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The politics of corporate social responsibility: Reflections on the United Nations Human Rights Norms for Corporations

David Kinley, Justine Nolan and Natalie Zerial*

Corporate Social Responsibility (CSR) has become a fixture on the agendas of corporate boards in much the same way as environmental issues did a decade or so ago. To what extent social responsibilities should be made legally enforceable remains a matter of some fierce debate. There are already many laws in Australia that bind corporations in respect of such “social” issues as occupational health and safety, labour standards, privacy, non-discrimination and environmental protection. But should there be more specific human rights coverage, especially in respect of off-shore corporate activities in developing countries where there are well-documented examples of corporate abuse – or corporate complicity in host-state abuses – of rights to life, protection from physical harm, trade union membership, labour standards and workplace conditions, and others? The United Nation’s Draft Human Rights Norms for Corporations seeks to impose obligations on states to ensure that corporations within their jurisdiction (including extra-territorial) abide by certain minimum human rights standards. Many (but not all) corporations are opposed to the idea and modus operandi of the Norms, as are many (but not all) governments, including Australia’s. In response to these concerns, the United Nations Secretary-General has appointed a Special Representative to review the Norms, which review is currently underway. This article analyses the debate over the Norms, focusing on the various reasons advanced by both sides, their legal implications, and the likely future of the Norms within the context of the developing notion of CSR, internationally and in Australia.

INTRODUCTION

The burgeoning growth of transnational corporations (TNCs) over the past few decades has been paralleled by concerns to find ways of minimising, or at least regulating, the deleterious impacts on social and human rights standards of the ever-increasing number of companies whose corporate tentacles stretch across national boundaries and beyond the reach of traditional corporate control mechanisms. However, neither industry based initiatives, such as individual corporate codes, nor multilateral initiatives, such as the Global Compact¹, involve the kind of concrete obligations that human rights, environmental, labour and other advocates believe are necessary to restrain effectively corporate misbehaviour. To the dismay of activists and the satisfaction of many TNCs, a proliferation of codes, networks and standards has been helping to improve corporate reputations, while effectively keeping any discussion of effective international regulatory measures off the agenda. However, the arrival of the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Norms)² on the international scene in 2003 provided some ground for believing

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¹ United Nations Global Compact. See <http://www.unglobalcompact.org> (viewed 10 January 2007).

² United Nations, United Nations Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html> (Norms) (viewed 4 December 2006).

that this status quo might be challenged. The Norms comprise a set of human rights obligations directed at companies, but which would be imposed upon them by way of the usual means of international law, namely, the domestic laws of individual states.

The heated debate that subsequently erupted epitomises the increasingly pervasive influence of non-state actors in the international arena. Beyond the usual friction between Northern and Southern states, a diverse group of Non-Governmental Organisations (NGOs), business groups, academics, lawyers and corporations each contributed to the vehement dialogue about the Norms,³ which the Secretary General's Special Representative on Business and Human Rights (SRSG) has subsequently described as a "train wreck".⁴ The unfortunate consequence of this furore is that the SRSG has now declared that the Norms are dead,⁵ but not the issues that gave rise to their birth.

The putative demise of the Norms was clearly not the fate that their makers' intended. However, this article argues that, far from being a failure, the Norms have been a beneficial and fruitful initiative, reinvigorating debate on the issue of business and human rights, raising new and important concepts regarding regulation of TNCs and enforcement of human rights obligations, and articulating a core set of standards for going forward. Before the emergence of the Norms in 2003 the focus of many stakeholders in the corporate social responsibility (CSR) arena seemed stalled and largely focused on the pros and cons of establishing and monitoring codes of conducts. A bottom up incremental approach to accountability was being pushed often simply at the level of what can and should be done by individual companies. The introduction of the Norms signalled a "top down" approach from the United Nations that gave hope to many human rights activists that United Nations involvement could quicken the pace of human rights protection, while simultaneously provoking concern from some business representatives and from states who did not welcome United Nations intrusion into the debate. The Norms provoked diverse reactions from the various stakeholders in the CSR community and this chapter aims to map the complex topography of the surrounding debate, including the political and commercial interests that have shaped the landscape and allegedly "poisoned the water".⁶ While the SRSG may have declaimed on the expiration of the Norms, the debate about human rights standards for corporations is now well and truly alive. From the point of view of the legal development of CSR, the Norms are likely to have an ongoing influence on the general direction of and any future initiatives and dialogue in this field, although their immediate influence on domestic policy and law is likely to be more limited.

THE DEVELOPMENT AND STATUS OF THE NORMS

The draft status of the Norms has not mitigated the debate over their content, form and aims. The Norms, avowedly still in draft form, were at a very preliminary stage of their life when the furore over them took off around August 2003. The United Nations sessional working group on multinational corporations, which was responsible for the Norms' development, was only formed in 1998; the decision to develop a code of conduct for TNCs was made in 1999 and the first draft of the Norms appeared in 2000.⁷

³ The Business and Human Rights Resource Centre, an independent not-for-profit organisation, has catalogued the contributions to the Norms debate on their excellent website. Both sides of the debate are equally covered. See <http://www.business-humanrights.org/Gettingstarted/UnitedNationsNorms> (viewed 4 December 2006).

⁴ Ruggie J, remarks delivered at a forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics (Bamburg, Germany, 14 June 2006) available at <http://www.reports-and-materials.org/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf> (viewed 4 December 2006).

⁵ Ruggie, n 4.

⁶ Aram R, *In the Hot Seat: Robin Aram, Vice President of External Relations, Policy and Social Responsibility, Shell* (24 February 2005) available at <http://www.sustainability.com/network/business-leader.asp?id=219> (viewed 4 December 2006).

