University of New South Wales
University of New South Wales Faculty of Law Research Series
2010

Year 2010 *Paper* 10

The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?

Justine Nolan*

*University of New South Wales

The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?

Justine Nolan

Abstract

A fundamental shift has occurred. The United Nations once dealt only with governments. By now we know that peace and prosperity cannot be achieved without active partnerships involving governments, international organisations, the business community and civil society. In today's world we depend on each other. The business of the United Nations involves the businesses of the world.

THE UNITED NATIONS' COMPACT WITH BUSINESS: HINDERING OR HELPING THE PROTECTION OF HUMAN RIGHTS?

JUSTINE NOLAN*

I. INTRODUCTION

> A fundamental shift has occurred. The United Nations once dealt only with governments. By now we know that peace and prosperity cannot be achieved without active partnerships involving governments, international organisations, the business community and civil society. In today's world we depend on each other. The business of the United Nations involves the businesses of the world.[1]

In 2005, amidst an era of reform the United Nations (UN) moved into its 61st year of existence. Constantly battling its critics, which label it bureaucratic, old-fashioned and ineffective; the UN is once again trying to reinvent itself. As part of the process to streamline and modernize the organisation, Secretary-General Kofi Annan is reaching out, beyond its nation state members, to non-state actors, particularly corporations, to help address human rights issues. Annan sees business as an essential partner in helping to curb human rights violations.[2] Engaging corporate actors is seen as part of the solution, not the problem in fulfilling the UN's mission to 'reaffirm faith in fundamental human rights … [and] to promote social progress and better standards of life'.[3]

Annan's ongoing attempts to overhaul the UN are aimed in part at enabling it to face the challenges of a new global era. The seemingly increasing rate of globalisation in the last three decades has placed the UN and governments generally in a difficult position.[4] On the one hand, policymakers want to encourage further economic integration to achieve positive benefits such as investment, technology and employment that global firms can

* Justine Nolan is a lecturer in international human rights law at the University of NSW and an Associate of the Australian Human Rights Centre, UNSW.

[1] A Zammit, *Development at Risk: Rethinking UN-Business Partnerships* (2003) A Joint Publication by the South Centre and UNRISD, 30 quoting United Nations Secretary-General Kofi Annan in a 1998 speech to the World Economic Forum.

[2] The term 'business' is used throughout this article to incorporate references to transnational corporations and business more generally as defined in the United Nations' *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, Agenda item 4, U.N. Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) ('the Norms'), paragraph I. The Norms defines 'transnational corporation' as 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 [20]. Paragraph 21 defines 'other business enterprise' to include any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, 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.

[3] *Charter of the United Nations*, Preamble.

[4] See generally R McCorquodale and R Fairbrother, 'Globalization and Human Rights' (1999) 21 *Human Rights Quarterly* 735 who refer to globalisation as an 'economic, political, social and ideological phenomenon which carries with it unanticipated, often contradictory, and polarising consequences.' Also see the varied collection of definitions of globalisation in First Report of the House of Lords Select Committee on Economic Affairs, The United Kingdom Parliament, *Globalisation* (2002) [21-56] at <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldeconaf/5/504.htm>

bring to national economic growth. But at the same time, many policymakers want to ensure that such corporations have safeguards in place so as to avoid causing environmental harm or directly or indirectly being involved in human rights abuses. Yet too often many governments lack the capacity and the will to regulate at the national level to ensure protection from such abuses because such regulation may make their nations less attractive to global investors. Thus, a range of actors, including civil society, governments, the United Nations and corporations, who want to promote global business citizenship must find a strategy that holds corporations accountable without thwarting the many benefits that such companies bring to their stakeholders.

As a result, the United Nations under the leadership of Kofi Annan, is being encouraged to forge partnerships and alliances with the private sector to ensure that globalisation is accompanied by the effective promotion and protection of human rights and the environment. The UN Secretary General is promoting the model that engaging with the private sector is not an option for the organisation but an imperative.[5] But such an approach has its critics who do not believe that economic globalisation can be made sustainable and equitable, even if accompanied by the implementation of standards for human rights. Such critics argue that corporations would like nothing better than to wrap themselves in the flag of the UN in order to 'bluewash' their public image, while at the same time avoiding significant changes to their behaviour.[6] Agreeing to disagree, Kofi Annan and the United Nations are forging ahead with their latest high profile attempt—the Global Compact—to enlist the help of business to humanize the face of globalisation.

At the World Economic Forum in Davos in January 1999, Annan proposed forming a compact between the United Nations and business promoting shared values and principles. The Global Compact, officially launched the following year, is an ambitious initiative that attempts to unite business and the UN on a mission to promote the positive role business can play in protecting human rights and the environment. The Global Compact asks business leaders to "embrace, support and enact, within their sphere of influence",[7] a set of ten principles in the areas of human rights, labour, the environment, and anti-corruption. The development of the Compact is part of the ongoing evolution of 'soft law' standards seeking to clarify (and at times limit) the human rights responsibilities of business.[8] It seeks to bring together the standards which have been developing over the last thirty five-years in the form of international guidelines, declarations and codes of conduct that are helping to define corporate responsibility for human rights. However, the Global Compact does not claim to be another code of conduct, rather the UN views itself as providing a framework and forum for the development of a global learning network where businesses can come together with other stakeholders to discuss how they can improve corporate adherence to the human rights, labour, environmental and anti corruption principles and then implement them in their operations. Business participation in the voluntary initiative is triggered simply by a letter sent from a company to the UN Secretary General advising support for the ten broadly framed principles and an ongoing commitment to publicly provide a description of the ways in which the company is supporting the Global Compact and its ten principles. While the

[5] Zammit, above n 1, 31.

[6] O F Williams, 'The UN Global Compact: the challenge and the promise' (2004) 14 *Business Ethics Quarterly* 755, 759. Also, K Bruno and J Karliner, 'The UN's Global Compact: Corporate Accountability and the Johannesburg Earth Summit' (2002) 45(3) *Development* 33, 34.

[7] The UN Global Compact, available at<www.unglobalcompact.org> The ten principles are set out below in Part II.

[8] The Global Compact specifically deals with four broad areas of concern: human rights, labour rights, the environment and anti-corruption. This article focuses on efficacy of the human rights principles (which in essence, incorporates labour rights) and refers to environmental and anti-corruption principles only as illustrative of other issues raised.

Compact carries a significant degree of authority and weight given the UN's 'international and intergovernmental character'[9] business adherence to the principles is completely voluntary and it does not attempt to impose any legally binding commitments on its participants. In fact, the United Nations seems eager to ensure that the Compact is not interpreted as anything more than a highly public effort to support a form of global corporate citizenship[10] and relies on companies to implement its ten principles based on concepts of enlightened self-interest, public accountability and transparency.[11]

Five years since the launch of the Compact, questions are being asked as to the value of this compact between the United Nations and business.[12] This paper considers whether the efforts of the Global Compact and its participants to protect human rights are likely to make a significant difference to corporate behaviour. Part 1 examines the notion of corporate responsibility and the role of the Compact as a form of soft voluntarism in promoting such concepts amid calls for developing stronger measures of corporate accountability. Part II addresses the mechanics and principles of the Global Compact itself and the history from which it is derived. Finally, Part III focuses on the flaws inherent in the structure of the Compact and the challenges it must face in order to have an impact in ensuring greater corporate respect and protection for human rights.

The Global Compact has been successful in attracting a large number of participants, now estimated at more than 2,000,[13] but its attempt to build such a broad and inclusive tent with a diverse range of corporate participants has resulted in a diminution of its overall effect. The Compact is constantly evolving,[14] however, in its current form it is not a vehicle to push companies beyond their comfort zone in confronting their human rights responsibilities.

