Yet it was originally considered applicable only against the State and its agencies. However, in the last few decades, thanks to Civil Society and the U.N. activities, the human rights discipline is being extended to non-state actors particularly to those who occupy public space and exercise enormous power on the people i.e. ‘Transnational Corporations’ (hereinafter TNCs). This is as it should be in the context

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of what is understood in developing countries under several labels such as privatization, liberalization, globalization and marketisation of what was earlier managed by the governments.

In the 21st century, TNCs become more relevant even for a common man as they are active in most of the dynamic sectors of national economies. They bring new jobs, technology and capital, and are also capable of exerting a positive influence in fostering development, by improving living conditions. However, the human rights activists claim that various kinds of corporate activity have a detrimental impact on human welfare are at least as old as Marxism and have always been a mantra of the political left worldwide.

One can easily find horror stories of unprincipled TNCs making handsome profits at the expense of clearly exploited employees and bystanders. Authors from Stephen Hymer to David Korten have chronicled the record. Various TNCs, from United Fruit to Coca-Cola, actively opposed progressive governments and laws designed to advance labor rights and other human rights. Debora L. Spar of the Harvard Business School believes that the social record of TNCs engaged in the extraction of natural resources in foreign countries has been especially poor. On the one hand the TNC must have cozy relations with the (all-too-often reactionary) government that controls access to the resource and share an interest in a docile and complaint labor force. On the other hand, the TNC has little interest in other aspects of the local population. The resource is mostly sold abroad, with a certain amount of the profits going to the governmental elite. If that elite does not act progressively to reinvest the profit into infrastructures that improve the lot of the local population, such as education, health care, and ecological protection, the TNC has seen little short-term economic interest in the situation.3

However, today’s assertions are different both in their origin and in their content. Many TNCs, including Nike and The Gap, have been accused of violating their workers’ economic, social and cultural rights by various means, for example; by employing child labourers, discriminating against certain groups of employees, such as union members and women, attempting to repress independent trade unions and discourage the right to bargain collectively, failing to provide safe and healthy working conditions, and limiting the broad

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They are also violating basic human rights i.e. right to water, right to have clean and pollution free environment and infringing environmental laws by dumping toxic waste which affects the lives and livelihoods of neighbouring communities.

A couple of examples from different parts of the world may illustrate this privatization process. In Nigeria, a massacre of some eighty people occurred at Umuechem a November 1990 after Shell had called in the Mobile Police Force, a paramilitary force, to protect its installations and personnel. Shell has also purchased handguns for Nigerian police. In Colombia, British Petroleum admitted in September 1996 that it has been paying the Colombian army to protect its installations in spite of the fact that the Colombian army has a notoriously bad human rights record. BP has also been accused of providing lethal training to the Colombian police through the services of a private British security firm. In India, the Dabhol Power Company is a joint venture between three US-based MNCs: Enron, General Electric have been paying the State police in order to provide police protection against demonstrators. The police officers in question have routinely used excessive force against the local villagers when they were peacefully protesting against the establishment of the power plant in their community. Few recent incidents of human rights abuses by state to promote the interest of TNCs in India are Nandigram violence in West Bengal and abuses of labor law in Gurgaon by Honda Company and ICICI bank employed goons for recovery as held by the Hon’ble Supreme Court in its recent decision in the Manager ICICI Bank Ltd. v. Prakash Kaur (2007) 2 RCR Cri 76.

However, Meyer also cites specific examples of TNC operations that violate second and third-generation rights in the Third World. The Bhopal environmental disaster in India; maquiladoras (export-oriented factories) in Mexico, Honduras, and El Salvador; and Nike sweatshops in Indonesia and Pakistan are prime examples of human rights

violations.” Meyer asserts that “some MNCs try to destroy labor unions. Many MNCs do harm to the environment.”

The problem is not only that most of them consistently engage in serious human rights abuses but they also still largely escape international legal scrutiny. This is primarily due to the prevailing [limited] concept of territorial jurisdiction in all the legal systems of the world as prescriptive jurisdiction is primarily exercised on the basis of territoriality it follows that a TNC is not governed by a single legal system. The parent company is subject to the laws of the home State while its foreign affiliates are subject to the laws of the various host States. The temptation to boost profits by conspiring in human rights abuses with the host State may therefore prove irresistible. Moreover, it is still not widely accepted that unlike an individual, a TNC has any obligations under international law.

