Business & Human Rights

The responsibilities of corporations for the protection and promotion of human rights

South African Institute for Advanced Constitutional, Public, Human Rights & International Law

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Introduction

"It is not a question of asking business to fulfil the role of government but of asking business to promote human rights in its own sphere of competence" Mary Robinson[1]

Corporations have a strong impact on the realisation of human rights. "In terms of potential impact, decisions and activities of many large multinational corporations are capable of doing more harm to persons and resources in ways that thwart human rights than decisions and activities of some nation-states".[2] These impacts are not merely confined to labour rights and environmental impact but span the full panoply of fundamental rights.[3] In this context, it becomes necessary for those concerned with fundamental rights to address the responsibilities of corporations for the protection and promotion of human rights. A number of questions immediately present themselves:

Corporations have a strong impact on the realisation of human rights.

- **Do corporations have responsibilities for the realisation of human rights? If so, on what basis do corporations have such responsibilities?**
- **What is the content of the duties that corporations have for the realisation of fundamental rights?**
- **What legal mechanisms should be adopted to enforce the responsibilities of corporations for the protection of fundamental rights?**

Over the past thirty years, these questions have been addressed with increasing frequency in the academic literature and in a range of voluntary approaches, each seeking to encourage corporations to adhere to human rights standards out of their own volition. The first part of this report traces and evaluates some of these developments at the international level. This analysis reveals a variety of conceptual and practical deficiencies with these frameworks, ranging from the lack of content provided to the obligations of companies to the weakness of enforcement mechanisms. Recognition of these drawbacks has led to calls for more binding obligations to be placed upon corporations for the realisation of human rights. In the second part of this report, we investigate three main developments in this regard: first, we consider the advent of litigation for damages

1 Quoted in A Wilson 'Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable Under the Alien Tort Claims Act'. In O De Schutter (ed) *Transnational Corporations and Human Rights* Hart, Oxford, 2006 at 63.

2 JJ Paust "Human Rights Responsibilities of Private Corporations" (2002) *Vanderbilt Journal of Transnational Law* 35: 801, 802.

3 Some of these impacts are documented in a recent report by Human Rights Watch entitled *On the Margins of Profit: Rights at Risk in the Global Economy*, February 2008 (Found at http://hrw.org/reports/2008/bhr0208/) at 7

It shall be argued that the key question that still remains outstanding and needs to be determined is a method of *delineating* effectively the responsibilities that corporations have for the realisation of fundamental rights.

against transnational corporations for the violation of human rights in countries outside the jurisdiction of the court in which the litigation is initiated. Secondly, we analyse an important recent United Nations initiative aimed at imposing binding responsibilities upon corporations. It shall be argued that the key question that still remains outstanding and needs to be determined is a method of delineating effectively the responsibilities that corporations have for the realisation of fundamental rights. Finally, we shall consider the progress made towards this goal in the framework for determining the human rights responsibilities of business proposed by Prof John Ruggie in a recent report considered by the United Nations Human Rights Council.

The third part of this report seeks to bring some of the international experience to bear in the South African context. It begins with a consideration of the largely voluntary framework in which corporate social responsibility has been conceived in South Africa. The report notes the lack of discourse around the binding responsibilities of corporations for the realisation of human rights. This is strange given the fact that the South African Bill of Rights contemplates the direct application of fundamental rights to juristic persons.[4] The report then proceeds to consider the manner in which corporate obligation should be conceived in South Africa, focusing on four main issues.

- First, it is argued that the questions that arise in the international framework under the headings 'sphere of influence' and 'corporate complicity' are relevant to understanding the horizontal application of human rights to corporations in South Africa. Two main factors are outlined: the impact corporations may have on human rights, and the capabilities of corporations.
- Secondly, it is argued that the horizontal application of the Bill of Rights brings about a shift in the very nature of the corporation that requires concomitant law reform;
- Thirdly, the report considers whether the human rights obligations of corporations extend beyond the borders of South Africa into other parts of Africa.
- Finally, the report considers the problem that the corporate form itself often immunizes companies from accepting full responsibility for their actions. In particular, the report focuses on the 'principal-subsidiary' problem that arises when attempting to delineate the responsibility of a principal company for the actions of a subsidiary. An approach is suggested whereby corporations may not use the corporate veil to shield them from their human rights responsibilities.

The report concludes with a series of recommendations for law reform in South Africa so as to ensure that binding obligations are placed upon corporations for the realisation of human rights.

4 Section 8(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution').

part 1

The voluntary approaches

Since the failure in 1992 to adopt a UN Draft Code of Conduct imposing mandatory obligations for human rights on transnational corporations, international efforts have focused on the voluntary adoption by corporations of human rights responsibilities. A range of initiatives have been proposed, the most important of which are outlined below.

1.1 OECD Guidelines

In 1976, the Organisation for Economic Co-operation and Development (OECD) passed the OECD Guidelines for Multinational Enterprises.[5] The guidelines are effectively recommendations to OECD-based companies about how they ought to behave in other countries.[6] The principles cover a range of issues, including information disclosure, bribery, consumer interests, science and technology, environmental concerns, competition, employment and taxation. In the wide-ranging review that took place in 2000, the OECD introduced a new provision that states that enterprises should "respect the human rights of those affected by their activities, consistent with the host government's international obligations and commitments".[7] The Guidelines also contain important provisions that impact on employment standards – for instance, calling for the elimination of child and forced labour – as well as environmental management.

> ... international efforts have focused on the voluntary adoption by corporations of human rights responsibilities.

The Guidelines have been widely used and have had an important influence on the development of notions of corporate social responsibility. They have also influenced other international instruments.[8] Nevertheless they have several key weaknesses:

5 The most recent version of the guidelines can be found at http://www.oecd.org/dataoecd/56/36/1922428.pdf

6 See J Humer "The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises". In MT Kamminga and S Zia-Zarifi Liability of Multinational Corporations under International Law (2000) at 198.

7 Principle II(2) of the Guidelines.

8 J Karl "The OECD Guidelines for Multinational Enterprises". *Human Rights Standards and the Responsibility of Transnational Corporations* (ed MK Addo). The Hague: Kluwer, 1999.