I. CORPORATE RESPONSIBILITY VS CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS

It is indisputable that the idea of corporate responsibility is becoming increasingly important to both domestic and transnational corporations as can be seen from the increasing number of initiatives aimed at promoting the concept.[15] Corporate responsibility, corporate social responsibility, corporate accountability or corporate citizenship, however termed, is a developing concept that lacks a commonly agreed definition. Despite the lack of consensus on a common definition or terminology, a distinction can be drawn between the use of terms such as corporate responsibility, corporate social responsibility and corporate citizenship versus corporate accountability. Corporate accountability implies commitment, legal responsibility and mechanisms that

[9] United Nations Office of the High Commission on Human Rights, *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,* 61st sess, Agenda item 16, 5, UN Doc. E/CN.4/2005/91 (2005) ('OHCHR').

[10] See discussion below at Part I which reviews the term 'corporate citizenship'.

[11] OHCHR, above n 9, 8.

[12] See discussion, below n 50.

[13] United Nations Global Compact states there are now nearly 2,200 participants in the Global Compact. See, United Nations Global Compact, 'UN Global Compact Participants Disclose Actions In Support Of Universal Principles' (Press Release 15 July 2005).

[14] An example is the attempt in 2004-05 by the Global Compact to develop more credible and transparent mechanisms to handle complaints of systematic and egregious abuse of the Compact's principles. See, UN Global Compact, 'The Global Compact's Next Phase', 6 September 2005, Attachment 1, Note on Integrity Measures at para. 4.

[15] See discussion below at Part II (b).

allow for enforcement of human rights.[16] It assumes reference to a process whereby a company considers, manages and can be held accountable for the long-term human rights impact of its decisions on its stakeholders.[17] Corporate accountability contrasts with the softer terms more commonly associated with the corporate responsibility/citizenship movement, the latter signifying more a voluntary uptake of ethical conduct by corporations that is not necessarily legally enforceable. For example, the Global Compact aims, through the power of collective action, "to promote responsible *corporate citizenship* so that business can be part of the solution to the challenges of globalisation".[18] Likewise, continuing with the theme of corporate responsibility, the World Business Council for Sustainable Development defines it rather abstractly as "the commitment of business to contribute to sustainable economic development, working with their employees, their families, the local community and society at large to improve their quality of life".[19] It is this more lenient type of terminology with which the Global Compact clearly sides and why it can be characterised as a soft form of voluntarism.[20]

Generally, the acceptance (in some circles) of the broad concept of corporate responsibility indicates acknowledgement of the influence of corporations on the economic and political life of most countries. Today, the economic capacities of some corporations often goes far beyond the economic capacities of the countries in which they operate and their political muscle is often far greater than the ability of some States to regulate them effectively.[21] The notion that this power should be accompanied by some level of responsibility lies at the heart of the corporate responsibility movement. However, there is a distinct lack of consensus about the nature and extent of such responsibility.

Over the last 35 years attitudes towards issues of corporate responsibility have come full circle, starting and ending with an emphasis on regulation and 'corporate accountability' rather than 'corporate social responsibility'. As can be seen from the discussion in Part II below, early efforts to curb corporate power in the 1970s were aimed at 'regulating' corporations to take responsibility for and be held accountable for human and environmental rights.[22] The discussions of the 1980s stand in contrast to this emphasizing deregulation and

[16] The Norms, above n 2, is the latest attempt to more clearly define standards using the language of corporate accountability rather than corporate responsibility and which includes proposed mechanisms for enforcing corporate adherence to human rights principles.

[17] The term stakeholder is also open to a multitude of definitions but the most comprehensive is that used in the recently formulated UN Norms, above n 2. The Norms define "stakeholder" to include stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations and other business enterprises such as consumer groups, customers, governments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations and others.

[18] 'What is the Global Compact?' (2005) The Global Compact <http://www.unglobalcompact.org>

[19] World Business Council for Sustainable Development, as stated in the KPMG International Survey of Corporate Responsibility, 2005.

[20] P Utting, *Rethinking Business Regulation: From Self Regulation to Social Control*, United Nations Research Institute for Social Development (UNRISD), programme paper 15, 16, (2005).

[21] United Nations Research Institute for Social Development (UNRISD), Corporate *Social Responsibility and Business Regulation: Research And Policy Brief 1*, UNRISD/PB/04/1, 1 (2004). See also S Joseph, *Corporations and Transnational Human Rights Litigation* (2004) 1.

[22] J Bendell, (United Nations Research Institute For Social Development), 'Barricades And Boardrooms: A Contemporary History of the Corporate Accountability Movement', Programme paper 13, 12 (2004) referring to R Jenkins, 'Corporate Codes Of Conduct: Self Regulation in A Global Economy', (Paper presented at the UNRISD Workshop on Promoting Corporate Responsibility in Developing Countries, Geneva, Switzerland, 23-24 October 2000) and see

corporate rights.[23] The 1990s was a period when globalisation gathered force (including a growth in the number and influence of civil society actors) and media interest focused on sensational issues such as the use of sweatshops by well known brands like Nike, Disney and Levi Strauss.[24] Corporate self regulation was the key buzz word.

Recently, as the limits of self regulation have started to become apparent, alternative approaches emphasizing corporate accountability (versus corporate social responsibility), and a renewed interest in international regulation of business are emerging.[25] The interest of a large number of civil society groups, including some high profile human rights groups, in promoting corporate accountability over corporate responsibility is evidenced by their unified stance toward the development of the United Nations' Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms).[26] The Norms constitute the most recent attempt to definitively outline the human rights and environmental responsibilities attributable to business. The Norms, drafted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights and debated for the first time by the United Nations Commission of Human Rights at its annual meeting in March 2004 and again in April 2005, have provoked diverse reactions from business, governments, human rights organizations and international and corporate lawyers[27] but have generally been embraced by civil society.

Support for stronger notions of corporate accountability is also evidenced by a new wave of litigation against companies alleged to have violated human rights or environmental

---

generally, J Nolan, 'With Power Comes Responsibility: Human Rights and Corporate Accountability', 28(2) *University of New South Wales Law Journal*.

[23] Bendell above n 22 at 1.

[24] B Herbert, 'Children of the Dark Ages', *New York Times* (New York), 21 July 1995, A25, A Bernstein, 'A floor under foreign factories?', *Business Week* (New York), 2 November 1998, 126; T Egan, 'The Swoon of the Swoosh', *New York Times* (New York), 13 September, 1998, 66 (column 1); A Bernstein, 'A potent weapon in the war against sweatshops', *Business Week* (New York), 1 December, 1997, 40.

[25] Bendell above note 22 at 1. Also Utting, above n 20 16-18 for a varied list of examples of how civil society and some governments are pushing stronger notions of corporate accountability.

[26] Amnesty International, 'The U.N. Human Rights Norms For Business: Towards LegalAccountability'(2004)<http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/$File/IOR4200204.pdf>
Also see a joint statement from human rights organizations welcoming the Norms, 'Nongovernmental Organizations Welcome the New U.N. Norms on Transnational Business' (Press release, 13 August 2003) <http://www.hrw.org/press/2003/08/un-jointstatement.htm#ngos>.