Cynicism about international codes and instruments is widespread. At present, the standards by which the conduct of TNCs should be judged are neither uniform nor effective. Strategies that human rights NGOs have employed against governments may, therefore, be the best hope for confronting irresponsible TNCs. Although the UN Global Compact does represent a step toward curtailing human rights abuses by TNCs, the fact remains that it is voluntary - not a mandatory set of resolutions - and does not hold corporations accountable by way of penalties or sanctions for violating its principles. Building upon the previous initiatives regarding corporate social responsibility, in August 2003, the 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.

In this paper, the author will discuss various views regarding the personality of TNCs in the era of globalisation, in which the advocates of human rights are looking towards the third generations of human rights i.e. right to development as well as environmental human rights jurisprudence, and also examine the various international instrument or ‘soft law’ which laid down legal obligations on the TNCs for the protection and promotion of human rights.

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In this section, the various arguments in favour and against the status of the TNCs in the international law are discussed. The term ‘TNCs’ emphasizes the fact that there is usually a single legal corporation operating in more than one country, with a headquarters and a legal status incorporated in the national law of the home state. According to Rigaux: “The concept of transnationality comes into its own when it is applied to an autonomous corporate system and, in this sense, the transnational corporation is one single corporation even if it is composed of corporation with separate identities under the corporation law of the State in which they operate.”

Many of the earliest corporations were granted charters from the Crown that made them both corporations and political entities. The corporate form was not widely available and these charters were granted on an ad hoc basis, often in accord with the ebb and flow of political expediency. When Parliament passed the Joint Companies Act in 1844, Robert Lowe, then Vice President of Great Britain’s Board of Trade, referred to corporations as ‘little republics.’ Specifically, Lowe noted that, “[i]n[ ]giving [corporations] a pattern the State leaves them to manage their own affairs and has no desire to force on these little republics any particular constitution.”

Professor Daniel J.H. Greenwood has explored in detail the rights of early corporations, particularly those rights which are similar to the rights of the sovereign. Professor Greenwood notes that, “in the beginning, everyone understood that corporations were somewhat sovereign” and that “[i]n[ ]deed, the British East India Company claimed aspects of sovereignty – the right to have its contracts treated as international treaties and the right to make war.” These early corporations even minted money. Some of these companies governed expansive territories and maintained standing armies that, at times, engaged in military action. Today’s corporations may never gain the measure of power held by the earliest companies at their apogee, but they seem to be trying.

The ontology of the corporation encompasses a number of theories regarding the nature of corporations. Corporations have been described as a person, private property of the shareholders, a nexus of contracts, an agent for the owners, a representative

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10 Id.
democracy, and even a religious entity. Currently, corporations are viewed as legal person, and have been regarded as such for almost 200 years. As legal persons, corporations are entitled to some constitutional protections. They have the right to hold property, to contract, and to sue and be sued as a juridical entity distinct from their shareholders, directors and employees. Corporate law theorists have more recently come to view the corporation as a special type of legal entity that has been and should be regulated and accommodated in unique ways.11

The TNCs traditionally have not been recognized as “subjects” of international law. The creation or adaptation of international regulatory regimes that impose human rights responsibilities upon corporations therefore appears to require a radical departure from the structure of international legal orthodoxy, which views non-state actors as mere objects of international law. Before such human rights duties can be imposed on TNCs, they must be recognized in international law as subjects of, or at least “participants in,” international law, capable of bearing international legal duties. In other words, they must possess international legal personality. Since the end of World War II, international instruments or other legal initiatives have conferred international legal personality on a number of new non-state actors. For example, in Reparations for Injuries Suffered in the Service of the United Nations the ICJ confirmed that States could confer international legal personality on international organisations such as the UN. Classically, also, individuals have acquired international legal personality via the establishment of human rights treaties, the creation of individual complaint mechanisms under various treaties, and the imposition of international responsibility for war crimes. In principle, therefore, there is nothing to prevent States from accepting TNCs as subjects of international law.12