- The Human Rights component remains underdeveloped and is specified in very general terms without a clear understanding of the nature of the obligations falling upon corporations.
- Adherence to the Guidelines is purely voluntary.
- Monitoring mechanisms do not provide sanctions for non-compliance or incentives for compliance and no remedies for violations are available.
- Monitoring mechanisms do not appear to be independent and lack transparency. [9]

1.2 ILO Tripartite Declaration

In 1977, the International Labour Organisation's governing body – comprising governments, employers and workers – approved the Tripartite Declaration of Principles concerning Multinational Enterprises. The declaration is non-binding and relates primarily to labour matters, including health and safety, a minimum age of employment, and conditions and benefits of work, among others.[10] Parties concerned with the declaration also bind themselves to respect the Universal Declaration of Human Rights and corresponding International Covenants as well as the Constitution of the International Labour Organisation (ILO).[11] Monitoring mechanisms include a periodic survey of the implementation of its provisions; and a method of having the guidelines interpreted.

The Tripartite Declaration is a significant recognition by business of its obligations to respect human rights. It also refers to obligations to realise the full panoply of rights that must be adhered to by corporations. Nevertheless, key weaknesses include:

- Apart from labour rights, other human rights obligations and their relationship to corporations are not properly specified.
- It is a purely voluntary initiative.
- It has had a limited up-take and failed to attract wide public interest.
- It has only weak monitoring mechanisms.[12]

9 DM Chirwa "The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law" 2006 *SAJHR* 22: 84-85.

10 See the declaration at http://www.ilo.org/public/english/employment/multi/download/english.pdf

11 Para 8 of the Tripartite Declaration.

12 See Chirwa (note 9 above) at 88.

1.3 The United Nations Global Compact

At the 1999 World Economic Forum, the UN Secretary-General Kofi Annan proposed the adoption by corporations of a Global Compact. The Compact includes ten principles, two of which deal with human rights, four with labour standards, three with environmental standards and one with anti-corruption.[13] The human rights principles provide that: 'business should support and respect the protection of internationally proclaimed human rights' and 'make sure that they are not complicit in human rights abuses'.[14] The objectives of the Compact are to place the ten principles at the centre of business activities around the world whilst also providing support for broader UN goals such as the Millennium Development Goals.[15]

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The Global Compact has been highly successful in attracting signatories with 3700 businesses participating in 120 countries as at February 2008. It has brought some degree of awareness of corporate responsibility for human rights to many businesses and provided some impetus for the change of policies.[16] Nevertheless, a number of key weaknesses of the initiative remain:

- The Compact is purely voluntary and has no legally binding force in international law.
- The principles contained in the Compact are vague and stated at a high level of abstraction. It is further unclear what the extent and range of responsibilities are that fall upon corporations. This allows corporations a wide margin of appreciation to claim compliance.
- The Compact lacks any meaningful monitoring mechanisms and is entirely based upon company goodwill.
- Companies that already comply with the principles are the ones likely to sign up to the Compact.
- Adherence to the Compact is often a good public relations exercise for companies without much substance.

[13] See www.unglobalcompact.org/AbouttheGC/index.html

[14] Principle 1 and 2 of the Global compact ibid.

[15] Ibid.

[16] See Chirwa (note 9 above) 90.

1.4 Company Codes of Conduct

The initiatives described above all come from multi-lateral institutions embracing a range of corporations. However, there has also been a trend over the past 15 years for individual companies to adopt their own codes of conduct. Levi-Straus is often credited as being the first transnational corporation to develop a code of conduct with principles governing its global sourcing and operations in 1991. The number of company codes of conduct has since then grown to 1000, with codes now featuring on websites and annual reports.[17]

One of the benefits of individual codes of conduct is that they are flexible and thus adaptable to the conditions of a particular business. There is also some evidence that a well-implemented code can have a positive impact on the realisation of at least core labour and employee rights.[18]

Nevertheless, key problems that remain with individual corporate codes of conduct include the following:

- Since they are adopted by companies themselves, there is little transparency in their development and implementation.
- Some companies report on compliance whilst others do not. Where it is done, reporting is controlled by the companies themselves, subject to potential bias and verification difficulties.
- Codes do not include a uniform set of human rights and thus may fail to encourage adherence to even certain basic minimum standards.
- There are generally few sanctions for non-compliance by suppliers and subsidiaries. Code-compliance is thus often an 'optional extra' rather an essential part of operations.
- Only a small fraction of companies have codes of conduct and where there are limited reputational benefits, there are few incentives to introduce such a code.[19]

[17] F McLeay 'Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Large Puzzle'. In De Schutter (ed) (note 1 above), 221.

[18] Ibid. at 230-232.

[19] Ibid. at 233-236.

part 2

BEYOND VOLUNTARISM: TOWARDS BINDING NORMS?

2.1 Problems with Voluntarism

The voluntary initiatives have no doubt played an important role in the development of thinking around the responsibilities of corporations for human rights. Even so, these initiatives obscure a number of problems.

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The first set of problems is conceptual and relates to the notion that responsibilities for human rights are assumed voluntarily. This approach is fundamentally flawed. The very logic of having a right entails that others have a duty not to violate that right,[20] and the notion of having a duty in turn means that the course of action concerned is obligatory, not voluntary. To suggest that one may voluntarily decide whether or not to follow a course of action is precisely to deny that one is required to perform that action as a consequence of a right that a person has. This means that duties to fulfil human rights cannot be voluntary. If corporations have such duties, then they must be binding. If they lack these duties, then we must accept that they have a discretion whether to adopt certain courses of action we may regard as good – but such actions cannot be required. It is thus critical to clarify whether or not corporations are the subject of binding responsibilities for human rights protection.

20 See Kramer, M, Simmonds, N.E., Steiner, H. 1998. *A Debate Over Rights*. Oxford: Oxford University Press at 9: "[a] right or claim, then, is the legal position created through the imposing of a duty on someone else".

The *second* set of problems relates to the content of the norms that are imposed upon corporations. Individual codes of conduct vary and the multilateral codes of conduct discussed above are extremely vague as to the nature and extent of the responsibilities that corporations have for the realisation of human rights. Clarification of these responsibilities is urgently required.