[27] For a negative reaction, see *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*, UN ESCOR, 55th sess, Agenda item 4, UN Doc E/CN.4/Sub.2/2003/NGO/44 (2003). ('IOE and ICC Joint Views') In contrast, The Business Leaders Initiative on Human Rights (BLIHR) chaired by Mary Robinson, the former United Nations High Commissioner of Human Rights, is 'road-testing' the Norms. It is expected that the various company projects under the initiative will add learning and experience on whether the Norms add value to the existing work on corporate social responsibility in the companies. Participating companies are Novartis, Transco Grid, Body Shop, Barclay's Bank, MTV Europe, Novo Nordisk, ABB, Hewlett Packard and Gap Inc. The project is expected to conclude in 2006. See S Skadegaard Thorsen and A Meisling, 'Perspectives on the UN Draft Norms' (Submitted for the IBA/AIJA conference on Corporate Social Responsibility, Amsterdam, 25-26 June 2004) < http://www.lawhouse.dk/?ID=259> at 22 November 2005. The response of both the United States and Australian governments to the Norms is indicative of the wary negative approach adopted by several States with regard to the possibility of developing binding corporate accountability measures. See, for example the stakeholder submissions of the United States and Australia to the Office of the High Commissioner for Human Rights: <http://www.ohchr.org/english/issues/globalization/business/contributions.htm#states>. The United States and Australia were 2 of only 3 countries that voted against the 2005 resolution of the Commission on Human Rights calling for an appointment of a Special Representative on business and human rights issues.

obligations. Corporations are increasingly facing scrutiny for the effect of their operations on the human rights and the environment, and the Alien Torts Claims Act (ATCA) in the United States, (legislation not traditionally applied to business activities), is one tool that is being used to emphasize this link in the public arena. The ATCA was passed by the United States Congress in 1789 and provides District Courts with jurisdiction over violations of the "law of nations". In the modern era, courts have allowed foreign victims to use ATCA to address egregious human rights violations. More recently, ATCA has been used against corporations that have allegedly been knowingly complicit in human rights violations.[28]

Litigation is also being used to attempt to hold companies to their oral and written commitments to uphold human rights. Recent efforts focusing on Nike[29] and Walmart,[30] demonstrate an innovative use of litigation to recognise the potential legal character of codes of conduct and firm commitments to human rights and environmental standards. These cases and others (pursued, for example, under the law of negligence in the United Kingdom[31] and Australia)[32] test the boundaries of existing legal assumptions with respect to the accountability of corporations for human rights and environmental obligations.

The newly established International Criminal Court (ICC) also offers another opportunity for using the law to hold individuals within companies accountable for egregious human rights abuses. Building on the UN's special tribunals set up in the 1990s, particularly those in the former Yugoslavia and Rwanda and on new legal precedents of universal jurisdiction, the ICC takes an important step towards global accountability for all, including potentially targeting individuals operating within a company that is involved in the commission of human rights abuses. The ICC is a permanent tribunal that investigates and tries individuals for the most serious international crimes: genocide, crimes against humanity, and war crimes.[33] The current prosecutor of the ICC, Luis Moreno-Ocampo has indicated that officials of corporations could be held accountable before the ICC for directly or indirectly facilitating conduct that leads to violations of international law.[34] For example,

[28] The *Alien Tort Claims Act* 28 USC §1350 (1789) was passed as part of s 9 of *Judiciary Act* (1789). The Act in its entirety reads: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' For an overview of cases brought under ATCA with respect to corporate liability, see generally Joseph, above n21.

[29] *Nike v Kasky*, 539 US 654 (2003). This case (settled September 12, 2003) alleged that Nike's reports on its labour practices in its supplier factories constituted a misrepresentation, an unfair business practice and false advertising under Californian law. See L Girion, 'Nike Settles Lawsuit over Labor Claims', *L.A. Times* (Los Angeles), 13 September 2003, C1.

[30] A class action complaint filed against US retailing giant Walmart (13 September 2005) alleges Walmart failed to meet its contractual duty to ensure that its suppliers pay basic wages due; forced workers to work excessive hours seven days a week with no time off for holidays; obstructed their attempts to form a union; and, made false and misleading statements to the American public about the company's labour and human rights practices. The claim alleges Walmart made false representations regarding compliance with its code of conduct. Walmart maintains a Supplier Standards Agreement with its foreign suppliers that incorporates adherence to its corporate code of conduct as a direct condition of supplying products to Walmart. The claim argues that by incorporating the code of conduct into the supply agreement, it creates a contractual obligation enforceable by the workers supplying to Walmart, who are the intended beneficiaries of the code's worker rights provisions. The claim is being pursued under California's *Unfair Business Practices Act* § 1720; <http://www.laborrights.org/projects/corporate/walmart/WalMartComplaint091305.pdf> at 22 November 2005.

[31] *Lubbe v Cape plc* [2000] 4 All ER 268; *Connelly v RTZ* [1998] AC 854.

[32] *Dagi and Ors v BHP and OkTedi Mining Limited (No. 2)* [1997] 1 VR 428.

[33] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, art 1 (entered into force 1 July 2002) The ICC can only investigate events that occurred after the treaty was entered into force.

[34] M Chertoff, 'Justice Denied', *The Weekly Standard* (Washington), 12 April 2004, 28.

if a company engaged in trading natural resources pays money to a government that uses it to fund soldiers who commit war crimes, arguably such a company may have facilitated a war crime and its relevant officers could be prosecuted.[35]

Given the contemporary establishment of the ICC and its limited capacity for investigations to date, much of this remains conjecture but a recently initiated Australian investigation shows the potential for using legislation in an innovative way to hold individuals within companies liable for egregious human rights abuses and press for stronger measures of corporate accountability. In October 2004, a small-scale rebellion occurred in the Democratic Republic of the Congo which caused the interruption of operations at a mine run by an Australian company, Anvil Mining. The rebellion was ruthlessly suppressed by the Congolese Armed Forces (FARDC). It is alleged that Anvil Mining provided logistical support to the soldiers by provision of company planes and vehicles used to gain access to the area. As a result of certain amendments to the Criminal Code in Australia, which were introduced as a result of the Rome Statute on the International Criminal Court, it is now a criminal offence under Australian national law for an Australian national to commit war crimes or crimes against humanity, even where those offences have occurred overseas, including aiding and abetting a crime.[36] Counsel in Australia has been instructed by several human rights organisations, two in the Congo, one in the United Kingdom and one in Australia, to file a complaint with the Australian federal police requesting them to investigate whether or not certain human rights violations, crimes against humanity and war crimes were committed by individuals of Anvil Mining. The ongoing investigation will hinge on the manner in which the planes and vehicles were provided to the military, that is, offered or commandeered. Because of the geographical isolation of the area it meant that it would have been very difficult without the provision of transport facilities for the Congolese military to have acted. The increasing prevalence of such innovative uses of legislation to curb corporate involvement in human rights abuses, indicates a growing appetite in some circles for the development of stronger measures of corporate accountability.

Beyond litigious techniques, calls for greater transparency and access to information on social and environmental aspects of company performance represent the next frontier for improving corporate accountability mechanisms. Mandatory legislation on various aspects of business transparency is emerging around the world. It can form part of company law, environmental regulation, or tailored legislation for institutional investors on social and environmental reporting.[37] A number of jurisdictions have begun to make inroads into regulating reporting on social and environmental issues including Australia, the United Kingdom, France and South Africa which, in various forms, have been regulating versions of triple bottom line reporting.[38] Such legislation, which for the most part is still relatively

[35] See discussion, below n 87 regarding corporate complicity in human rights abuses.

[36] *Criminal Code* 1995 (Cth) s 268 proscribes genocide, crimes against humanity and other serious war crimes.

[37] See generally, H Ward, 'Legal Issues In Corporate Citizenship' (Report prepared for the Swedish Partnership for Global Responsibility, February 2003) <http://www.iied.org/pubs/pdf/full/16000IIED.pdf.> at 22 November 2005.

[38] Recent legislative initiatives in select jurisdictions indicate a willingness of corporate regulatory agencies within these jurisdictions to adopt a more expansive view of what issues are considered material to a corporation's short- and long-term performance, thus requiring disclosure and increasing corporate transparency in a company's public reports. Superannuation legislation in the United Kingdom, Australia, Belgium and Germany has incorporated reporting requirements with respect to certain human rights. Also France has introduced mandatory annual disclosure and reporting requirements for the largest corporations under French law (the New Economics Regulations (NRE) were adopted in May 2001 by the Parliament and came into force on January 2002. Law N° 2001-420). And in South Africa, the Johannesburg Securities Exchange adopted a "Code of Corporate Practices

open ended, may be used to support claims that argue for the legitimacy of incorporating social and environmental considerations into corporate decision-making and highlights the possibility of corporate regulatory agencies devising mechanisms to make clearer the connection between corporate action and the protection of human rights.