(3) LEGALITY OF TRANSNATIONAL HUMAN RIGHTS OBLIGATIONS

The complex relationship multinational corporations entertain vis-a-vis human rights in the countries in which they develop their activities is hardly surprising. TNCs are simply agents of economic globalization. They have the potential to be important actors in development, not only in that they may contribute to the expansion of exchanges and therefore to economic growth, but also in that they may help fulfill a form of development

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11 Id.
oriented towards the expansion of human capabilities, of which human rights are both a main ingredient and a precondition.\textsuperscript{13}

Any discussion of the implementation or the promotion of human rights obligations beyond national borders needs first to establish the legal foundations for these claims. The basis for any such obligation would be found not only in international human rights Covenants and Conventions but also in the UN Charter. As members of the United Nations, the States have pledged themselves to “achieve international cooperation in solving international problems. . . . And in promoting and encouraging respect for human rights and for fundamental freedoms. . . .” Further, in Article 56, UN members “pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement” of “universal respect for, and observance of, human rights and fundamental freedoms.” These provisions, seen in conjunction with Article 103, which states that obligations under the Charter will prevail over other obligations in international law, imply that member-States of the UN will be under an obligation to operate in accordance with respect for human rights. By the very inclusion of human rights in the UN Charter, they became a matter of international concern.\textsuperscript{14}

International human rights law principally contemplates two sets of actors who may be held liable for abuses - States, through the concept of state (primarily civil) responsibility, and individuals, through the concept of individual (primarily criminal) responsibility. States are duty holders for the full range of human rights, whether defined in treaties or customary law. Individual responsibility applies to a far smaller range of abuses, principally characterized by the gravity of their physical or spiritual assault on the individual.

The world’s largest TNCs are more powerful and influential than many States has been a cliché since the 1960s.\textsuperscript{15} The TNCs have a direct impact on the economic, political, and social landscapes of the countries in which they operate, their activities have considerable effect on individuals and human rights, both positively and negatively. Steven R. Ratner, who sees noticeable limits to holding States solely accountable for

human rights violations in modern international affairs, asserts that “corporations may have as much or more power over individuals as governments.” In analyzing the power of TNCs today, Susan Strange emphasizes the need to conceptualize power beyond political power to include economic power and accordingly concludes that markets matter more than States. Corporations control a great amount of capital, generating about one-fifth of the world’s wealth. Only six nations (the United States, Germany, Japan, United Kingdom, Italy, and France) have tax revenues larger than the nine largest multinational corporations sales.

The extent to which TNCs already possess an international legal status may be ascertained by enquiring whether TNCs have any existing rights or duties under international law. Steven Ratner developed an argument to justify why these corporations do require ‘moving beyond state responsibility’? He answered the same by quoting many reasons like: first, the desire of many less developed States to welcome foreign investment means that some governments have neither the interest nor the resources to monitor corporate behaviour, either with respect to the TNCs employees or with respect to the boarder community. Their views on investment might lead them to assist companies in violations, for instance, through deployment of security forces. For instance, whatever one may believe of the merits of claims against Freeport-McMoRan of human rights abuses in Irian Jaya or against Texaco in the Colombian rainforest, there seems little doubt that those entities exercise significant power in certain regions, often with little interference by the government.

Second, regardless of its position on foreign investment, the government might also use corporate resources in its abuses of human rights. Third, as firm have become more international, they have also become ever more independent of government control. Many of the largest TNCs have headquarter in one state, shareholders in others and operation worldwide. If the host state fails to regulate the acts of the company, other States, including the state of the corporation’s nationality, may well choose to abstain from regulation based on the extraterritorial nature of the acts at issue. Corporation can also

shift activities to States with fewer regulatory burdens, including human rights regulations.\(^{19}\)

Much of the business community has traditionally argued that human rights do not need to be a priority for developing countries (and that companies operating or investing in countries with repressive governments should not be challenged). The substantive merits of this argument are showing strain. For example:

*Many in the business sector traditionally argued that it is acceptable for governments of developing countries to give a low priority to civil and political rights while focusing on economic development. Their theory: respect for civil and political rights will naturally follow later, after trade and investment create a middle class and induce political liberalisation.*\(^{20}\)