Finally, the *third* set of problems with voluntary norms relates to their monitoring and enforcement. Individual codes of conduct are monitored and enforced by the companies themselves, leading to a lack of credibility and objectivity. The multi-lateral initiatives generally provide very weak forms of monitoring and enforcement. There also seems to be a lack of remedies for non-compliance. If corporations have responsibilities for human rights protection, then effective mechanisms need to be developed to ensure that they comply with their duties.

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These problems with voluntary initiatives have led some to advocate for the imposition of *binding* obligations upon corporations for human rights responsibilities. Three important developments have occurred in this regard: first, the possible imposition of civil liability upon corporations for human rights abuses committed in other countries; secondly, the development of a draft document by the UN Sub-commission on Human Rights that seeks to impose binding human rights responsibilities upon corporations; and finally, the release of a United Nations report by Prof John Ruggie proposing a framework for the imposition of human rights obligations upon corporations.

2.2 Transnational Human Rights Litigation

One of the most effective methods of imposing binding obligations on corporations is to make them civilly liable for violations of human rights. It is further important that such civil actions for damages be available not only in the country where the violation takes place (where the court system is often unable or unwilling to deal with the claim) but also in the other, typically more developed country where the principal company has its offices. This kind of action has been of particular importance in the United States where a particular Act exists for this purpose known as the Aliens Tort Claims Act (ATCA).[21] The Supreme Court has upheld the enforceability of this law in circumstances where there are particularly serious human rights violations that breach binding rules of customary international law or the terms of a treaty.[22]

Whilst no claim under ATCA has as yet reached the level at which a court has imposed civil liability upon the parties, a court came close to suggesting it would be prepared to do so in the important

21 28 USC § 1350 (1948).

22 See *Sosa v Alvarez-Machain* (03-339) 542 US 692 (2004).

case of *Doe v Unocal*.[23] The case concerned a claim by a group of villagers in Burma seeking redress for egregious human rights abuses associated with the construction of the Unocal pipeline in Burma. These abuses included forced labour, rape and murder. The United States Court of Appeal found that the case met the threshold standard of serious violations of the 'law of nations' required by ATCA. The problem, however, was that the action was against a corporation (private party) and one of the contentions was that such an action could only be entertained against a corporation where state action had taken place. The court found that there were some norms in relation to which liability could be imposed directly upon corporations: these involved international crimes such as genocide, slavery and war crimes. Crimes such as rape, torture and summary execution may generally require state action, but such action is not required when these are committed in furtherance of the category of crimes that do not require state action, such as genocide and war crimes.

One of the most effective methods of imposing binding obligations on corporations is to make them civilly liable for violations of human rights.

The court also held in a landmark holding that, although the human rights abuses were committed by the Myanmar military, it was not necessary for the imposition of liability on a corporation for the corporation directly to have committed such crimes, but merely to have aided and abetted them.[24] The standard for "aiding and abetting" was "knowing practical assistance, or encouragement that has a substantial effect upon the perpetration of the crime".[25] The court found that a reasonable factfinder could find Unocal guilty of aiding and abetting the commission of the crimes alleged in this instance.

The *Unocal* case demonstrates the importance of domestic remedies for violations of human rights committed in other jurisdictions. As with other litigation of this nature, the case did not get to trial because a settlement was reached between the parties. Nevertheless, the possibilities of civil liability must have provided an incentive on the part of Unocal to settle.

At the same time, however, the case also demonstrates some of the legal difficulties with this form of litigation:

- First, the action lies only in respect of a relatively narrow class of human rights violations that meet the threshold of being particularly egregious. This restrictive focus excludes from its ambit a range of rights – such as economic, social and cultural rights – that are often most prone to abuse by corporations.[26]

23 41 ILM 1367 (2002)

24 Ibid. at 1375

25 Ibid.

26 D. Kinley and J Tadaki 'The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) *Virginia Journal of International Law* 44: 931, 941.

... transnational human rights litigation is important for it establishes that the realisation of human rights standards is not voluntary and can have enforceable consequences for corporations that affects their financial bottom-line.

- Secondly, the 'state action' requirement generally applies, with the exception of a narrow class of actions such as genocide, slavery and war crimes. This makes it difficult to impose liability for human rights violations on the part of corporations for a range of crimes where there is no state complicity.
- Thirdly, often a principal company will claim it lacks liability for the actions of a subsidiary in another country.
- Finally, another important problem that often rears its head in these actions is the question of jurisdiction and, in particular, the principle of 'forum non conveniens'. This principle holds that a court may refuse to assert jurisdiction over a matter where there is a more appropriate forum available to the parties, in the sense that the case may be tried more suitably in that forum for the interests of all the parties and the ends of justice.[27] This principle has provided a successful line of defence for many corporations to litigation faced in their home states.[28] It can help shield companies from liability for transgressions committed overseas by themselves or their subsidiaries or sub-contractors, and "continues to pose a daunting impediment to transnational human rights litigation in the US".[29] There has, though, been a contraction of the principle in recent years.[30]

Further general difficulties with transnational human rights litigation against corporations involve the following:

- Litigation is time-consuming and there is no guarantee of success.
- The vulnerability of corporations to litigation will depend on their place of nationality and operation, and on the relevant legal frameworks.
- Most human rights victims cannot access legal remedies abroad.
- The human rights abuses that can be proved against companies represent only a very small percentage of actual abuses.
- Litigation focuses on punishing those who abuse rights, but does not actively promote incentives for the adoption of 'best practices' in relation to human rights by companies.[31]

27 *Lubbe v Cape Plc* [2000] 4 All ER 268 at 274.

28 Ibid. at 943.

29 S Joseph *Corporations and Transnational Human Rights Litigation*. Hart: Oxford, 2004.

30 See *Wiwa v Royal Dutch Petroleum* 226 F 3d 88 (2d Cir 2000) and *Lubbe v Cape Plc* [2000] 4 All ER 268.

31 S Joseph (note 29 above) at 153.

Despite these disadvantages, transnational human rights litigation is important for it establishes that the realisation of human rights standards is not voluntary and can have enforceable consequences for corporations that affects their financial bottom-line. Some of the legal issues at stake in the litigation are of importance to the broader determination of the liability of corporations for the realisation of human rights. Particularly critical is the necessity to clarify the scope and content of corporate obligations. The next section considers the most recent attempt to establish a codification of binding norms upon corporations. An examination of its deficiencies will help establish a number of outstanding issues relating to corporate liability for human rights violations that this report seeks to identify and analyse.