At the very least, the ongoing development of these legal mechanisms described above sounds a warning for business to consider more seriously their human rights obligations and the public commitments they make to them. The limited ambition of the Global Compact to *guide* rather than *enforce* improvements in corporate behaviour stands in stark contrast to some of these latest efforts to promote corporate accountability over corporate responsibility.

II. THE GLOBAL COMPACT

A. *What it is and what it is not*

The Compact is a purely voluntary initiative that aims to use the "power of collective action... to promote responsible corporate citizenship."[39] The Compact asks business leaders to "embrace and enact" a set of ten principles relating to human rights, labour rights, the protection of the environment and corruption, in their individual corporate practices.[40] The standards aim to reflect those norms as laid out in the Universal Declaration of Human Rights, the ILO's Tripartite Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption. The ten principles are:

Human Rights
- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and
- Principle 2: make sure that they are not complicit in human rights abuses.

Labour Standards
- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: the elimination of discrimination in respect of employment and occupation.

Environment
- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies

Anti-Corruption

and Conduct" that requests all publicly listed corporations to disclose non-financial information in accordance with the Global Reporting Initiative Sustainability Reporting Guidelines.

[39] See 'About the GC' at <www.unglobalcompact.org>.

[40] Originally launched in 2000 with nine principles, the tenth relating to corruption was added in June 2004 at the Global Compact Leaders Summit; see <www.unglobalcompact.org>.

- Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.

The Global Compact seems clearer now on what it is and what it is not than when it was first established five years ago. In its first few years of existence there was a flurry of letters back and forth between the Compact and civil society emphasising concerns with the Compact model and its limitations for enforcing improvements in corporate behaviour.[41] Concerns generally focused on fears of companies using the United Nations as a public relations cover while offering only token changes toward improving actual corporate responsibility practises.[42] From the beginning, the Global Compact had an open door policy where businesses only had to submit a letter of intent to the Secretary General expressing support for the Compact and agreeing to advocate for its principles and submit once a year examples of good practice in relation to at least one of the principles. In practice however, few companies complied with this minimal reporting requirement.[43] The easy access into the Compact continues to concern many NGOs and motivated the Compact to undertake a strategic review of the integrity of its processes over the last year.[44] However, although civil society concerns have not noticeably decreased over the last five years, the Global Compact has taken the time to become more assertive about what it does stand for.

In a recent interview with the Executive Head of the Global Compact, Georg Kell, he emphatically stated that the Global Compact "is not an enforcement mechanism…it's a learning dialogue and a platform for action".[45] Kell is keen to characterise the Global Compact as a learning network and one that is more closely associated with the concepts of corporate responsibility and thus distance it from stronger notions of enforcement that accompany an understanding of corporate accountability.[46] In the words of the Compact itself:

> [T]he Global Compact is not a regulatory instrument—it does not "police", enforce or measure the behavior or actions of companies. Rather, the Global Compact relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based.[47]

In principle, the idea of establishing a global learning network to improve corporate adherence to human rights, labour, environmental and anti corruption principles seems sound. However its reliance on public accountability, transparency and the enlightened self interest of companies to achieve this goal has been hindered from the outset by a lack of

[41] See, for example, the letters from Human Rights First (then Lawyers Committee for Human Rights) stating its concerns with the Global Compact, available at <http://www.humanrightsfirst.org/workers_rights/issues/gc/index.htm>.

[42] For example, concerns over the inclusion of Nestle as a Global Compact participant in view of its alleged violations of the International Code on the Marketing of Breast-milk Substitutes were raised consistently by an NGO group CorpWatch to the United Nations; see <www.corpwatch.org>.

[43] See discussion, below n 94.

[44] The Global Compact has come around to recognising that there does need to be some threshold for non-compliance at which business participation should be excluded from the Compact. Its 2005 Integrity Measures, allows the Compact to list participants as non-active or be removed from its website but it still does not contain a regular monitoring or verification feature.

[45] PriceWaterhouseCoopers, 'The UN Global Compact: Moving to the Business Mainstream, An Interview with Georg Kell, Executive Head', (2005) 2 *The Corporate Responsibility Report*,13.

[46] See generally, G Kell and D Levin, 'The Global Compact Network: An Historic Experiment in Learning and Action', (2003) 108(2) *Business and Society Review*, 151.

[47] See 'About The GC' at <http://www.unglobalcompact.org>.

clarity around its principles, limited transparency requirements and an overemphasis on the voluntary nature of the initiative.[48] Network learning may act as an impetus for improving corporate behaviour but only if business takes the next step and incorporates it into its practices.[49] The 2004 study by McKinsey & Company, commissioned by the Global Compact to assess its impact does not provide solid reassurance that the network learning model is penetrating organisational behavioural changes focused on encouraging greater adherence to the protection of rights.[50] While arguing that the Compact had "noticeable incremental impact" on companies, the study also acknowledged that 40% of participants in the Global Compact felt that participation in the initiative had no significant impact on company policy reform.[51] Such a response indicates that it may be time to rethink the soft voluntary format of the learning network model of the Global Compact in favour of stronger notions of enforcing corporate accountability as set out in the UN Norms.[52]

B. *The origins of the Global Compact*

The interaction between business and human rights concepts and the recognition of the necessary existence of such a relationship is not new. What is new is the ever increasing breadth and depth of the business-human rights debate. The United Nations has a history of interacting with business but its attitudes and approaches to business have undergone a profound change during the past three and a half decades. For much of that period business has viewed the United Nations with hostility. The launch of the Global Compact signalled a significant change in the relationship between business and the UN.

In the 1970s, amidst calls for a New International Economic Order, work began within the UN on drafting an international code of conduct to regulate the activities of transnational corporations (TNCs).[53] In 1975, the UN established a Centre on Transnational Corporations (UNCTC), which by 1977 was co-ordinating the negotiation of a voluntary Draft Code of Conduct on Transnational Corporations. Over subsequent years the negotiators managed to agree that TNCs should respect host countries developmental goals, observe their domestic laws, respect fundamental human rights, adhere to sociocultural objectives and values, abstain from corrupt practices, and observe consumer and environmental protection objectives. Negotiations lingered until the 1990's but the now defunct United Nations Centre on Transnational Corporations met serious political and business opposition. It was viewed an attempt by the United Nations to meddle in the affairs of business. The involvement of the United Nations in corporate affairs was viewed as an unnecessary and unwanted effort (by companies and some governments) to regulate business.

In the 1980s, the United Nations' policy towards TNCs changed course. Instead of trying to regulate foreign direct investment, UN agencies sought to facilitate the access of developing countries to investment.[54] Deregulation was encouraged.

---

[48] See discussion in Part III below.

[49] Zammitt, above n 1, 95 for further discussion on organisational learning. Also see generally, Kell and Levin, above n 46.

[50] McKinsey & Company, *Assessing the Global Compact's Impact*, (Report prepared for the Global Compact Office, 11 May 2004).

[51] Ibid 2-4.

[52] The Norms, above n 2, [15-18] provide for general provisions for implementation including options of monitoring and reporting at both international and national levels.

[53] P Utting, 'UN-Business Partnerships: Whose Agenda Counts?' (Paper presented at a seminar on Partnerships for Development or Privatization of the Multilateral System?, Oslo, 8 December 2000) 2.

[54] Ibid 2-3.

The 1990s was a period when globalization gathered force and corporate lobbying effectively undermined multilateral attempts at addressing their power. Corporate self regulation was the key buzz word and the take up and development of codes of conduct in various forms from 1991 (when Levi Strauss first introduced its code) to the end of the decade was remarkable and was accompanied by an impressive body of research literature focused on exploring this new phenomenon.[55] These codes of conduct were an attempt by business to self regulate and make transparent (at varying levels) their acknowledgement of universal human rights and/or environmental standards.