In terms of transnational obligations, the principle would be that States would have a duty to act in accordance with customary international human rights law in their international operations to the extent that people in a foreign state do not suffer as a result of the first state's action. In fact, principles of diplomatic protection and state responsibility could be used as an analogy in this setting. It is a recognized principle that States shall refrain from causing harm to another state. Another principle holds that if a state harms another state's national, this action in international law terms is seen to cause harm to the second state. If one state harms the national of another state when this national still is in his or her own state, however, the issues of diplomatic protection or state responsibility do not seem to be carried as far. For example, if an agent of a state travels to another state and assassinates one of that state's nationals, quite obviously, a case of responsibility will be triggered. If the first state gives an export licence for torture equipment to be sold to the second state and citizens of the second state die from torture, however, the issue of responsibility is not as clear.\(^{21}\)

There is, in fact, ample evidence that TNCs do possess international rights and duties, and, with respect to their rights, the capacity to enforce them. TNCs have traditionally been given rights under foreign investment law, particularly in relation to expropriation, compensation, and non-discrimination national treatment relative to

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\(^{19}\) *Ibid.*, at 463.


domestic firms. TNCs also have direct duties under some multilateral conventions. For example, both the International Convention on Civil Liability for Oil Pollution Damage and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment directly impose liability on legal persons including corporations.  

TNCs are also empowered to enforce their rights. For example, a treaty created under the World Bank enables corporations to submit disputes to binding arbitration by the International Center for the Settlement of Investment Disputes. And under NAFTA, corporations are able to seek recompense, spectacularly, from foreign governments for breach of their rights to unhindered, cross-border trade through the Agreement’s private dispute-settlement mechanism. There are many other tribunals that allow corporations to bring claims, including the Seabed Dispute Chamber, the Iran – United States Claims Tribunals, and the United Nations Claims Commission, to name a few. Evidently, therefore, as even this brief survey makes clear, it is possible to invest in TNCs sufficient international legal personality to bear obligations, as much as to exercise their rights.

(4) INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The United Nations (UN), in its life of five decades, has faced several challenges as promoter of human rights in international arena. One such challenge has been to ensure that even non-state actors such as TNCs respect human rights, at least within their respective spheres of activity. Some of the provisions of the UN Charter, there are a number of other treaty provisions that may be of relevance in international human rights law. The most prominent instruments from which transnational human rights obligations may be established are the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). In respect to transnational obligations, there may be a rather substantive difference between the two Covenants. The general obligation provisions can be found in Article 2 of both Covenants. Article 2 of the ICESCR contains the following passage:

1. Each State Party to the present Covenant undertakes to take steps, *individually and through international assistance and co-operation*, . . with a view to achieving progressively the full realisation of the rights recognised in the present Covenant. (Emphasis added.)

Article 2 of the ICCPR is rather different in that it states:

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22 David Kinley and Junko Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law”, p. 946.
23 Ibid., at 947.
1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant. (Emphasis added.)

These texts seem to indicate that the obligations upon the ratifying States are tied more firmly to national borders in terms of civil and political rights than for economic and social rights. Civil and political rights are guaranteed within the ratifying state's territory and for individuals over whom it exercises jurisdiction. On the other hand, economic, social, and cultural rights shall be achieved individually and "through international assistance and cooperation," without specifying a territorial or jurisdictional limitation. Without going into detail on the specifics of the various aspects of the obligations as provided by the two Articles 2, it seems that a preliminary conclusion can be drawn that the drafters of the ICESCR have envisioned that the fulfillment of these rights has transnational dimensions as well as domestic ones.

This vision is also evidenced in other articles of the ICESCR, particularly in Article 23, which states, *inter alia*, that:

The States Parties to the present Covenant agree that *international action* for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance, etc. (Emphasis added.)

This article is seemingly rather weak in the role it envisions for transnational operations, in terms of promoting economic, social, and cultural rights. It is significant in this endeavour, however, that the ICESCR specifically recognizes the role of not *only* the ratifying State, but also States outside national borders. It should also be noted that the listing of activities that other States are supposed to engage in to achieve the rights listed in the ICESCR are examples and cannot be read as an exhaustive list, as the article itself uses the term "such methods as."25

Other treaties express the idea that the state can ensure the respect of human rights by non-state entities. For example, Article 2(d) of the International Convention on the Elimination of All Forms of Racial Discrimination requires state parties to “prohibit and bring to an end, by all appropriate means, including legislation ..., racial discrimination by

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25 Ibid., at 791.
any person, group or organization...” Hence, States have the indirect responsibility to prevent racial discrimination by corporations.