2.3 UN Draft Norms

The UN Sub-commission on Human Rights established a working group in 1998 that, at its first meeting, decided to examine the possibility of developing a code of conduct for corporations based on human rights standards.[32] After discussion within the group, consensus was reached that an entirely voluntary system was not adequate and the working group was mandated to draft binding norms concerning human rights and corporations. The principles that were adopted are referred to as the "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights".[33] The Sub-commission adopted the norms on 23 August 2003 and then referred the norms to the Commission on Human Rights. There was some disagreement at the Commission surrounding the norms, particularly by international business and some states. The Commission eventually did not adopt the norms but rather considered them to be simply a draft proposal.[34] The Commission appointed a Special Representative to investigate further some of the issues relating to corporations and human rights, and the appointee – Prof. John Ruggie – has released a series of reports in this regard.

The Norms are significant in that they represent an attempt "definitively to outline the human rights and environmental responsibilities attributable to business".

2.3.1 Content

The Norms are significant in that they represent an attempt "definitively to outline the human rights and environmental responsibilities attributable to business".[35] Moreover, this is not a voluntary initiative but a process embarked upon by the United Nations.[36] As a result, it is

32 Chirwa (note 9 above) at 93.

33 See http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En

34 Resolution 2004/116, UN Doc E/CN.4/2004/L.11/Add.7 (2004).

35 J Nolan 'With Power Comes Responsibility: Human Rights and Corporate Accountability'. (2005) *The University of New South Wales Law Journal* 28: 581.

36 D Weissbrodt and M Kruger 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'. (2003) *American Journal of International Law* 97: 901, 903.

important to consider the norms in a little more detail. The focus here is on outlining the Norms, though there is an accompanying commentary that is meant to assist in their interpretation.

After a lengthy preamble, section A outlines the general principles relating to the obligations of corporations. Whilst states are said to have primary responsibility for realising human rights, the norms provide that "within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.[37]

The Norms then go on to specify that corporations are bound to ensure equality of opportunity and treatment as well as non-discrimination against employees;[38] to respect the right to security of the person and not to commit international crimes;[39] to respect a range of worker's rights including avoidance of forced labour and child labour, providing safe working conditions, providing employees with adequate remuneration and respecting rights of collective bargaining;[40] to respect the national sovereignty of states;[41] to avoid bribery and corruption;[42] to ensure the safety and quality of goods;[43] and to protect the environment. [44] The Norms also include a catch-all provision that extends the responsibilities of corporations to all other internationally recognised human rights. [45]

In dealing with implementation, the Norms provide four main suggestions of how this can be done:

- Corporations are obligated to develop internal rules of operation that comply with these Norms and are required to report in accordance with these rules. They are required to ensure that contractors and subsidiaries also comply with these internal rules.
- The United Nations will provide periodic monitoring in a transparent manner of corporations and their compliance with these norms.
- States are required to establish the necessary legal and administrative framework for ensuring compliance with these Norms at a national level.

37 See the Norms found at http://www1.umn.edu/humanrts/links/NormsApril2003.html at para 1.

38 Ibid. at para 2

39 Ibid. at paras 3-4.

40 Ibid. at paras 5-9.

41 Ibid. at paras 10.

42 Ibid. at para 11.

43 Ibid. at para 13.

44 Ibid. at para 14.

45 Ibid. at para 12.

- Corporations are required to provide reparations to individuals where these Norms have been violated and this shall be enforced by domestic courts and international tribunals where appropriate.[46]

The Norms as they currently stand rest in a legal no-man's land.

2.3.2 Key Problems with the Norms

Though the Norms have been lauded for their attempt to create binding obligations upon business, as they stand, they remain an inadequate instrument for the achievement of this purpose for a range of reasons. These are explored below.

a) The Legal Status of the Norms

The Norms as they currently stand rest in a legal no-man's land. The Commission on Human Rights recognised that they contain 'useful elements' but found that the proposal had no legal standing in and of itself.[47] The Special Representative of the Secretary-General who was appointed by the Commission has also produced a strong critique of the Norm's claims to legal standing.[48]

The problem is that international legal principles have generally applied to states, and there is only a limited class of international crimes, such as genocide and crimes against humanity, which are recognised as being applicable to all persons. The traditional view is that corporations are only indirectly bound by international human rights instruments: through the obligations imposed by domestic law in accordance with the state's obligations.[49] The Special Representative sums up his view of the current legal position by saying that none of the recent developments in this area support the proposition that "international law has been transformed to the point where it can be said that the broad array of international human rights attach direct legal obligations to corporations."[50]

46 Ibid. at paras 15-19.

47 See note 34 above.

48 Interim Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises E/CN.4/2006/97 at para 60 found at http://www.unglobalcompact.org/docs/issues_doc/human_rights/English_version.pdf

49 "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts" A/HRC/4/035 at para 35 found at http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf

50 Note 48 above at 64.

b) The Nature and Extent of Corporate Obligations

Whilst some have argued that the Norms represent an attempt definitively to outline the human rights responsibilities of business,[51] they are in fact inadequate for this purpose. The Norms actually only impose very few specific obligations: those that are described are widely accepted in the fields of labour law, international criminal law and environmental law. In relation to the rest of the rights, there is only the catch-all clause and, at times, the Norms impose obligations on corporations that have not been accepted by all states.[52] The Norms have thus been said to be over-inclusive, placing "third generation rights", such as the right to development and environmental protection, on the same level as other fundamental rights.[53]

Moreover, corporations are only required to meet specific obligations in so far as these fall within their "sphere of influence", with states retaining the primary obligation to realise fundamental rights. Whilst the working committee sought to allow the obligations of corporations to vary according to their influence and capabilities, it is important to recognise that, without further clarification, this notion provides no clear guidance as to the ambit of corporate obligation in any specific instance.[54] This lack of specification is damaging to the Norms. It allows corporations to assert that they are not bound in a particular instance and thus to escape liability where this should be imposed. It also may be said to be unfair to corporations in that individuals may assert binding obligations where none should apply. Clarity in relation to the operation of this concept is thus critical if the Norms are really to be capable of achieving their purpose.