At the same time and continuing today, UN-business relations entered a new era as the international body strives to develop partnerships with large corporations or establish long term projects funded by corporate philanthropists.[56] The United Nations is clear in its belief of the positive role business can play in 'being part of the solution to the challenges of globalisation'.[57]

Throughout this period when the United Nations started to change course and develop a more user friendly relationship with business, there were ongoing efforts to continue to develop 'soft law' mechanisms to guide improvements in corporate behaviour, some in the 'corporate responsibility' mode and others, more recently, that could be characterised as 'corporate accountability' initiatives. Since the 1970's a number of inter-governmental organizations have formed voluntary guidelines, declarations and codes of conduct to guide the activities of corporations with the most notable being the efforts of the Organization for Economic Cooperation and Development (OECD) and the International Labour Organisation (ILO).

The OECD *Guidelines for Multinational Enterprises* (first established in 1976 and revised in 2000) take the form of a recommendation from OECD Governments to multinational enterprises to abide by a set of voluntary guidelines that take into account issues as diverse as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. The Guidelines clearly state that "observance of the guidelines is voluntary and not legally enforceable" and are intended as "good practice for all".[58]

In 1977, the ILO established its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977)[59] which recognizes that business plays

---

[55] World Bank Group Corporate Social Responsibility Practice, '*Strengthening Implementation Of Corporate Social Responsibility In Global Supply Chains*' (2003); K Gordon And M Miyake, (Organization For Economic Co-Operation And Development), 'Deciphering Codes Of Corporate Conduct: A Review Of Their Contents', Working Papers On International Investment, Number 1999/2, (1999); C Sabel, D O'Rourke and A Fung, 'Ratcheting Labor Standards: Regulation For Continuous Improvement In The Global Workplace', The World Bank, Social Protection Discussion Paper No. 11 (2000); J Diller, 'A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives', (1999) 138 *International Labour Review* 99.

[56] Zammit, above n 1, Chapter III. Also Utting, above n 53, 3. Recent examples include the establishment of the UN Foundation with a one billion dollar grant from CNN founder Ted Turner and the establishment of the Global Alliance for Vaccines and Immunizations whose contributors include the Bill and Melinda Gates Foundation.

[57] See <http://www.unglobalcompact.org>.

[58] Organization for Economic Co-Operation And Development (OECD), *OECD Guidelines For Multinational Enterprises*, (2000) I(1), I(4) 'Concepts and Principles'.

[59] The Declaration can be seen as providing guidance for how corporations should implement the fundamental ILO conventions. The overarching obligations with respect to labour rights are set out in the eight fundamental conventions of the International Labour Organization: Forced Labor Convention (C29); Freedom of Association and Protection of the Right to Organize Convention (C87); Right to Organize and Collective Bargaining Convention (C98); Equal Remuneration Convention (C100); Abolition of Forced Labor Convention (C105); Discrimination (Employment and Occupation)

an important part in the economies of most countries but acknowledges the complexity of their role and the positive and negative influences corporations can have on development. The Tripartite Declaration aims to encourage the positive contribution which multinational enterprises can make to economic and social progress by devising a set of principles to improve conditions of work in multinational enterprises.

The OECD Guidelines and the ILO Tripartite Declaration were revolutionary in the sense that they explicitly honed in on delineating the obligations of companies with respect to protecting human rights and in some form paved the way for the establishment of the Global Compact's ten principles. However, like the Compact they continue to be subject to severe limitations. Apart from the fact that they are non-binding, their implementation mechanisms are extremely weak and the duties outlined are broad, lack detail and provide little practical guidance for companies aiming to implement such rights.[60] While the OECD Guidelines and the ILO Declaration *encourage* companies to promote and protect internationally recognized human rights, there are no effective, independent enforcement mechanisms to ensure they do so. Decisions cannot be enforced directly against a company and their power to compel behavioural changes remains subject to the political will and ability of national governments.[61]

Parallel to the development of these high-level broad inter-governmental guidelines were efforts focusing more specifically on regional issues or particular industries. In 1977 the Sullivan Principles,[62] directed at the behaviour of American companies operating in South Africa, were established, and in 1984 the MacBride Principles[63] were created with the aim of influencing the behaviour of US firms in Northern Ireland. Both were voluntary guidelines established to justify the continued presence in South Africa and Ireland respectively, of American firms, and to guide their behaviour within a regime which mandated, and in some cases even required, the exploitation of workers. The codes were voluntarily adopted by some businesses to avoid harsher external regulation (the threat of United States legislation) which would require companies to disinvest from South Africa and Northern Ireland.

More recently, the 1990s has seen increased media attention focused on 'sweatshop' conditions used by high profile companies such as Levi Strauss, Gap, Nike and others to produce consumer goods.[64] In the rush to find cheaper and quicker ways to produce shoes, apparel, and other labour-intensive goods for the global marketplace, transnational corporations have moved much of their manufacturing offshore to countries where practical legal protections for workers are limited. Such media attention sparked a growing public demand for corporations to take responsibility for a range of human rights and environmental problems in countries where they operate and foreshadowed the ever

Convention (C111); Minimum Age Convention (C138) and Worst Forms of Child Labour Convention,(C182). These conventions are legally binding on those states that have ratified them. Obligations then exist at a national level to ensure enforcement of these rights by corporations; they do not directly bind companies.

[60] The results of OECD Watch's study of forty-five complaints filed over the last five years suggests "that the Guidelines have [not] helped to reduce the number of conflicts between local communities, civil society groups and multinational companies." The report also criticised the lack of transparency of the OECD in dealing with complaints. See, OECD Watch, 'Global NGO Coalition Calls for Tighter Regulation of Multinational Corporations' (Press release, 22 September 2005).

[61] International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism: Human Rights And The Developing International Legal Obligations Of Companies* (2002) 99-102, ('ICHRP').

[62] Leon Sullivan, *The Sullivan Principles* (1977).

[63] Sean McManus for the Irish National Caucus, *The McBride Principles* (1984).

[64] See above, n 24.

increasing uptake of codes of conduct. Codes of conduct assume many forms and roles.[65] One function is in setting a standard to which companies publicly commit. Although codes are not generally legally enforceable, they are backed by the reputation of the company that adopts them, supported by the ever-present threat of media exposure. As such, codes have tended to be adopted more quickly by those companies that rely heavily on the value of their brand to sell their product and their content influenced by the issues most relevant to the company's operations.

In addition to company-specific codes, alliances between NGOs, companies, industry groups and in some cases trade unions have led to an increase in multi-stakeholder approaches to developing consensus on code standards, guidelines and monitoring mechanisms. Codes such as the Fair Labor Association's Workplace Code of Conduct,[66] Social Accountability 8000,[67] the Ethical Trading Initiative,[68] the Global Reporting Initiative,[69] AA1000,[70] Voluntary Principles on Security and Human Rights,[71] and the Business Principles for Countering Bribery[72] are just a few of the plethora of codes and guiding principles that have been developed, all largely focused on transnational corporations who bear responsibilities, either directly or via their supply chain for the protection and promotion of human rights and environmental norms.[73] The content of these codes and guidelines have laid the foundation for the establishment of the ten principles set out in the Global Compact.

Despite this extensive array of principles and guidelines that attempt to define the social responsibilities of corporations, there remains "a gap in understanding what the international community expects of business when it comes to human rights."[74] It is partly for this reason that subsequent to the establishment of the Global Compact, the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights were formulated. The Norms were developed at the instigation of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, a 26-member group of experts, which reports to the 53 government members on the Commission on Human Rights.[75] In 1998 the Sub-Commission established a working group on the activities of transnational corporations which, in 2001, was asked to

[65] Gordon and Miyake above n 55. This OECD study was the result of an investigation of 246 voluntary codes collected "from business and non-business contacts which OECD Member governments helped identify" (at 8). Out of this set of codes, they found that 118 or 49% of them were issued by individual companies (mostly multinationals), while 34% were industry and trade association codes, 2% issued by an international organization, and 15 % by partnership of stakeholders (mainly NGOs and unions) (at 9).