(a) The OECD Guidelines for Multinational Enterprises (1976)

James Salzman introduces his examination of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises by highlighting the revelations in the early 1970s of ‘wide-scale unethical and illegal activities by multinational companies’. The Ministerial Declaration adopted by the OECD in 1976 was actually focused on the promotion of international investment. The Guidelines for Multinational Enterprises were simply an add-on to the inter-governmental Declaration on International Investment and Multinational Enterprises. The OECD was seen by some as simply reacting to the possible threat of normative activity with regard to multinationals by the UN General Assembly. This OECD non-binding initiative could be seen as a way of stalling a potentially more obligatory framework at the UN level. At the time, the Guidelines were considered completely voluntary and today the revised Guidelines still state in their first operative paragraph:

The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable.

The OECD Guidelines have been revised several times. In 2000, it recommended that enterprises “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” Specially, they recommend that enterprises contribute to policies of non-discrimination with respect to employment, to the effective abolition of child labor, and to the elimination of all forms of forced or compulsory labor. However, the OECD complaints procedure does not

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26 The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

27 Andrew Clapham, Human Rights Obligations of Non-State Actors, p. 201.


29 David Kinley and Junko Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law”, p. 950.
represent a judicial or even quasi-judicial finding but rather a series of procedures for requesting consultation, good offices, conciliation, or mediation as well as ‘clarifications’ of the Guidelines.30

(b) The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977)

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was adopted by the Governing Body of the International Labour Office on 16 November 1977, and amended in November 2000. Like the OECD Guidelines, the Tripartite Declaration contains principles of relevance to both multinational and national enterprises. In fact, the Declaration often addresses not only multinational but also national enterprises specially.31

Multinational enterprises play an important part in the economies of most countries and in international economic relations. This is of increasing interest to governments as well as to employers and workers and their respective organizations. Through international direct investment and other means such enterprises can bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology and labour. Within the framework of development policies established by governments, they can also make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of basic human rights, including freedom of association, throughout the world.32

The fact that the Declaration is stated to be voluntary can not detract from the normative value of those parts of it that reflects binding obligations, where companies are already bound to respect certain legal obligation, their inclusion is declaratory and a reminder of those existing obligations. The Declaration includes a number of general policies which are not necessarily related to questions of rights and obligations. But there is a specific reference to human rights: ‘All the parties concerned by this Declaration . . . should respect the Universal Declaration of Human Rights and the corresponding international Covenants adopted by the General Assembly of the United Nations.’33

30 Andrew Clapham, Human Rights Obligations of Non-State Actors, p. 207.
31 Ibid., at 212.
33 Ibid., at 213.
From the point of view of the regulation of human rights abuses by TNCs, the implementation mechanisms of the OECD Guidelines and the ILO Declaration can hardly be considered intrusive on States or corporations. Quite apart from the fact that they are non-binding, the monitoring bodies do not function as judicial or quasi-judicial bodies, but rather their roles are limited to clarification of the interpretation of instrument. They do not make specific findings of misconduct by individual companies and their identities are kept confidential, thereby shielding them from public scrutiny and potential embarrassment. Furthermore, while the Guidelines and the Declaration encourage TNCs to respect internationally recognized human rights norms, they simultaneously uphold the primacy of national law. Thus, they can do nothing to prevent host States from adopting lax labor and environmental standards, and TNCs cannot be condemned for taking advantage of such standards.34

(c) The UN Global Compact (2000)

On 31 January 1999, at the World Economic Forum in Davos, Switzerland, the UN Secretary General asked world business leaders to embrace and enact a Global Compact, both in their individual corporate practices and by supporting appropriate public policies. The Global Compact now includes ten principles. The first two refer to human rights. The Compact principles cover both the commission of human rights abuses and complicity in human rights abuses. On the one hand, companies are to make sure they do not themselves commit human rights abuses; on the other hand, companies are to support appropriate public policies and ensure they are not complicit in other people’s human rights abuses. Under the Global Compact Principle 1, world business is asked to: ‘support and respect the protection of international human rights within their sphere of influence’. 35