This lack of specification is damaging to the Norms. It allows corporations to assert that they are not bound in a particular instance and thus to escape liability where this should be imposed.

A similar problem arises in relation to the extent of corporate obligation. Corporations often operate in states that violate human rights. When is it fair to impose liability on such corporations? Such liability could be imposed only when they are directly involved in the abuse or contribute to the abuse. On the other hand, it may be argued that liability may be imposed where corporations remain silent in the face of such abuse. These questions usually arise in the attempt to define the notion of "corporate complicity" in human rights violations. The Norms do not address this problem and consequently fail to provide guidance in this regard.

51 Nolan (note 35 above) at 583.

52 Interim Report (note 48 above) at 66.

53 Nolan (note 35 above) at 595.

54 Ibid. at 67.

Related to "corporate complicity" is the problem of subsidiaries and supply chains. When are corporations liable for the actions of their subsidiaries and contractors? The Norms require corporations to implement them in their dealings with other businesses: yet, they do not provide any guidance as to when the corporation may itself be held responsible for the actions of other parties. Again, they leave unspecified a major issue in relation to the imposition of binding obligations upon corporations.

c) Enforcement of Corporate Obligations

Even supporters of the Norms recognise that the enforcement mechanisms are "rudimentary".[55] The self-regulatory framework adopted for the Norms does not really go beyond previous voluntary initiatives. The United Nations compliance mechanisms are underdeveloped: whilst they seem to contemplate treaty bodies requiring reports by States on compliance by corporations within their territories,[56] this provides only a very indirect method of assessing corporate compliance and will depend upon state capacity and willingness to make these enquiries. The Norms clearly envisage a role for states but do not provide any clear idea of which mechanisms may be most effective in this regard. Whilst the Norms lay out the field of possible mechanisms, in order to ensure that human rights standards are in fact binding, it will be necessary for settled mechanisms to be developed for enforcement.

Even supporters of the Norms recognise that the enforcement mechanisms are "rudimentary".

2.4. The Ruggie Framework

In light of the controversy engendered by the draft Norms as well as some of their deficiencies, the United Nations Human Rights Commission appointed a Special Representative to investigate further some of the issues relating to corporations and human rights. The appointee – Prof John Ruggie – has conducted research in this area and released a series of reports. In April 2008, he made public his proposed framework for the imposition of human rights responsibilities upon corporations (what I shall term the Ruggie framework).[57]

55 D Weissbrodt and M Kruger (note 36 above) at 922.

56 Ibid. at 607

57 See J Ruggie 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) A/HRC/8/5 found at http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

The report proposes a 'due diligence' approach whereby companies are expected to ensure that the impact of their activities does not cause adverse human rights impacts.

The framework comprises three main principles. First, the report emphasizes the state's duty to protect individual rights against abuse by non-state actors.[58] To this end, states are encouraged to introduce regulatory measures to strengthen the legal framework governing human rights and business, as well as to provide mechanisms for the enforcement of such obligations.[59]

Secondly, businesses are said to have the responsibility to respect human rights. Instead of focusing on specific rights as the Draft Norms do, the report argues that corporate responsibility extends to all internationally recognised human rights.[60] It also contends that it is necessary to focus on the specific responsibilities of corporations in relation to rights which are not equivalent to those of states. "To respect rights essentially means not to infringe on the rights of others – put simply to do no harm".[61] The report proposes a 'due diligence' approach whereby companies are expected to ensure that the impact of their activities does not cause adverse human rights impacts.[62]

Finally, the third principle is that there must be access to remedies.[63] This involves investigation processes where violations are alleged, as well as provisions for redress and punishment where required. The report proposes a variety of judicial and non-judicial mechanisms to improve and strengthen enforcement.[64]

The Ruggie framework attempts to deal with many of the deficiencies of Draft Norms. The approach is a minimalist one, designed to command widespread agreement: it focuses on the widely accepted legal duty of states to protect whilst only placing the largely negative obligation to respect upon corporations. Whilst it is an advance on the Draft Norms, the range and ambit of this obligation to respect

58 A good example of the violation of a state duty to protect occurred in Nigeria where the government apart from actively violating human rights allowed oil companies to degrade the environment, impacting on the right to health, the right to housing and the right to food of the Ogoni people in this area. This was found to be a violation of Nigeria's duties under the African Charter in *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria* No. 155/96 (Oct 2001) 15th Annual Activity Report of the African Commission on Human and People's Rights at 31-44 found at http://www.achpr.org/english/activity_reports/ activity15_en.pdf

59 Ruggie Report (note 57 above). at [18].

60 Ibid. at [51]-[52].

61 Ibid. at [24].

62 Ibid. at [56]-[64].

63 Ibid. at [26] and [82].

64 Ibid. at [83]-[87].

still requires further elaboration if corporate responsibilities for human rights are to be properly delineated. For instance, the framework could be understood merely to impose obligations not to commit human rights violations; yet, the report suggests that "doing no harm" is not 'simply a passive responsibility but may entail positive steps.'[65] Avoiding negative violations may well require the company to put in place measures to ensure that such violations do not take place.[66] Much of the difficulty lies in specifying the nature and extent of the positive steps that are required.[67] Moreover, it may be questioned whether a duty to respect does not place the bar too low for business, failing to articulate the manner in which powerful corporate actors actually have certain duties to make positive contributions towards the fulfilment of human rights in the societies in which they operate.[68] What the framework lacks is a specification of factors that would govern the imposition of stronger positive obligations upon corporations in particular contexts.

Avoiding negative violations may well require the company to put in place measures to ensure that such violations do not take place. Much of the difficulty lies in specifying the nature and extent of the positive steps that are required. Moreover, it may be questioned whether a duty to respect does not place the bar too low for business, failing to articulate the manner in which powerful corporate actors actually have certain duties to make positive contributions towards the fulfilment of human rights in the societies in which they operate. What the framework lacks is a specification of factors that would govern the imposition of stronger positive obligations upon corporations in particular contexts.