⁷ United Nations, United Nations Doc, E/CN.4/Sub.2/2000/WG.2/WP.1 (2000) *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises* United Nations. It should be noted that the Norms are not the United Nations's first attempt to engage with the problem of human rights and TNCs. The Centre on Transnational Corporations was established by the United Nations in 1975, and by 1977 it was coordinating negotiation of a voluntary *Draft Code of*

The din of debate over the Norms got progressively louder once the Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) unanimously adopted the draft Norms in August 2003,⁸ and continued apace throughout the period leading up to the first consideration of the Norms by the United Nations Commission on Human Rights (CHR) at their 60th session in April 2004. No doubt due to a combination of public and behind-the-scenes lobbying by pro- and anti-Norms groups, the CHR's approach to the Norms has been characterised by prudence, generally encouraging further consultation and analysis. At its 60th session, it requested the Office of the High Commissioner of Human Rights (OHCHR) to consult with all the relevant stakeholders, and to compile a report analysing the Norms in light of the various existing initiatives and standards on business and human rights.⁹ When debate continued after this OHCHR report was published in February 2005,¹⁰ the CHR requested at its 61st session that the United Nations Secretary-General appoint a Special Representative on the issue of human rights and business (SRSG).¹¹

Professor John Ruggie of the Kennedy School of Government at Harvard University was appointed to this position in 2005,¹² and he has since continued the extensive consultation process begun by the OHCHR.¹³ He published an Interim Report in 2006¹⁴ and, at the time of writing, was preparing for his final report, which is to be delivered in mid-2007.¹⁵ The SRSG's interim report, apart from indicating dissatisfaction with the form and reach of the Norms, reflected Ruggie's desire to accommodate both sides of the debate. Admittedly the report, and his surrounding commentary, has been patently critical of some aspects of the Norms, viewing the initiative as "engulfed by its own doctrinal excesses" and creating "confusion and doubt" through "exaggerated legal claims and conceptual ambiguities".¹⁶ However, Ruggie has acknowledged the usefulness of some of the substance of the Norms, particularly the summary of rights that may be affected by business.¹⁷ No matter what is said about the unsustainable status of the Norms in their present form, it should and will not relegate their substantive content and the debate that has surrounded them to history; these elements will inevitably continue to mark out the contours of deliberations in the area for some time to

Conduct on Transnational Corporations. However, no final agreement was concluded. See Blendell J, *Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement* (Paper No 13, United Nations Research Institute for Social Development Programme on Technology, Business and Society (2004) 11).

⁸ United Nations, Sub-Com Res 2003/16, "Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights" (13 August 2003), in *Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-Fifth Session*, 20 October 2003, E/CN.4/Sub.2/2003/43) at 51-53.

⁹ United Nations, CHR Dec 2004/116, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* (20 April 2004, E/CN.4/Dec/2004/116).

¹⁰ United Nations, *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights* (15 Feb 2005, E/CN.4/2005/91).

¹¹ United Nations, CHR Res 2005/69, *Human Rights and Trans-national Corporations and Other Business Enterprises* (20 April 2005, E/CN.4/RES/2005/69).

¹² United Nations, *Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises* (28 July 2005, United Nations Doc SGA/A/934) <http://www.un.org/News/Press/docs/2005/sga934.doc.htm> (viewed 4 December 2006).

¹³ The SRSG, in collaboration with the Business and Human Rights Resource Centre, is maintaining a website where he posts relevant materials on his mandate and the consultation process. See <http://www.business-humanrights.org/Gettingstarted/UnitedNationsSpecialRepresentative> (viewed 4 December 2006).

¹⁴ United Nations, *Interim Report of the Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (22 February 2006, E/CN.4/2006/97).

¹⁵ The SRSG has already noted the "existing time and resource constraints" (United Nations, n 14 at [6]) which will inevitably limit the scope of his final report; however, there is a strong probability that his mandate will be extended in line with United Nations practice.

¹⁶ United Nations, n 14 at [59].

¹⁷ United Nations, n 14 at [57]-[58]. See further, his reiteration of these points in his Opening Statement to the United Nations Human Rights Council (25 September 2006) pp 2 and 4; available at <http://www.reports-and-materials.org/Ruggie-statement-to-United-Nations-Human-Rights-Council-25-Sep-2006.pdf> (viewed 4 December 2006).

come. The SRSR's consultation process, while attempting to reconcile both sides of the debate, has already exposed the persistent conflicting reactions to the process of the Norms' creations, and to its form, content and aims.

THE REACTION TO THE NORMS: STEPPING INTO THE CSR DEBATE

CSR itself, particularly the place of human rights in CSR, is already contentious ground. One of the reasons the Norms have engendered such controversy, therefore, is that they have stepped into the middle of this debate, not only by crystallising the connection between human rights and CSR, but by positing a system whereby international law responds directly and forcefully to corporate action that violates such rights. It is thus not surprising that much of the critical commentary on the Norms corresponds with the many of the concerns frequently voiced in respect of other CSR matters, such as the perceived problems that might flow from soft laws made hard, and from the alleged inappropriateness of placing human rights obligations on corporations.¹⁸

CSR in its present state is an exceptionally broad-reaching and varied melange of soft and hard law, encompassing subjects as diverse as the environmental and fiscal responsibilities of corporations, as well as occupational health and safety, labour rights and, most importantly for our discussion, human rights obligations. The legal aspects of CSR generally have been promoted through national initiatives,¹⁹ although legal, quasi-legal and political initiatives²⁰ have proliferated at the international level. To a certain extent, and much to the consternation of their detractors, the Norms were an attempt to remedy this piecemeal approach to CSR by uniting these obligations in one document.²¹ For instance, the Norms took a broad-brush approach to defining "human rights", including inter alia environmental obligations, consumer protection and labour rights among their provisions. They also sought to conjoin the national and international levels of CSR: while maintaining that states have the primary responsibility for ensuring that business respects human rights,²² the Norms placed state responsibility in an international framework, articulating global standards for corporate behaviour and recognising that any effective CSR regime in the current global environment required amalgamating states' responsibilities with direct regulation of corporate action.