[66] www.fairlabor.org.

[67] www.sa-intl.org.

[68] www.ethicaltrade.org.

[69] www.globalreporting.org.

[70] www.accountability.org.uk/aa1000.

[71] http://www.state.gov/g/drl/rls/2931.htm.

[72] http://www.transparency.org/building_coalitions/private_sector/business_principles/dnld/business_principles2.pdf.

[73] Several of these codes and guidelines can be distinguished by their focus on performance or reporting standards (for example SA8000 vs GRI). AA1000 is more of a 'process' standard advising companies on how to approach these issues from a systems management point of view.

[74] OHCHR, above n 9, 8.

[75] The Human Rights Commission is the main body within the UN dealing with human rights issues and is comprised of (rotating) representatives of 53 member governments. The Commission sits in Geneva each year for approximately 6 weeks during March and April. At the time of writing, reform proposals are being discussed in the United Nations to replace the Commission with a smaller standing Human Rights Council, see; Report of the Secretary-General, *In larger freedom:towards development, security and human rights for all* (2005).

"[c]ontribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights."[76]

The Norms were adopted by the UN Sub-Commission on the Promotion and Protection on Human Rights in August 2003. They were considered by the Sub-Commission's parent body within the UN, the Commission on Human Rights, in April 2004 and again in 2005. The Commission did not adopt the Norms, but did not reject them either, and the Norms remain in a holding pattern. Despite their apparent legal limbo, the Norms have taken on a life of their own. A number of companies and NGOs are 'road-testing' the Norms.[77] Indeed, it is likely that in the short term, the Norms will become the international standard for corporate human rights responsibilities, and may over the longer term constitute the blueprint for future international standards. This is not to say that the Norms have been universally welcomed, in fact they have survived despite consistent efforts by some business organisations and governments to defeat them.[78] However, prompted by the widespread interest in the Norms (both positive and negative), the Commission was motivated to take a number of initiatives. Most importantly, it resolved in April 2005 to appoint a Special Representative on the issue of 'business and human rights'.[79] The appointment of the Special Representative reflects a growing consensus internationally on the importance of companies to promote and protect human rights.[80]

The rights encompassed by the Norms cover a wide spectrum of human rights including the most fundamental and basic rights that have been agreed as accepted standards for nation states and individuals for decades and previously enunciated in some of the codes mentioned above. The issues encompassed within the Norms focus on the right to equal opportunity and no-discriminatory treatment; the right to security of persons; the rights of workers; consumer protection; environmental protection and economic, social and cultural rights.[81] As such, the Norms represent a growing refinement and acceptance of the core rights applicable to business. In this sense, they are crucial in offering much needed clarification of the nature and extent of business human rights obligations and stand in contrast to the broad principles outlined in the Global Compact. The Norms similarly attempt to incorporate a wide variety of implementation techniques ranging from company self-reporting to external verification but the proposals outlined in the Norms are more in the form of road signs than well developed theses on the most effective means of enforcing corporate accountability for rights.

With the plethora of codes, declarations and guidelines that have been developed in the last three decades, it begs the question of how the Global Compact stands apart from the others and what value it brings to the business and human rights arena. The Compact has much in common and is derived from other multi-stakeholder initiatives but the UN factor

---

[76] UN Sub-Commission on the Promotion and Protection of Human Rights, *The effects of the working methods and activities of transnational corporations on the enjoyment of human rights*, Sub-commission on human rights resolution 2001/3, 25th meeting, UN Doc E/CN.4/Sub.2/RES/2001/3 (2001).

[77] See above n 27.

[78] See above n 27.

[79] *Promotion and Protection of Human Rights*, UN ESCOR, Commission on Human Rights, 61st sess, Agenda Item 17, UN doc E/CN.4/2005/L.87 (2005).

[80] On 28 July 2005, the UN Secretary General appointed Professor John Ruggie as the UN Special Representative. Professor Ruggie previously served as UN Assistant Secretary-General and senior adviser for strategic planning from 1997 to 2001. He was one of the main architects of the United Nations Global Compact, and he led the Secretary-General's effort at the Millennium Summit in 2000 to propose and secure the adoption of the Millennium Development Goals. The Special Representative is due to hold broad-based consultations and issue two reports, an interim one in 2006 and a final one in 2007.

[81] See discussion below in Part III (a) and the Norms, above n 2 [1-14].

sets it apart. From the outset it was clear that the credibility of the United Nations brand name was, and continues to be important in attracting a large number of business participants to the initiative. The moral authority and leadership of the Secretary-General in establishing the Global Compact validates the business and human rights connection as an issue that warrants high level attention and guarantees the Compact, via the UN, global reach. An additional attraction of using the United Nations to promote these issues is its undisputed convening power and networking capacity.[82] The Compact enjoys inter-governmental backing along with support from governments, business and segments of civil society. These positive attributes of promoting corporate responsibility through the United Nations can turn negative if it is used more as a cover for improving corporate practices rather than implementing actual changes in the boardroom and on the ground. The lack of clarity of the Compact's principles, its limited accountability and transparency and an overemphasis on the value of the voluntary approach to corporate responsibility are all factors which damage the credibility of the Global Compact model.

III. CHALLENGES FACING THE GLOBAL COMPACT

The launch of the Global Compact in 2000 offered the promise of strengthening corporate respect for human, labour and environmental rights and with over 2,000 companies involved in the Compact some might argue it has already done so. But the challenge currently facing the Compact is whether the practices of its participants live up to the rhetoric. In three crucial areas it appears that the Global Compact model suffers fundamental flaws which affect its ability to engender practical support for rights. These three issues: the lack of clarity in the content and scope of the Compact's principles; its limited notions of accountability and transparency; and the overemphasis on the value of the voluntary approach to improving corporate behaviour result in a diminution of the overall promise offered by the Compact in bringing such a large number of companies together.

A. *Lack of clarity in content and scope of the Compact's principles*

From the outset the Compact has framed its principles in broad terms. It adopts a descriptive rather than prescriptive approach, asking companies to 'embrace, support and enact, within their sphere of influence' a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption. By defining the requisite behaviour only in terms of actions that embrace, support and enact rights, the Compact immediately appears to be more promotional than protectionist in character.[83] Compare the language used in the latterly drafted Norms which asks business, within their spheres of activity and influence "to promote, secure the fulfilment of, respect, ensure respect of and protect human rights".[84] Such distinctions in drafting continue in the detail of the principles themselves.

A major problem with the Compact is the elusive nature of its broadly framed principles. The human rights and labour standards aim to reflect those norms as laid out in the Universal Declaration of Human Rights and the ILO's Tripartite Declaration on Fundamental Principles and Rights at Work. With the exception of the labour rights

[82] Kell and Levin, above n 46, 160.
[83] OHCHR, above n 9, 5.
[84] The Norms, above n 2, [A.1].

principles which are narrowly focused, the Compact does little to advance the debate toward clarifying what the key human rights issues are for business.

The human rights principles ask business to "support and respect the protection of internationally proclaimed human rights" within their sphere of influence and that business should "make sure that they are not complicit in human rights abuses" but do not specify the exact human rights which business should support and respect.[85] The rights covered by the Universal Declaration of Human Rights are presumably not all primarily relevant to business activities but little guidance is provided as to which, if any, rights should be prioritised. Likewise by way of comparison, Principles 7, 8 and 9 of the United Nations Global Compact are also broadly framed and encourage businesses to support a precautionary approach to environmental challenges, undertake initiatives to promote greater environmental responsibility, and encourage the development and diffusion of environmentally friendly technologies. The principles cited in the Global Compact do not constitute a sufficient basis for designing enforceable standards and are beneficial more from the point of view of acting as yet another indicator in the global arena of the general relevance of international human rights norms to business. The lack of conceptual clarity leaves a wide margin of appreciation to business regarding the interpretation of these principles and offers little practical guidance in interpreting and limiting the responsibility of business for human rights. The broadly framed principles of the Global Compact stand in contrast to the rights more specifically enumerated in the Norms.