The UN Global Compact is another soft law instrument directed at TNCs. The lack of independent monitoring and enforcement via sanctions highlights the limited ambition, and therefore, impact, of this initiative in providing protection against corporate abuse of human rights. It is true that the UN expressly acknowledges that it has neither the mandate nor the capacity to monitor and verify corporate practices. Yet, there is some concern as to the credibility of the Global Compact given that it is quite possible for TNCs to continue violate of human rights while enjoying the status of signatory to the Global Compact. At the end of the day, the Global Compact is little more than an instrument of rhetoric. It has

34 David Kinley and Junko Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law”, p. 951.
35 Andrew Clapham, Human Rights Obligations of Non-State Actors, p. 218.
indeed raised awareness of the issues involved, both within the corporate world and the UN itself, which is an important first step, but it is no more than that.  

Reviewing the soft law instrument of the OECD, the ILO, and the UN’s Global Compact, one might conclude that in practice they have achieved little of substance, due largely to their non-binding nature and the lack of meaningful implementation mechanisms. But they have at least demonstrated institutions to formulate some human rights standards against which the conduct of TNCs can be measured. Moreover, some commentators raise the possibility that soft-law initiatives may be elevated to hard-law through the formulation of customary international law.


The UN Sub-Commission on the Promotion and Protection of Human Rights is a body created to act as a ‘think-tank’ to assist the UN Commission on Human Rights (an inter-governmental body of 53 member States of the United Nations). Its twenty-six members are elected as independent experts by the inter-governmental Commission on Human Rights. In 2003, after four years of discussions and consultations, the Sub-Commission approved the ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (hereinafter ‘the Norms’). The Sub-Commission decided to transmit to the Commission in turn decided to call for a study into the obligations on corporations, and determined that the Sub-Commission should not monitor the Norms contained in its ‘draft proposal’.

In the present context, however, it is worth examining the Sub-Commission’s text to see what it contributed to the initiatives already discussed. In contrast to the OECD and ILO texts, the Sub-Commission’s text defines what is meant by a transnational corporation and draws a distinction between the responsibilities of transnational’s and those of ‘other business enterprises’. For the purposes of the Sub-Commission’s text: ‘The term “transnational corporation” refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries- whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.’ The extension of the Norms to other business enterprises was

36 David Kinley and Junko Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law”, p. 951.
37 Andrew Clapham, Human Rights Obligations of Non-State Actors, p. 226.
contentious during the drafting process, perhaps in part due to a fear that the Norms would eventually be applied to small companies in developing countries, and thereby place them at a competitive disadvantage compared to wealthy TNCs. The final texts defines three situations in which the Norms are presumed to apply to: ‘any business entity, regardless of the international or domestic nature of its activities, including a TNCs, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.’

The Norms are ‘presumed to apply, as a matter of practice’ to these enterprises: where the business enterprise has any relation with a TNC; where the impact of business enterprise is not entirely local; or where the activities involve violations of the right to security. We shall return to the ‘right to security’ provision below. Although the Norms have this variegated application depending in the circumstances, the present discussion mainly refers to the addresses with the shorthand ‘corporations’ for the purposes of the following exposition.\(^\text{38}\)

The Norms start by recalling that the UDHR was addressed to individuals and organs of society as well as governments. As we have seen, a close examination of the Declaration reveals that States are rarely mentioned as such, the Declaration being drafted to emphasize the rights of the individual rather than the duties of the governments. In 1948, the UN General Assembly proclaimed ‘this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance’. Moreover, the ILO Tripartite Declaration of 1977 called for corporations to respect the Universal Declaration and the Covenants. The application of the UDHR to corporate activity has been asserted by a number of organisations and authors. Lou Henkin sees multinational as the addresses of the Declaration:

As this juncture the Universal Declaration may also address multinational companies. This is true even though the companies nerve heard of the Universal Declaration at the time it was drafted. The Universal Declaration is not only addressed to the governments. It is a ‘common standards for all peoples and all nations.’ It means that ‘every individual and every organ of society shall strive – by progressive measures . . .