The Norms were thus an innovative response to at least some of the established problems with CSR. In this context the intensity of the debate is hardly surprising – companies and business organisations were already conversant in CSR and were furthermore mobilised to engage with and lobby on it. The Norms had the disadvantage of being frighteningly new on a playing field that was already dominated by experienced, well-funded and often antagonistic players.

Two sides (or more) to every debate

At the outset of this discussion, it is worth noting certain key features of the debate about the Norms. The first point is that the debate, which has involved a large but predictable variety of players – human rights and labour NGOs, trade unions, corporations, national and international business organisations, lawyers, and academics from multiple disciplines – has not split along obvious factional lines. While

¹⁸ For such arguments and their rebuttal, see Parker C, "Meta-Regulation: Legal Accountability for Corporate Social Responsibility", in McBarnett, Voiculescu and Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (forthcoming, 2007).

¹⁹ *Corporate Code of Conduct Bill 2000* (Australia); *Corporate Responsibility Bill 2003* (UK); and *Corporate Code of Conduct Bill 2000* (US). See also n 68 below and accompanying text.

²⁰ For example, see the United Nations Global Compact available at <http://www.unglobalcompact.org> (viewed 4 December 2006); the *Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises* (27 July 2000); and the *International Labour Organisation's Tripartite Declaration on Fundamental Principles and Rights at Work* (1998).

²¹ International Organisation of Employers (IOE) and International Chamber of Commerce (ICC), *Joint views of the IOE and ICC on the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights": The Sub-Commission's draft norms, if put into effect, will undermine human rights, the business sector of society, and the right to development: The Commission on Human Rights Needs to End the Confusions Caused by the Draft Norms by Setting the Record Straight* (March 2004) available at <http://www.reports-and-materials.org/IOE-ICC-views-United-Nations-norms-March-2004.doc> (viewed 4 December 2006) pp 24-25.

²² See Art 1 in United Nations, n 8.

the players have been unsurprising, the sides they have taken have at times defied expectations. For instance, a number of corporations and businesses, most notably those involved in the Business Leaders Initiative on Human Rights (BLIHR), have actively supported the Norms,²³ while a number of international law academics have expressed concerns about the form and content of the Norms,²⁴ and some human rights organisations, such as Amnesty International, while stressing the valuable contribution that the Norms have made, have accepted that their current format constitutes merely a basis for going forward, rather than a blue-print.²⁵

The second point is that the polarisation of the debate into two camps – those for the Norms and those against the Norms – is not only a largely artificial division, but has contributed to the present impasse. The Norms are explicitly in draft form, and were brought before the international community with the intention that they would be the subject of amendment, debate and reform.²⁶ However, instead of looking to how the Norms could be changed to accommodate different views, the polarised debate has prematurely translated a draft document into a static and immutable one, which must be accepted or rejected as a whole. This has split the proponents of the Norms between those who can envisage substantive changes to the Norms that will still achieve the aims of human rights regulation of business, and those who believe that Norms need to be preserved wholly or largely in their present form. The polarisation has also allowed those companies who dislike the Norms for the simple self-serving reason that they wish to avoid their human rights obligations, to hide behind the more eloquent and often cogent arguments of those who oppose the Norms for particular formal or practical reasons. Companies can thus conveniently denigrate the Norms without hurting their corporate image.²⁷

Critical responses to the Norms

The arguments for and against the Norms have been discussed in greater depth elsewhere.²⁸ This article is concerned less with the merits of these arguments than with asking who is voicing the various objections to the Norms, and why. In particular, the following discussion tries to expose how the two issues discussed above – the players and the artificial polarisation – have impacted on the various criticisms levelled at the Norms.

The challenges to the Norms have been underlined by criticism of the process of their creation. Primarily, states, corporations and business groups have complained about the failure of the Sub-Commission and the Working Group to engage in sufficient consultation.²⁹ However, the accuracy of this criticism has been disputed.³⁰ Multi-stakeholder consultations were conducted,³¹ and included, among others, the International Business Leaders Forum and the World Business Council for

²³ See Business Leaders Initiative on Human Rights (BLIHR), <http://www.blihr.org> (viewed 4 December 2006). The 12 participating companies are ABB Ltd, Alcan Inc, AREVA, Barclays PLC, Gap Inc, Hewlett Packard Co, MTV Europe Networks, National Grid PLC, Novartis Foundation for Sustainable Development, Novo Nordisk A/S, Statoil ASA and The Body Shop Int PLC.

²⁴ See for example the comments made by John Ruggie quoting Philip Alston in *Comment to FIDH Position Paper by John Ruggie, United Nations special representative on Transnational Corporations & Human Rights* (20 March 2006) available at http://www.fidh.org/article.php?id_article=3166 (viewed 4 December 2006).

²⁵ See letter from Irene Khan, Secretary-General, Amnesty International to John Ruggie, Special Representative on Human Rights and Transnational Corporations (27 April 2006) available at <http://web.amnesty.org/library/index/engior500022006> (viewed 4 December 2006).

²⁶ The Commission on Human Rights expressly recognised their status as such: see Commission on Human Rights, Agenda Item 16, United Nations Doc E/CN.4/2004/L.73/Rev.1 (2004). For discussion, see Nolan J, (2005) "With Power Comes Responsibility: Human Rights and Corporate Accountability" 28 *United Nations SWLJ* No 3 581, pp 604-605.