2.5 Conclusion: Understanding Corporate Obligations

There is a need for binding human rights standards which are "consistent and comprehensive, rather than allowing companies to accept the standards of the lowest common denominator".[69] The United Nations Norms did not succeed in providing a principled basis upon which to establish the obligations of corporations. The Ruggie framework fares better, yet it is minimalist and still leaves open many unanswered questions as to the nature of the positive obligations upon corporations to ensure respect for human rights norms. It is thus necessary to consider the manner in which the responsibility of corporations can be more effectively delineated.

65 Ibid. at [55].

66 This may have specific relevance in relation to particular types of rights such as economic and social rights: see, for instance, D Aguirre 'Multinational Corporations and the Realisation of Economic, Social and Cultural Rights' (2004-5) 35 *California Western International Law Journal* 53.

67 The Ruggie Report somewhat unsatisfactorily simply states at [54] that the 'broader scope of the responsibility to respect is defined by social expectations". If social expectations are low given a history of corporate violations, are continued human rights abuses acceptable?

68 The framework does recognize that such obligations may exist on occasions but fails to provide any clear outline as to when this may be so. See the Ruggie Report. at [24].

69 Nolan (note 35 above) at 591.

The next section of this report will seek to consider the manner in which a number of similar problems arise at the domestic level when considering the human rights responsibilities of corporations. The focus will be on South Africa, a country that plays an important role in standard-setting on the African continent as well as being the place where many corporations are housed that do business in other parts of Africa. South Africa also has a constitutional framework that is particularly conducive to the imposition of binding human rights obligations upon corporations.

part 3

TOWARDS BINDING HUMAN RIGHTS OBLIGATIONS FOR BUSINESS IN SOUTH AFRICA

3.1 The Current Approach: Voluntary Assumption of Responsibility

Apartheid was recognised as an international crime by the United Nations in 1973.[70] South Africa's pariah status internationally had an undeniable impact on corporations doing business in South Africa. For some, apartheid represented an opportunity to make profits, especially during the 1960s when the South African economy was very strong. As time progressed, calls began for a boycott by international companies of South Africa. A number of companies, such as Barclays Bank, pulled out. Others, seeking to avert a total boycott, argued that constructive engagement on the basis of ethical principles was a better way to defeat apartheid. The best known of these initiatives were the Sullivan Principles, to which many corporations operating in apartheid South Africa subscribed. [71]

70 See the International Convention on the Suppression and Punishment of the Crime of Apartheid found at http://www.anc.org.za/un/uncrime.htm. It is now included in the Rome Statute of the International Criminal Court.

71 These principles are still adhered by certain corporations in other contexts and can be found at http://www.globalsullivanprinciples.org/principles.htm.

With the advent of democracy, South Africa adopted a new constitutional framework that is conducive to the imposition of binding obligations upon corporations. Yet, despite this, the corporate social responsibility framework in South Africa after 1994 has been dominated by voluntaristic approaches.[72] As a method of recognising their obligations, many large corporations have corporate social investment divisions that donate large sums of money for the development of important social projects. Nevertheless, the corporate social investment model is effectively a model whereby corporations give "charity" to causes that move them, either because of the positive reputational benefits that flow from such donations, or out of a genuine altruistic concern for the welfare of society on the part of shareholders and directors.

This framework of voluntarism has been complemented by developments in relation to corporate governance and, in particular, the King II Report that made certain far-reaching recommendations.[73] In the first place, the King II Report broadened the notion of company stakeholders to include "the community in which the company operates, its customers, its employees and its suppliers".[74] According to one author, "[t]he dismantling of apartheid brought with it the realisation that companies were not operating in a vacuum. The shibboleths of the exclusive approach or shareholder supremacy at all costs approach started to fall apart".[75]

With the advent of democracy, South Africa adopted a new constitutional framework that is conducive to the imposition of binding obligations upon corporations.

Secondly, the Report introduced the notion of non-financial reporting and the idea of the "triple bottom line", which extends the traditional conception of the role of business beyond the single-minded pursuit of profit to embrace social and environmental considerations. Through this notion, it has been recognised that companies have a duty to adopt sound policies that minimise their negative impact on society.

The King II Report represents a welcome development in the thinking around corporate social responsibilities in the South African context.[76] Yet, the approach adopted there has a number of drawbacks from a human rights perspective:

- There is very limited focus on human rights and no attempt to delineate the obligations of corporations.

72 See D. Aguirre 'Corporate Social Responsibility and Human Rights Law in Africa' (2005) *African Human Rights Law Journal* 5: 239, 264 for criticism of a purely voluntaristic concept of corporate social responsibility.

73 See King II Report, a final draft of which can be found at http://innerweb.nu.ac.za/depts/unms/king-report-on-corp-gov.pdf

74 Ibid. at Para 5.3.

75 T Mongalo *Corporate Law and Corporate Governance*. Claremont: New Africa Books, 2003 at p. 198.

76 Another important development was the development of a JSE Social Responsibility Index. Companies apply for inclusion in the index and are assessed against a number of defined criteria and indicators.

- The King II Report is somewhat equivocal on how the duties of directors of a company should be conceptualised in relation to these wider stakeholders and social concerns.[77]
- Ultimately, the King II Report seems to focus on aspirations and ideals of good corporate citizenship rather than hard obligations. It provides guidance that is to be followed on a voluntary basis. Only where required by bodies such as the JSE, does such guidance become mandatory.
- The focus of the King II Report is upon "corporate governance" and consequently the framework in which it operates is one of self-regulation. It does refer to the benefit of independent verification as involving "greater transparency and confidence in a company's integrity",[78] yet ultimately there is no obligation to have one's non-financial reports verified. Thus, non-financial reporting can in fact mask a number of violations that the company simply does not reflect in its reports.
- In the unlikely event that a company should report a human rights violation or environmental infringement that is not made known by other means, the King II Report does not outline any remedies.

It should be evident that, whilst these proposals have sought to encourage recognition of the wider social responsibilities of corporations, they fall short of the notion that such responsibilities impose binding obligations with enforceable consequences.

3.2 Towards Binding Obligations in Law

It is remarkable that so little has been written concerning the human rights obligations of corporations in South Africa.[79] Company law and constitutional law have continued largely as separate disciplines with a very limited area of overlap. This is so despite the express application of the Bill of Rights to natural and juristic persons.