\(^{38}\) Id.
secure their universal and effective recognition and observance among the people of the member States. Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applied to them all.39

There are at least five significant attributes of the Norms that should be identified. First, the Norms evince a strong commitment that nothing in the Norms shall diminish the human rights obligations of governments.40

The Norms further deal with a second issue, that is, whether they apply only to TNCs or to all business. If one applies human rights standards only to TNCs, however, that differential treatment could be considered discriminatory. Accordingly, the Norms apply not only to TNCs, but also to national companies and local business, in that each will be responsible according to its respective sphere of activity and influence. A third significant attribute of the Norms and the related Commentary is that they have a very broad and comprehensive approach to human rights. As the most comprehensive set of standards so far developed, the Norms and Commentary require TNCs and other business enterprises to respect the rights to equality of opportunity and treatment, respect for international, national and local laws and the rule of law, respect for the right to health as well as other economic, social, and cultural rights; other civil and political rights; consumer protection; and environment protection.41

While the Norms apply to all companies, it should be noted as a fourth attribute that these Norms are not legally binding as they would be if they were a treaty, but are similar to many other UN declaration, principles, guidelines, and standards that interpret existing law and summarize international practice. Eventually, of course, the Norms could be considered what international law scholars call “soft law” and could also provide the basis for drafting a human rights treaty on corporate social responsibility.42

The final attribute of the Norms is that they do endeavor to include five basic implementation procedures and anticipate that they may later be supplemented by other techniques and processes. First, the Norms anticipate that companies will adopt their own internal rules of operation to assure the protections set forth in this instrument. Second, the

41 Ibid, at 294.
42 Ibid, at 294-295.
Norms indicate that businesses are expected to assess their major activities in light of their provisions. Third, compliance with the Norms is subject to monitoring that is independent, transparent, and includes input from relevant stakeholders. Fourth, if companies violate the Norms and cause damage, the Norms call for compensation, return of property, or other reparations. As the Norms become a matter of business practice, they may be used by national legislatures and courts in establishing whether a company has provided consumers or investors with adequate information about its products and services. In some countries, compliance with the Norms may be relevant to determining liability for injuries caused by businesses and their officers. Fifth, recognizing the significant responsibility of governments, the Norms call upon governments to establish a framework for application of the Norms.43

(5) CONCLUSION

States have adopted international texts which are addressed to corporations themselves and which specifically call for human rights to be respected by TNCs. Individual were recognized as having duties and rights under international law as international tribunals came to exert jurisdiction over such rights and duties. Although there are only rare instances of an international tribunal where a corporation could be the respondent in a dispute, corporations can still be the bearer of international duties. Lack of international jurisdiction to try a corporation does not mean that a corporation is under no international legal obligation. Clearly, if the Nuremberg judgement is to make legal sense, the individuals tried in Nuremberg must have been under some international obligation before the Nuremberg Tribunal was created to try them. This view is reinforced by the reasoning of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadic decision of the Appeals Chamber. International legal obligations can exist independently of any international institution to enforce them, and the ICTY has been at pains to demonstrate that the individuals were bound by existing international law and not due to any law making exercise by the Security Council itself.

Accordingly, international human rights standards should be used to assist governments in respecting human rights themselves and in ensuring respect for human rights by non-State entities. Strong governments should not be seen as the enemy of human rights. Similarly, weakened governments do not necessarily afford adequate human rights protection against abuses by TNCs, armed opposition groups, perpetrators of ethnic

43 Id.
violence, perpetrators of domestic violence, and other non-State entities. While international human rights law and procedures have been used in the past to strengthen the capacity of international institutions *vis-a-vis* governmental violations, they should also be used to strengthen the resolve of governments to protect individuals from human rights abuses by non-State entities.

The relationship between the UN, human rights organizations, and business is as complicated as the relationship between such organisations and governments. Already humanitarian and human rights organizations have started appealing to directly to ‘business’. The President of the ICRC, the UNHCR, and the UN High Commissioner for Human Rights have all made overtures to businesses as part of their response to globalization. All are aware of the instinctive mutual suspicion of the humanitarian and business communities, but all have recognized the global power and possibilities of working more closely with business. Various initiatives with regard to conflict diamonds, and concerning security in the oil and gas extraction sector, have attempted to bring business, governments, and the non-governmental sector, into a framework, or process, which allows for agreement on common standards and a degree of monitoring. The paradigm shift is coming as businesses are treated, not only as partners, but as having responsibilities under the international law of human rights.