²⁷ See claims made about Shell and Robin Aram (Shell's Vice-President of External Relations and Policy Development) in this regard: Corporate Europe Observatory, "Shell Leads International Business Campaign Against United Nations Human Rights Norms", *CEO Info Brief* (March 2004) available at <http://www.corporateeurope.org/norms.html> (viewed 4 December 2006).

²⁸ Kinley D and Chambers R, "The United Nations Human Rights Norms for Corporations: The Private Implications of Public International Law" 6(3) 2006 *Human Rights Law Review*, pp 16-33; and Nolan, n 26, pp 584-605.

²⁹ IOE-ICC joint submission, n 21, pp 18-19, 29. See Kinley and Chambers, n 28, pp 11-12.

³⁰ Corporate Europe Observatory, n 27.

Sustainable Development.³² According to one commentator, the responsibility for any feelings of disenfranchisement lie directly with the business groups themselves who “instead of communicating their views directly to the working group [chose] back-channel lobbying against the Norms”.³³ Similarly, a number of states indicated their displeasure at their lack of involvement in the Norms’ development, which they in part indicated in the 2004 CHR resolution, when they declared that the Norms had not been created at their instigation.³⁴ This is despite the fact that, as the delegate for Cuba highlighted, “studies did not always have to have been requested in advance by the Commission”.³⁵ The SRSG’s conspicuous and wide-ranging programme of consultation has been a more or less successful attempt to remove any grounds for such accusations in respect of future initiatives. Given that the CSR community involves a very broad range of stakeholders, to move beyond the impasse of the Norms and achieve real prospects for progress in the protection of human rights in the business arena, all voices must be heard. While trade unions and NGOs often claim the moral ground of speaking for workers, companies too must be involved and empowered in the development of CSR.³⁶ However, calls for further engagement should not be used as a delaying tactic or simply because some players are unhappy with the shape the debate is taking. Notably, in this respect, the ICC on the one hand had called for a “more systematic” consultation process,³⁷ while also commenting to the SRSG that it had decided to drop out of negotiations on the basis that “the topic of discussion became the shape of the table in the tribunal chamber where companies would be tried”.³⁸ Good faith consultation is necessary and beneficial; but participation cannot be predicated on any particular stakeholder getting their own way.

In relation to the Norms themselves, their most polarising feature is their apparent attempt to impose obligations directly on companies, in addition to parallel obligations on states. This sought to address one of the most significant barriers to regulating TNCs: the fact that, due to their transnational nature, they often operate in a legal vacuum, particularly in states that are themselves human rights violators or which are too weak to prevent or remedy violations. Directly binding TNCs through international law could be one way of overcoming this problem, but it is an unorthodox step, and is exaggeratedly portrayed by the Norms’ detractors as turning international law on its head.³⁹ The unfavourable reactions to these perceived legal implications of the Norms range across quizzical academic commentary,⁴⁰ through states’ scepticism,⁴¹ to outright corporate hostility.⁴² On the other hand, for many human rights NGOs, this kind of legal progressivism is essential to achieving change

³¹ Weissbrodt D and Kruger M, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (2003) 97 *American Journal of International Law* 901, pp 904-905.

³² Corporate Europe Observatory, n 27.

³³ Corporate Europe Observatory, n 27.

³⁴ United Nations CHR Dec 2004/116, n 9, para (c).

³⁵ United Nations, E/CN.4/2004/SR.56 (26 April 2004); 60th Sess, 56th Meeting, 20 April 2004, at 10 am: see [155].

³⁶ See the ICC’s stakeholder submission, n 21, p 6 – their definition of “consultation” is a process “which is based on open discussion without pressure, among a group of equals, feedback and joint reflection, and some effort to arrive at joint conclusions.”

³⁷ International Chamber of Commerce stakeholder submission to the OHCHR: letter from Maria Livanos Cattai, International Chamber of Commerce, to Dzidek Kedzia, OHCHR (7 September 2004) pp 5-6 at <http://www.ohchr.org/english/issues/globalization/business/docs/intchamber.pdf> (viewed 4 December 2006).

³⁸ Ruggie, n 3.

³⁹ See Kinley and Chambers, n 28, pp 30-42. Such portrayal is exaggerated at least in the sense that since the Nuremberg Trials international law has taken note of, and imposed obligations upon, individuals and other non-state entities; on which history see Clapham A, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) pp 59-83. The direct imposition of obligations on non-state entities by international law is perhaps most clearly illustrated today by the *Statute of the International Criminal Court 1998*, Art 25 of which sets out the conditions under which individual criminal liability for war crimes and crimes against humanity are to be established. In respect of the less conspicuous (but extant) instances of international law binding corporations, see discussion in Kinley and Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law”, (2004) 44 *Virginia Journal of International Law* 931, at 993-994.

⁴⁰ For example, Baxi U, “Market Fundamentalisms: Business Ethics at the Altar of Human Rights” (2005) 5 *Human Rights Law Review* 1.

in corporate human rights behaviour. This debate over this particular aspect of the Norms reflects the broad debate in CSR about the appropriate response of international law to corporate misbehaviour. Minimalists argue that international law is not the appropriate method of dealing with corporations, beyond, that is, the limited scope of soft international law initiatives, such as the United Nations's Global Compact, which are voluntary and exhortatory rather than legally binding;⁴³ while maximalists argue that international law can and should be used to bind corporations, and even lobby for an instrument analogous to the Rome Statute of the International Criminal Court, that might impose international law directly on corporations through an international adjudicative body.⁴⁴ More than any other subject, this controversy has prevented the Norms from going forward, mainly because it is not a problem of drafting but concerns the fundamental mechanism and design of any standards seeking to regulate corporate action that violates human rights.