Along with the lack of specificity in defining the relevant rights, is a vagueness concerning the scope of the initiative, in particular the degree of responsibility a company assumes in embracing, supporting and enacting these rights. The Compact uses the phrase 'sphere of influence' to limit business responsibility for rights but does not define this crucial term.[86] The exact nature of company responsibility for rights is subject to the practical interpretation of its participants and the marketplace, with the two sides likely to offer deeply contrasting views.

Precisely what falls within the sphere of influence of a corporation is debatable and may be influenced by both moral and legal responsibilities which will help determine if a company is complicit in human rights violations.[87] In attempting to more firmly confine the sphere of influence concept, the nature of the obligation should be considered, as should to whom that obligation is owed. The appeal to business in the Compact is to embrace, support and enact a set of broadly referenced rights. The terminology used suggests that this is not so much as an obligation placed on business but rather a polite request to respect rights. While it may be interpreted as incorporating an obligation to refrain from acting in a way that constitutes a violation of rights, it does not necessary flow from the language employed that a company then accepts a positive duty to prevent violations of rights and to play a proactive role in promoting the specified rights. Such consequences are more likely to stem from principle 2 of the Compact which asks businesses to make sure they are not complicit in human rights abuses.

Understanding complicity represents an important challenge for business and it is a term the Global Compact should seek to provide clarity on. The Office of the United Nations High Commissioner for Human Rights argues that broadly speaking, "corporate complicity in human rights means that a company is participating in or facilitating human rights abuses committed by others."[88] In examining the notion of corporate complicity it is

[85] United Nations Global Compact, Principles 1, 2, above n 7.

[86] The Norms refer to a company's 'sphere of activity and influence' to apportion corporate responsibility for rights but it is similarly undefined. The Norms, above n 2, [A1].

[87] ICHRP, above n 61, 136.

[88] OHCHR Briefing Paper, 'The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity' in A joint publication of the United Nations Global Compact Office and the

possible to distinguish between direct complicity (positively assisting), beneficial complicity (benefiting indirectly from human rights violations committed by someone else, for example, government) and silent complicity (silence or inaction in the face of human rights violations: to do nothing is not an option).[89] Whether a company could be held legally responsible for all such forms of corporate complicity is a different question from whether they will be judged morally responsible by the public at large.[90]

The question of who falls within the sphere of influence of a corporation will likely not turn on legal principles alone but the lack of guidance provided by the Compact suggests it is possible for companies to view it in a restrictive manner. A restricted legalistic interpretation could limit a company's sphere of activity and influence to those with whom it has a direct relationship, such as employees and shareholders. However a more contemporary view may be to look beyond a company's contractual relationships in defining its stakeholders and consider those with whom it has a particular political, economic, geographical *or* contractual relationship.[91]

However limits should be placed on the assumed extent of a company's influence. It is not the role of a company to act as a substitute for government and much depends on the closeness of the connection between a company and its stakeholders. Clearly there is a sliding, and at this point in time still largely undefined, scale of responsibility between a company and the victim or violator of the human rights abuses. The more direct the connection, the greater the responsibility placed on the company to prevent or protect potential victims from such abuse.[92] The lack of clarity provided in the Compact in terms of both the content of the principles and their scope leaves a far too enticing opportunity for some corporations to abuse the polite generosity of the Compact in picking and choosing their 'obligations' to at least support human rights.

B. *Limited accountability and transparency*

Accountability, or rather the lack of it, is the crucial issue that faces the Global Compact. There are now more than 2,000 companies participating in the Compact. There can be no

---

Office of the United Nations High Commissioner for Human Rights, *Embedding Human Rights in Business Practice* (2004) 14, 19.

[89] A Clapham and S Jerbi, 'Categories Of Corporate Complicity In Human Rights Abuses' (2001) < http://209.238.219.111/Clapham-Jerbi-paper.htm>.

[90] For example, public pressure led in part to a claim being filed against Royal Dutch Petroleum Co under the *Alien Torts Claims Act* alleging complicity in gross human rights abuses, *Wiwa V Royal Dutch Petroleum Co* No 96 Civ 8386, 1998 US Dist LEXIS 23064 (SDNY 25 Sept. 1998). Also see Charles Woofson and Matthais Beck, 'Corporate Social Responsibility failures in the oil industry' in Rory Sullivan (ed), *Business and Human Rights: dilemmas and solutions* (2003).

[91] ICHRP, above n 61, 136. Also an expanding definition of stakeholder is also being discussed in company law reforms. See for example The United Kingdom's Department of Trade and Industry *Guidance on the OFR and changes to the directors' report* (April 2005) which notes that directors of a company subject to Operating and Financial Review disclosure requirements should consider the impact of the business's operation on a variety of stakeholders including employees, customers, suppliers and society more widely 'to the extent necessary' to comply with the relevant regulations. In July 2003, the U.K. government announced its intention of requiring certain business to produce operating and financial reviews (OFRs). This followed the work of the Company Law Review and the 2002 White Paper 'Modernising Company Law'. The OFR is designed to improve the disclosure of information by companies. The UK *Companies Act 1985 (Operating and Financial Review and Directors Report etc) Regulations* 2005 [S.1. 2005/1011] came into force on March 22, 2005. Also relevant is the Department of Trade and Industry most recent White Paper on company law reform, *Company Law Reform* March 2005; <www.dti.gov.uk/cld/review.htm>

[92] See generally S R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility?' (2001) 111 *Yale Law Journal* 443.

doubt that the participation of such a group (bearing in mind that there are estimated to be about 65,000 transnational corporations in the world)[93] has helped broaden corporate focus on human rights issues but at the same time it has consistently been alleged that a number of companies are simply using their participation in the Global Compact as a marketing tool. Growing disenchantment with the current model has seen the Compact labelled by one critic as merely providing a 'venue for opportunistic companies to make grandiose statements of corporate citizenship without worrying about being called to account for their actions.'[94]

Very little is asked of participating companies to prove their commitment to the ten principles. The participating company is required to do three things:

- Send a letter from the Chief Executive Officer (and endorsed by the board) to Secretary-General Kofi Annan expressing support for the Global Compact and its principles;
- Publicly advocate the Global Compact and its principles via communications vehicles such as press releases, speeches, etc.; and
- Publish in its annual report or similar corporate report (for example, a sustainability report) a description of the ways in which it is supporting the Global Compact and its ten principles.[95]

These current requirements for a company to report on its progress in its annual report and publicly advocate the Global Compact are not exactly rigorous and have weakened since its inception. The Compact's original aim was to have companies communicate their progress on the Global Compact website but because so few companies took up this offer, rather than mandating compliance with this requirement, the Global Compact adapted its policies to conform to market practices.[96] Establishing the external 'verification' process via corporate publications as opposed to a centralised UN website arguably results in a lower level of scrutiny of corporate performance.

In response to criticisms about the minimal reporting requirements imposed on corporate participants in the Compact, an annual 'Communication on Progress' was introduced in 2003. These communications describe actions taken by each participant in support of the ten principles and are made available publicly, including via the Compact's website. In 2005, in an attempt to further defend the Global Compact's integrity, a new requirement was introduced that allows for companies to be designated as 'inactive' if they do not submit a Communication on Progress for two years in a row, a move, albeit limited, at least in the right direction for increasing the transparency of corporate performance.[97] In communicating aspects of their compliance with the Compact, companies are expected to use indicators that accurately convey their achievements and difficulties in applying the principles to their business operations. Tracking a company on certain issues from year to year requires some performance metrics that all can understand. While the indicators in the environmental assessment area have a longer history of development, social reporting indicators (accounting for human rights and labour standards performance) are only in their infant stages and much more consensus building is required. The Global Compact has no

[93] This is a general estimate commonly quoted, for example see Nuchhi R Currier, 'World Investment Report 2002 Transnational Corporations and Export Competitiveness', *United Nations Chronicle Online Edition*, 17 March 2003 <http://www.un.org/Pubs/chronicle/2003/webArticles/031803_wir.html>.