The application clause of the Bill of Rights begins by asserting that "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".[80] This is often taken as asserting the protection that a bill of rights traditionally grants to individuals against the state.[81] However, the Constitution goes beyond this so-called "vertical relationship" to assert a degree of "direct horizontal application" between individuals and other individuals: significantly,

77 Mongalo (note 75 above) at 212.

78 King II Report (note 74 above) at para 13.

79 A review of South African writing on company law and constitutional law found very limited references to corporate *obligations* for the realisation of human rights..A rare exception that only offers a short treatment of the subject is M Havenga "The Company, The Constitution and the Stakeholders" (1997) *Juta's Business Law* 5(4): 134-139.

80 Constitution of the Republic of South Africa Act 108 of 1996.

81 I Currie and J de Waal *The Bill of Rights Handbook*. Lansdowne: Jutas, 2005 at 33.

this includes legal persons.[82] Thus, section 8(2) of the Constitution provides that "a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". Section 8(4) expressly provides that "a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of that juristic person". The next sections seek to draw out the implications of these provisions for corporations.

3.3 Horizontal Application: When are Human Rights Binding on Companies?

The most important section of the Bill of Rights relating to the obligations of companies is section 8(2) that is quoted above. The clause envisages three sets of circumstances: on the one hand, a right may be of no application to private persons; a right may apply fully to private persons; and a right may only be applicable to a certain "extent". Thus, the mere existence of the right in the Bill of Rights does not determine its application to private persons such as corporations. In order to determine whether the right imposes binding obligations, something further is required. These elements are specified in section 8(2) which outlines two factors that determine the applicability of a right to private actors: the "nature of the right" and the "nature of any duty imposed by the right".

> If private parties have a large degree of impact upon the right, then it is more likely that it will be of application in the horizontal sphere.

This suggests that there are features of certain rights and certain duties that render them of application to private persons whilst certain features render them inapplicable. In order to render these factors meaningful, it is necessary to read the "nature of the right" to refer to a certain "feature of the right" or the "justification" or "content" of the right that renders it of application to private persons. The problem is that without any further specification, these two factors are almost entirely unhelpful as the most critical question is which *features* render such rights or duties applicable to private parties. In the absence of such specification, the courts, when deciding whether to apply a right to private persons in a particular case, will have to provide an understanding of the features of the rights that render them applicable to private persons.

The Constitutional Court has only once addressed section 8(2) and the question of direct horizontal application, in its decision in *Khumalo v Holomisa*.[83] The case concerned whether the common law of defamation as developed by the courts was inconsistent with the Constitution.

82 This is different from the position that obtained with the interim Constitution where the Bill of Rights only had 'indirect horizontal application'. See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

83 2002 (5) SA 401 (CC).

Since the litigation occurred between two private parties, the applicants effectively asserted that the right to freedom of expression was of horizontal application in the dispute and could be applied directly to the law of defamation.

In applying section 8(2), the Court outlined three *features* of the right to freedom of expression that rendered it capable of direct horizontal application in this case. First, the court referred to the 'intensity of the right'. The meaning of this phrase is unclear, but it suggests that the *importance* of the right is a factor determining whether it should be of direct horizontal application.[84] This is a strange criterion upon which to decide the application question: a right such as the right to citizenship is very important, but clearly does not apply between private parties because its essential features render it incapable of such application.

What we see happening in a rudimentary fashion in *Khumalo* is the Constitutional Court beginning to grapple with the principled features that may lead rights to be of application between private parties.

Secondly, the court referred to the potential invasion of the right in question that could be occasioned by persons other than the State or organs of State. This factor looks more promising in determining the application question as it refers to the impact that private parties may have on the exercise of a particular right. If private parties have a large degree of impact upon the right, then it is more likely that it will be of application in the horizontal sphere. This is of particular importance in the context of companies given that the increasing power of corporations provides them with the potential to have a large impact upon fundamental rights.[85] Nevertheless, this factor lacks specificity: is it only potential impact that determines whether the right is of application or does there have to be an actual impact? Moreover, is any form of impact sufficient or does it have to be a severe impact?

Thirdly, the court referred to the *nature* of the parties before it and whether the right had a particular importance to them. The *role* of the private party within the broader society could also be considered. Thus, given that freedom of expression is of critical importance to the media and that the media plays a fundamental role in South African democracy, the court found that this right applied directly to the dispute.

What we see happening in a rudimentary fashion in *Khumalo* is the Constitutional Court beginning to grapple with the principled features that may lead rights to be of application between private parties. This is precisely the question that is being asked at the international level in trying to make

84 Currie and De Waal (note 81 above) at 52 suggest that this phrase refers to perhaps the force or strength of the right and that this may be determined by its importance in the constitutional order as its outlined by the court in several paragraphs in the judgment.

85 Nolan (note 35 above) at 581 and A Cockrell *Butterworths Human Rights Compendium* (RS 13 Oct 2003) ch3 at 3A2.

sense of the notion of "sphere of influence". Dissatisfaction with the vagueness of this notion and the consequent lack of clarity it engenders for the imposition of obligations upon corporations has led the UN to ask its Special Representative to render it more precise.

Lehr and Jenkins, two of the researchers for the UN Special Representative, published an interesting piece in which they argued that there are two major problems with the notion of "sphere of influence".[86] First, the idea of influence alone cannot be used to assign human rights responsibilities to companies "unless one makes the unreasonable assumption that they are responsible for the enjoyment and abuse of rights by every person or entity their influence may touch". Secondly, the notion lumps together too many disparate concerns to be truly useful. It is necessary to attempt to disentangle the various elements contained in this notion in order to understand more precisely what the factors are that govern the imposition of human rights obligations upon corporations.

The major unanswered question currently in relation to corporations and human rights is to find a clear method to determine the application of human rights responsibilities to corporations and, in particular, the extent of their positive obligations in this regard

Lehr and Jenkins argue that the notion of influence lumps together ideas of "proximity, impact, control, benefit and political influence".[87] Proximity refers to the connection between the company and surrounding communities. As the authors point out, however, pollution has impacts on communities far away from the source thereof and violations of privacy can endanger "far-flung and dispersed persons". Proximity alone cannot therefore determine the human rights obligations of companies.