Part of the perceived problem with imposing international legal obligations directly on corporations has been that it "privatises human rights".⁴⁵ Under the extreme version of this argument, the Norms are accused of absolving states of their international human rights law responsibilities by placing obligations on institutions that are neither democratically elected nor qualified to make the sorts of difficult decisions regarding human rights that are required by international law. Human rights obligations can be interpreted as involving qualitative assessments of what might constitute compliance, and is thus arguably distinguishable from the occupational health and safety, financial reporting, environmental and other obligations that domestic laws increasingly impose on corporations. However it appears more likely that it is the twin costs of compliance, and (the potentially even higher costs of) non-compliance with such obligations, which constitute the prime motivating factors spurring on corporate objections to such legal obligations.

A closely related controversy concerns the intended legal status of the Norms. In contrast to the voluntary and generally aspirational format of existing international instruments and codes on TNCs, the Norms seek ultimately to impose binding legal obligations on states and on corporations, and suggest the possible use of international as well as national courts and tribunals to uphold the Norms' principles and impose damages on recalcitrant corporations.⁴⁶ The explanations for opposition to the legal character of the Norms have included both specific arguments that it upsets the legal order,⁴⁷ as well as more whimsical or rhetorical objections, such as the claim that there are too many "whereases" in the text of the Norms for businesses to be comfortable.⁴⁸ In fact, there is not a single "whereas" in the Norms. Instead, there are many instances of a more admonitory and a far more discomfiting legal word for businesses interesting in escaping concrete responsibilities: "shall". The professed disdain for legalese seems to be a façade behind which some businesses are hiding their fear of being exposed to new and relatively unprecedented avenues of legal liability. This concern of the corporate lobby is perhaps well founded. The cases brought under the United States' *Alien Torts Claims Act 1789* have

⁴¹ See Kinley and Chambers, n 28, at footnote 72 and accompanying text.

⁴² See nn 47 and 48 below and accompanying text.

⁴³ See United Nations Global Compact, n 19. See also, Nolan J, "The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?" (2005) 24 *University of Queensland Law Journal* No 2 at 445 and Deva S, *The Global Compact For Responsible Corporate Citizenship: Is It Still Too Compact To Be Global?* (conference paper presented at the 3rd ASLI Conference on The Development of Law in Asia: Convergence versus Divergence, in Shanghai, 25-26 May, 2006).

⁴⁴ The ICC currently has jurisdiction over genocide, war crimes and crimes against humanity with respect to individuals only, but that includes individuals acting in their capacities as directors, employees or agents of corporations; see further, n 64, and also Nolan, n 43, pp 450-451.

⁴⁵ IOE-ICC joint submission, n 21, p 1.

⁴⁶ Norms, n 2, Art 18.

⁴⁷ Mendelson M, *In the matter of the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights": Opinion of Professor Emeritus Maurice Mendelson QC* (4 April 2004) at [29], available as "Report I" to CBI's stakeholder submission to the Report of the High Commissioner for Human Rights, at <http://www.ohchr.org/english/issues/globalization/business/contributions.htm> (viewed 4 December 2006).

⁴⁸ As reported of Shell's Robin Aram, see Corporate Europe Observatory, n 27.

already demonstrated that human rights can be costly for corporations.⁴⁹ Yet the practicality of such an objection, let alone its morality, is questionable. A fear of unmeritorious claims is forgivable, albeit one that should be viewed critically in light of the cost of litigation and other factors. However, to the extent that corporations are seeking to prevent genuine claims of abuse by appealing to a need to maintain the current legal status quo, they are engaging in the type of corporate self-interest and protectionism that has led to the often bad human rights reputation of business worldwide.

A final objection to note is the evident distrust of the language of “sphere of influence” and “complicity” as used in the Norms. Related to the anxiety over legalese – especially international legalese – some corporations and their legal advisers have railed against the vagueness of certain terms and provisions in the Norms.⁵⁰ One critic has even suggested that a corporation that pays tax to a government “suspected of past or, possibly, future human rights abuses” might thereby be considered “complicit” in human rights violations under the Norms.⁵¹ In large measure, this type of reaction to the terminology used in the Norms is the clearest example of the degree of the scare factor behind the corporate campaign to kill off the Norms. It is widely acknowledged, even by the Norms’ supporters, that these terms do indeed need further definition, and that the process of refining their meaning should draw on well-established concepts in tort, criminal law or even contract law, building on tests such as those for causation and duty of care.

In fact, this process has already begun. Defining the scope of a company’s “sphere of influence” and clarifying the limitations on corporate complicity in human rights violations, is a specific part of the SRSG’s mandate. Further, the companies involved in the Business Leaders Initiative on Human Rights have also taken up the gauntlet in a very practical manner to delimit what conduct such terms might incorporate.⁵² The question of who or what falls within the sphere of activity and influence of a corporation – that is especially, to which stakeholders the obligations to protect, promote, respect and secure the fulfilment of human rights are owed – will likely not turn on legal principles alone. The same can be said of determining the limits of corporate complicity.⁵³ But these are issues where debate and practical experience is essential in clarifying the terms and setting limits on liability. Calling for the outright rejection of the Norms because of lack of precision in the terms it uses is an extreme reaction – especially in light of their current draft status, which is precisely disposed to ironing out through debate and discussion textual difficulties such as these. Concurrently, much of the NGO support for the Norms overlooks the need for further clarification in these areas. For the debate to move forward, the shortcomings of the language used and the need for rearticulating certain principles has to be both acknowledged and addressed.