[94] Williams, above n 6, 762 quoting S P Sethi.

[95] See 'How Can We Participate' at www.unglobalcompact.org.

[96] Zammit, above n1, 83.

[97] Global Compact 'Note on Integrity Measures' above note 14, [3]. The provision became effective as of July 2005.

requirements stipulating standard reporting provisions but encourages companies to use the Global Reporting Initiative[98] (a reporting system that is more about process than assessing performance). If the Global Compact was willing to strengthen accountability from its participants and face up to the issue of standardizing reporting on human rights compliance it could have a valuable role to play in gathering consensus on such indicators. Such action however seems unlikely.

The Global Compact has stated that it will not be involved in monitoring or verification of compliance with the principles. And that the Compact is not a code but should be seen as a frame of reference to stimulate best practices and to bring about convergence around universally shared values.[99] But it is questionable if the limitations of the current model even allow for this. The results of the 2004 McKinsey study suggest not.[100] In many ways with its limited notions of transparency, the Compact does seem to be yet another variation of a code but one without accountability.[101] The limitations of the Global Compact model highlight the narrow ambition, and therefore, impact of this initiative in providing protection against corporate abuse of human rights.[102]

C. *Limitations of the voluntary approach*

The Global Compact is designed to complement and not substitute regulatory frameworks by encouraging voluntary, innovative corporate practices to support greater respect for human, environmental, labour and anti-corruption standards.[103] The voluntary nature of the Compact and its emphasis on dialogue and learning makes it primarily an educational tool—rather than a viable means of enforcing corporate accountability commitments. However, at the same time, given the Compact's significant public profile, it is in a prime position to support other UN initiatives that seek to press companies to confront their human rights responsibilities. Until the recent development of the Norms, the Compact has been (and for many, remains) the principal UN vehicle for dealing with issues of corporate responsibility. The recent decision by the Commission on Human Rights at its 2005 meeting to recommend the appointment of a Special Representative on business and human rights suggests urgency for collaboration and reconciliation between the Global Compact and the stronger proposals contained in the Norms.

When alternatives, such as the Norms, are proposed the Global Compact has been held up by some as a reason for nipping such initiatives in the bud. Several influential business organisations, (notably the International Chamber of Commerce and the United States Council for International Business), vigorously opposed the Norms and the 2005 recommendation of the Commission to appoint a special representative on business and human rights.[104] One of the arguments put forward is that such initiatives are not needed because business is already engaged with the Global Compact and that regulatory initiatives

[98] GRI, above n 69.

[99] Williams, above n 6, 762.

[100] McKinsey, above n 50. But the Global Compact has come round to recognizing that there does need to be some threshold for non compliance at which business participation should be excluded from the Compact—the 2005 Integrity Measures—allows the Compact to expel members for egregious violations but it does not have a regular monitoring or verification feature.

[101] Zammitt, above n 1, 265.

[102] D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law*, 931, 951.

[103] Kell and Levin, above n 46, 159.

[104] See above n 27.

would undermine the spirit of the United Nation's new level of engagement with big business. The Compact is being used by some as an avoidance technique to avoid the introduction of stronger corporate accountability measures at either national or international levels.

The use of such tactics to promote the soft voluntarism of the Global Compact over the potentially stronger mechanisms contained in the Norms invites general speculation about the role of self regulation in promoting greater respect for rights. The Compact, with its limited transparency and lack of clarity around the content of its principles, essentially asks companies to self regulate the nature and extent of the support they offer for the protection of rights. The rapid uptake of the various codes of conduct and guidelines developed over the last three decades and the large number of companies participating in the Global Compact indicates an obvious propensity of companies to endorse a self regulatory approach to rights protection. It is clear that self regulation can, and does, have a role to play in promoting corporate respect for human, labour and environmental rights but to be effective the self regulatory model must meet some minimum requirements - all of which the Compact model is currently lacking.

First, the principles which a company must adhere to should be clearly specified. Without this, it will not be possible for external stakeholders to evaluate and verify the outcomes. The lack of clarity in the nature and scope of the Compact's ten principles leaves far too much room for speculation as to whether or not a participant is adhering to its standards in company practices. Second, there should be credible and reliable monitoring. The better self-regulatory regimes include independent performance auditing, auditor certification and formal verification processes. This does not exist in the Compact model of corporate responsibility. Third, effective enforcement is essential. Most self-regulatory regimes rely on peer pressure and/or some sort of certification as the primary incentives for participation and compliance. The limited transparency of the Global Compact makes it difficult for either corporate peers or NGOs to 'police' the compliance of participants within the Compact.

Finally, the most effective self regulatory models of corporate responsibility are likely to be mulitstakeholder based and this is what the Global Compact sets out to achieve. The Global Compact endorses the approach that improvements will only occur when all stakeholders are fully engaged in the effort to develop corporate practices that do more to respect and promote human rights and in this sense the Compact formally includes not only business but also labour unions, NGOs and representatives of UN agencies in its participatory model. However from the outset the influence of business has far outweighed the contributions of the NGO and labour participants. The most recent example comes from the Compact's 2005 proposal to establish an advisory board. Of the proposed twenty members; 11 seats are reserved for companies compared with just 4 for civil society and 2 for labour representatives. This imbalance is likely to exacerbate existing concerns that the Compact is heavily tilted in favour of corporate interests and approaches. If the Compact is serious about being a genuine "multi-stakeholder" initiative, a more equitable allocation of board seats should be found and implemented.

The softly, softly approach of the United Nations to engendering greater respect for rights by business carries the risk of subverting the public purpose of the organization. Close relations between the UN and big business provides "ample scope for 'capture' such that the United Nations—the supposed rule setter—wittingly or otherwise begins to adopt the agenda of business partners without debate and due democratic procedure".[105] This appears to be the case with the ongoing development of the Global Compact's corporate responsibility model.

[105] Zammit, above n 1, 8.

IV. CONCLUSION

The United Nations clearly finds itself in a difficult position. On the one hand it is aware of the limitations it faces in trying to deal exclusively with the impact of business on human and environmental rights and so it is right in assuming that in this era of globalisation, the state is not necessarily the most capable or indeed only agent for addressing such issues. Non state actors—such as corporations—have distinct responsibilities and competencies to deal with particular issues. However the United Nations Global Compact must do more to clearly define the obligations and expectations of its participants and to narrow its focus on what it should be trying to achieve. The Global Compact should not be just another United Nations forum for allowing for broad-based corporate participation but aim to provide specific guidance on the pragmatic issues companies face in complying with human rights in the business world. In order to do this the Compact must urgently address issues around the lucidity of its principles and encourage the introduction of mechanisms that allow for greater transparency and accountability measures to 'enforce' corporate protection for rights. The emphasis on its voluntary approach toward corporate responsibility should not be used to inhibit the ongoing development and exploration of stronger corporate accountability mechanisms at both the international and national levels. The Global Compact is focused on inspiring practical action to support rights but it is doubtful whether it is achieving this. If the Compact continues on its path of self destruction to build a broad and inclusive tent for all corporate participants, the result will only continue to be a diminution of its overall message that does little for the protection of human rights. The United Nations Global Compact does have a role to play in promoting a greater understanding of the links between business and human rights but the shortcomings of the current model need to be urgently addressed before it can be viewed as a valuable contributor to this field.