Constructive responses to the Norms

Having painted a rather bleak picture of the Norms’ reception, we now turn to the more enthusiastic and constructive responses to the Norms and their aims. As a matter of fact, the strong opposition to the Norms has been matched by an equally robust and, at times, equally single-minded, movement in support of them. There can be no doubt that the more fundamentalist Norms’ supporters have, like the Norms’ fundamentalist detractors, exacerbated conflict over the Norms. While the Norms’ creators

⁴⁹ See generally, Joseph S, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004). No case has yet gone through to judgment under ATCA but costs are still incurred, both in defending the allegation and in several cases paid through out-of-court settlements, eg, see Chambers R, “The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses” (2005) 13 *Human Rights Brief* 14.

⁵⁰ IOE-ICC joint submission, n 21, which argued that the draft Norms are “extraordinarily vague” and as such, actions taken to enforce the Norms “will result in widespread arbitrariness – violating the interests and rights of business” at 3; see also Mendelson, n 47 at 9.

⁵¹ Deal TE, (Senior Vice President, Washington, United States Council for International Business) *The Proposed Norms on the Responsibilities of Business Regarding Human Rights* (statement to the Fund for Peace, Human Rights and Business Roundtable, Washington, DC, 6 February 2004) available at <http://www.uscib.org/index.asp?documentID=2823> (viewed 4 December 2006).

⁵² Originally 10 companies, there are now 12 participating companies (listed at n 23). See text accompanying n 56.

⁵³ In this respect, see the work of the International Commission of Jurists, available at http://www.icj.org/news.php?id_article=3961&lang=en (viewed 4 December 2006) and accompanying text of n 59, below.

were modest about the legal status of the initiative, some NGOs incorrectly trumpeted the Norms as a codification of customary international law.⁵⁴ They have also vociferously advocated that part of the initiative that suggests the direct imposition of obligations on corporations, despite the practical difficulties of achieving consensus on this issue and the equally important problems of implementation.⁵⁵

One of the most constructive approaches to the Norms has come from a small but influential part of the corporate sector itself, which, although not providing uncritical support for the initiative, has tried to build on the substance of the Norms in order to formulate best practice regulation of corporate behaviour in relation to human rights. Specifically, this has been the approach of the Business Leaders Initiative on Human Rights (BLIHR), which consists of a growing number of companies that have sought to demonstrate and develop the Norms' potential by "road-testing" them in the context of their existing business operations.⁵⁶ BLIHR has now produced three reports, documenting their approach and the lessons they have learnt throughout this process. Apart from showing the possibility of engagement with, in contrast to opposition to human rights by business,⁵⁷ the group has also shown that some of the most controversial features of the Norms are much less confronting than the bulk of the corporate lobby has suggested. An excellent example of this is the work that the BLIHR companies have done on refining the concepts of "sphere of influence" and "complicity" in the practical setting of everyday commercial activity.⁵⁸

Another worthwhile response to the Norms has been from a number of international lawyers and academics who have sought to use this process to develop the international legal aspect of CSR. Here, notably, the International Commission of Jurists (ICJ) has begun work on defining the legal aspects of corporate complicity and human rights with direct reference to the Norms and the debate the Norms have engendered.⁵⁹ The ICJ initiative has kick-started a lively and constructive legal debate about the way international law should address corporate crime, and the SRSG has expressly indicated he will keep a keen eye on these discussions, from which he will certainly gain.⁶⁰ CSR can only benefit from fuller engagement with the academic and legal community on the difficult issues that arise in attempts at regulation.

MOVING PAST THE POLITICS? RUGGIE'S RESPONSE

As SRSG, Professor John Ruggie has tried to move past the "divisive debate over the Norms" and to reconcile the pro- and anti-Norms lobbyists by illuminating what unites rather than what divides the two camps.⁶¹ In order to achieve this aim, he has declared that the manner in which the Norms are framed must be abandoned, but has confirmed that their substance may be resurrected in a new and less controversial format.⁶² This could be done in part by choosing to focus on further clarifying the rights relevant to business and by setting limits on their applicability by defining what falls within a corporation's sphere of influence, while leaving actual implementation and enforcement to national law mechanisms. This will not satisfy all parties but would be a beneficial, if incremental step, toward

⁵⁴ See, for example, Amnesty International, *Statement of Support for UN Human Rights Norms for Business* (8 March 2004), <http://web.amnesty.org/library/Index/ENGIOR420052004?open&of=ENG-393>.

⁵⁵ For example, see the Joint Submission to OHCHR on the Human Rights Responsibilities of Business, Prepared by Rights and Accountability in Development (RAID); World University Service (German Committee) Forum Menschenrechte; the International Network for Economic, Social, and Cultural Rights (ESCR-Net) (September 2004).

⁵⁶ See n 52.

⁵⁷ BLIHR, *Report 3: Towards a Common Framework on Business and Human Rights: Identifying Components I* (June 2006).

⁵⁸ BLIHR, n 57, pp 9-11.

⁵⁹ See the International Commission of Jurists, n 53.

⁶⁰ See Baker M, *Mapping Out the Way Ahead for Business and Human Rights Business Respect*, No 90 (12 March 2006) available at http://www.mallenbaker.net/csr/CSRfiles/page.php?Story_ID=1554 (viewed 4 December 2006).

⁶¹ United Nations, n 14 at [69].

⁶² "The Norms are dead! Long live their Principles!" has been suggested by Geoffery Chandler as the banner under which the quest for corporate accountability for international human rights abuses ought now be pursued; in correspondence (April 2006).

refining the legal aspects of CSR. Of more interest in the present context is how Professor Ruggie has responded to the Norms' reception, and his vision for moving forward.

Professor Ruggie is a political scientist rather than a lawyer, and he has approached his mandate with the goal of engaging with the politics surrounding the initiative, rather than ignoring or trying to escape it. This has its benefits and disadvantages. The political response to the Norms has been characterised by inappropriate and unfortunate division and confrontation, with extreme views being expressed by both sides. While disengagement with any stakeholder is not a viable option, international law, particularly international human rights law, cannot simply be subordinated to political engagement. Ultimately the purpose of any human rights initiative for business is not to placate or stifle business but to ensure that human rights are protected, respected and upheld as part of good business practice. Complaints and concerns from the corporate sector must be acknowledged, but should also be viewed in their proper context. Formal human rights standards will inevitably place some burden on business. However, as BLIHR has shown, the size of that burden need not be excessive and, if businesses choose, they can embrace such an initiative and the supplementary benefits of clearer and universal standards as well as the benefits of human rights compliance for their corporate culture and image. However at the same time the socio/political reality of the context in which greater corporate accountability is being sought must be acknowledged. Incremental steps that clarify the circumstances under which corporations can and do have human rights responsibilities are positive, but should not be the final step.

The SRSG shares the traditional view that the best way to regulate corporations is via state responsibility, although he has also recognised that states are not always willing or capable of implementing human rights regulations. That said, his primary engagement with this problem has thus far focused on discussion of "weak governance zones",⁶³ and his vicarious concern with corporate complicity in states' human rights abuses.⁶⁴ He has yet to address the far more controversial issue that all states can fail in terms of corporate human rights regulations, and that developed states can be and have been party to corporate human rights abuses.⁶⁵ Reconciling the traditional academic view of international law with the real human rights failings of all states is one of the SRSG's most difficult tasks. From a purely theoretical point of view, the maximalists are undeniably correct about the capacity of international law to speak directly to corporations, if and when states consent to do so. A corporate equivalent of the International Criminal Court is not only possible, it has already been mooted, albeit unsuccessfully to date⁶⁶ and, as Ruggie points out, "there are no inherent conceptual barriers to States deciding to hold corporations directly responsible [for violations of international law]... by establishing some form of international jurisdiction".⁶⁷ Indeed, the objections to the legal aspects of the Norms do not dispute the possibility of international law binding corporations, although they are careful to mount the argument that no such international legal apparatus exists at the moment – rather they dispute the practicality of trying to first, obtain consent from states for such an instrument and secondly, implement such a system.

The SRSG's conclusions on enforcement mechanisms are also of interest. Thus far, he seems to be keen on formulating universal and consensual human rights standards rather than creating enforcement mechanisms. This is certainly helpful in avoiding going over the same contested ground as before with the Norms, as any initiative involving real legal teeth is going to result in strong resistance from a number of states and corporations. However, NGOs are rightly critical of the value of any initiative that does not have any meaningful enforcement provisions. Voluntarism has its limits.

⁶³ United Nations, n 14 at [27], [30] and [75].

⁶⁴ See nn 57 and 58 and accompanying text.

⁶⁵ Complaint to the Australian National Contact Point, regarding allegations of human rights abuses in immigration detention centres run by a private security firm – namely, Global Solutions Ltd. See further: http://www.bsl.org.au/pdfs/FinalStatement_GSL_Australia.pdf (viewed 4 December 2006).

⁶⁶ A proposal by France that the Rome Statute include a provision that extended criminal liability beyond individuals to include legal persons, such as corporations, was never adopted. See "Developments-International Criminal Law" 114 (2001) Harv L Rev 1943, 2031-2032.

⁶⁷ United Nations, n 13 at [65].

Consensual and universal standards are undoubtedly a laudable aim, but they will be unlikely to satisfy any but the corporate sector who are already happy with the manifold voluntary codes that seek to regulate their behaviour.

Implications for Australian companies

In a report issued in June 2006, an Australian Parliamentary Committee noted that “corporate responsibility is emerging as an issue of critical importance in Australia’s mainstream business community”.⁶⁸ The level of interest from Australian companies and regulators in addressing corporate responsibility has waxed and waned over the past three decades, however there has been a flurry of recent governmental activity in the area. In March 2005, the Australian Government’s Corporations and Market Advisory Committee (CAMAC) was asked to consider and report on several issues relating to corporate responsibility. Just a few months later in June 2005 the Federal Government’s Parliamentary Joint Committee on Corporations and Financial Services (PJCFCS) announced that it would also conduct an inquiry into corporate responsibility. Both inquiries focused on the current regulatory regime and the extent to which Australian law, particularly the *Corporations Act 2001* (Cth) permits or requires corporate decision makers to have regard for the interests of stakeholders other than shareholders, and the broader community. Ultimately the inquiries were assessing the role government can or should play in promoting “socially responsible behaviour by companies” and early results indicate a predisposition to promoting a voluntary approach to corporate responsibility that is led by business and not imposed by government.⁶⁹

In Australia, the promotion of corporate social responsibility seems to largely rely on companies adopting a strategy of “enlightened self interest”. In its 2006 report, the PJCFCS accepted that the desire of most companies to avoid regulation would voluntarily spur business to “improve responsible corporate performance”⁷⁰ and consequently the existing legal framework, that relies on business adopting an enlightened self-interest approach to integrating human rights and corporate responsibility notions into its operations, is largely adequate. These conclusions of the PJCFCS, and the likely predisposition of CAMAC to adopt a similar stance, emphasising the voluntariness of corporate responsibility, is perhaps not surprising given the overarching views of the Federal Government. The Australian Government made its stance on corporate responsibility clear in its official response in late 2004 to the proposed United Nations Norms in the context of their debate by the United Nations Human Rights Commission. Writing in the context of international legal responsibility for human rights standards, the Government’s formal response included these revealing comments:

The Australian Government is strongly committed to the principle that guidelines for Corporate Social Responsibility (CSR) should be voluntary. The Norms represent a major shift away from voluntary adherence. The need for such a shift has not been demonstrated ... We believe the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging greater awareness of societal values and concerns through voluntary initiatives.⁷¹

Consistent with this approach, the PJCFCS recommended the establishment of an Australian Corporate Responsibility Network that would be an industry vehicle to raise the collective level of corporate responsibility performance in Australia. While more extensive industry cooperation in this area is a positive step, voluntarism has its limits, particularly if initiatives remain exclusively in the domain of business, without any significant public transparency, external stakeholder input or any external pressure to ensure that CSR is treated as a business practice rather than merely a public relations exercise. Network learning may act as an impetus for improving corporate behaviour, but

⁶⁸ Parliamentary Joint Committee on Corporations and Financial Services (PJCFCS), *Corporate responsibility: Managing risk and creating value* (2006) at xiii, available at http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/report/index.htm (viewed 4 December 2006).

⁶⁹ The PJCFCS’s report was issued in June 2006, see n 68. At the time of writing, CAMAC had not yet issued its final report, which is expected sometime prior to the end of 2006.

⁷⁰ United Nations, n 2 at xiv.

only if business takes the next step and incorporates it into its practices.⁷¹ For corporate responsibility to survive and indeed succeed in Australia, companies must be open to and seek input from a broad array of stakeholders (such as its employees, its customers and the community in which it operates) as to the relevance of human rights in its business operations and the most effective means of ensuring such rights are respected, promoted and protected. The power and prominent role of corporations in society and the perceived reach of corporate activities and influence rightly give rise to concern about the impact of corporate conduct on the broader community. Such concern is evident in the media interest in recent examples of corporate irresponsibility,⁷² but it seems at present that there is little impetus, at least from regulators in Australia, to keep pace with international initiatives and to act on such concerns.

WHERE TO FROM HERE FOR CSR AND INTERNATIONAL LAW?

After all of the political furore, what has been achieved? A great deal, one might say, particularly from the perspective of CSR. The Norms and the surrounding debate have brought renewed attention to the issue of corporate influence on human rights and have forced states, corporations and international corporate groups such as the International Chamber of Commerce to think seriously about this issue. The Norms have also identified a path to crystallising soft law on CSR into hard law, although, as we have noted, any such path to that end remains one of the most controversial aspects of the Norms.

Despite the intriguing and cogent arguments for an international document that speaks directly to corporations, the way forward will inevitably be through the international legal orthodoxy of state responsibility. International law must be the spine of any serious effort to reform this area, and by utilising the traditional modes of regulation some of the poisoned ground may be bypassed, and states may be more willing to come to the table. However, this does not mean that the process would be irrelevant for corporations outside of domestic regulation. As BLIHR has shown, initiatives in this area can and should be embraced by corporations, not merely out of fear of legal liability, but as best practice requires.

The next big question is how effectively to extend state responsibility in respect of TNCs. There are increasing examples of states trying to regulate corporate behaviour, particularly in areas of environmental protection and even social responsibility,⁷³ as well as corporate (especially fiscal) governance,⁷⁴ however few of these have an extra-territorial reach.⁷⁵ It may be necessary to incorporate some form of extra-territorial jurisdiction in a state's internal regulations in order to properly address the TNC phenomenon. Alternatively, the possibility for some form of international dispute mechanism holds certain benefits.

⁷¹ Network learning is also the backbone of the United Nations Global Compact. See n 20.

⁷² For example, recent media interest in companies such as James Hardie Industries and its equivocating payments to asbestos victims, and the corruption allegations against the Australian Wheat Board (AWB) and its alleged payments to Saddam Hussein's regime, have brought the issue of corporate responsibility into the public eye via the mainstream press. Regarding James Hardie, see the Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (September 2004), available at <http://www.lawlink.nsw.gov.au/mrcf> (viewed 4 December 2006). With respect to AWB, in November 2005, the Hon TRH Cole was appointed Commissioner to conduct an inquiry into and report on whether decisions, actions, conduct or payments by Australian companies mentioned in the Final Report (*Manipulation of the Oil-for-Food Programme by the Iraqi Regime*) of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme breached any Federal, State or Territory law. The AWB is one of the companies being investigated. See <http://www.ag.gov.au/agd/www/UnitedNationsOilForFoodInquiry.nsf> (viewed 4 December 2006).

⁷³ See for example, in the United Kingdom, the *Companies Bill 2006*, cl 173(1)(d) which, within the general duty of directors to act in ways that "promote the success of the company", obliges directors to have regard to "the impact of the company's operations on the community and the environment"; see <http://www.publications.parliament.uk/pa/cm200506/cmbills/218/2006218a.pdf> (viewed 4 December 2006).

⁷⁴ See, for example, in the United States, the *Sarbanes-Oxley Act (2002)* Pub L No 107-204.

⁷⁵ Corporate social responsibility legislation introduced into the legislatures of the United States, the United Kingdom and Australia in recent years has sought expressly to apply extra-territorially; none of these initiatives, however, was successful. For discussion, see Kinley and Tadaki, n 39 ("From Talk to Walk"), p 942, and McBeth A, "A Look at Corporate Code of Conduct Legislation" (2004) 33 *Common Law Review* 222.

In our view, any further push to have the Norms adopted in their current form is a lost cause – whatever the merits of such an argument. That said, in so far as there is need and value in formulating international standards for corporate respect for human rights (and we believe there is on both counts), then it is hard to see past the existing core substantive provisions of the Norms. If one was indeed to start all over again, then the list of rights relevant to corporate enterprise one would almost certainly draw up, the emphasis on the direct but not exclusive legal responsibility being borne by states, and the attendant directions given to states as to how and what policies and procedures they should implement domestically to enforce those standards, would look not unlike what the Norms provide today. In which case, perhaps, the lesson to be learnt from the political debate that has surrounded the Norms thus far is that even if we do have to go over some of the same ground again, at least this time we will have all stakeholders present, primed and above all engaged in what will certainly be a lengthy, but hopefully fruitful and measured debate.