Causation refers to the ability of companies to affect the enjoyment of fundamental rights. The role of this factor may at times also be "unclear" or "indirect": for instance, the harm is often caused through a supply chain or through a number of companies acting together. This leads to a consideration of control, which has to do with how "tightly coupled [the company] is to the harm's immediate cause" and the ability of the company to influence whether the particular violations occur or not. This may be complex given the involvement of nominally different subsidiaries of the company and involves determining standards for the "complicity" of the company in human rights violations.[88] "Benefit" involves the notion that companies may not directly cause harm but may benefit from human rights violations such as forced labour. "Political influence" refers to the capacity of a company to influence government policy and actions in relation to human rights.

86 A Lehr and B Jenkins 'By Invitation: Business and Human Rights – Beyond corporate spheres of influence' found at http://www.ethicalcorp.com/content.asp?ContentID=5504

87 Ibid.

88 See I Tofalo 'Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations'. In De Schutter (note 1 above).

Several other factors have also been suggested that are of relevance to determining the human rights responsibilities of corporations, including knowledge of the violation, the duration thereof as well as the severity of the violation.[89]

The major unanswered question currently in relation to corporations and human rights is to find a clear method to determine the application of human rights responsibilities to corporations and, in particular, the extent of their positive obligations in this regard.[90] In the absence of such a method, it is submitted that there are two main factors which can assist in determining this responsibility:

- First, from the perspective of those who find themselves subject to human rights violations or potentially subject to them, the impact or potential impact of corporations on the enjoyment of rights by natural persons must be considered.
- Secondly, from the perspective of the corporations themselves, their own capacities, capabilities and functions are the critical concern for determining the range of their responsibilities.

Both of these principles require further development and certainly embrace a number of the factors outlined above. Nevertheless, they can provide preliminary guidance when considering in particular instances whether corporations have responsibilities for the realisation of particular rights.

3.4 Horizontal Application: Requiring Reform of the Corporate Structure and Company Law?

The traditional understanding of the purpose of business, and of corporations in particular, was of course the maximisation of profit. Milton Friedman thus famously argued that "there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game".[91] Recent developments in the international sphere as well as domestic initiatives have challenged this very limited understanding. Notions such as the "triple bottom line" are meant to recognise corporate responsibilities that go beyond simply making profit. Yet, as we have seen, these ideas lack binding force. Moreover, as some have argued, the very nature of the corporate form itself is inimical to recognising wider social responsibilities.

89 Report released by John Ruggie 'Corporate Responsibility to Protect Human Rights' on a meeting convened by him in Geneva on 4-5 December 2007 at p 6 found at http://www.reports-and-materials.org/Ruggie-Geneva-4-5-Dec-2007.pdf at 7.

90 See the critique of the Ruggie framework discussed above.

91 Milton Friedman, Capitalism & Freedom 133 (1962); *see also* Milton Friedman, *The Social Responsibility of a Business is to Increase Profits*, N.Y. Times, Sept. 13, 1970 (Magazine) at 32, 125.

This argument arises from considering certain of the essential features of companies. These are often described as the achievement of separate legal personality, which allows the company to be the bearer of its own rights and liabilities. The very purpose of the corporation is thus to separate out the shareholders from bearing full responsibility for the fate of the company and "the risk carried by the contributors of capital extends no further than the loss of the amount which they have contributed to the venture as capital".[92] The focus of corporate activity is thus to achieve value for its shareholders without imposing full responsibility for its actions upon those very shareholders. Thus some have argued that "this creates a structure which is pathological in the pursuit of profit".[93]

The focus of corporate activity is thus to achieve value for its shareholders without imposing full responsibility for its actions upon those very shareholders. Thus some have argued that "this creates a structure which is pathological in the pursuit of profit".

In South Africa, the Constitution fundamentally alters the terms of this debate. In order to understand why, it is important to recognise that, in 1994, South Africa adopted a system of constitutional supremacy whereby the Constitution regulates the very foundations of South African society. This means that "the Constitution is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control".[94] All exercises of public power are subject to the constraints of the Constitution.[95]

The same is true of private bodies, whose actions are also constrained by the Constitution. Section 8(2) makes it clear that private bodies must conform to the Bill of Rights to the extent that it is applicable to them. Consequently, private bodies cannot be conceived of as having powers that directly conflict with their responsibilities in terms of the Constitution, which is the founding source of all legal authority in South Africa.

This legal principle has important implications for corporations. Since all law now derives from the Constitution, and structures cannot be created that are in conflict with the Constitution, the structures established by the Companies Act 61 of 1973 must conform with constitutional constraints. This means that the notion of creating a structure which can pursue profit at the expense of human rights is no longer legally tenable. **Inherent in the structure of a company now is the implicit demand that it respect and protect human rights to the extent that these rights are applicable to it. The applicability of the Bill of Rights to corporations, in other words, goes beyond purely imposing obligations upon them: it changes the very nature of the corporation in South Africa.**

92 HS Cilliers et al *Entrepreneurial Law*. Durban: Butterworths, 2000.

93 See Corporate Watch Report *What's Wrong with Corporate Social Responsibility* (2006) at 9.

94 *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at [44].

95 Ibid. at [51] and [85]ff.

Thus, a corporation no longer can claim that corporate social responsibility is voluntary. Rather, the exercise of corporate power is only allowed to the extent that it does not violate the human rights of others. The radical nature of this change has not been noticed until now, but it is a logical outcome of the direct horizontal application of the bill of rights to corporations (and private actors more generally).

Some might argue that these considerations are pretty abstract and would thus question how this insight in fact impacts on common-law rules and the statutory position of companies. Although there is some merit in this contention, the appropriate response is not to assume that business can carry on as usual, but to think through the ways in which the Companies Act may be amended to reflect the changed constitutional status of companies. Failing this, the courts have the power to develop the common law and, in relation to natural and juristic persons, to "apply, or if necessary develop the common law to the extent that legislation does not give effect to that right".[96]

Inherent in the structure of a company now is the implicit demand that it respect and protect human rights to the extent that these rights are applicable to it. The applicability of the Bill of Rights to corporations, in other words, goes beyond purely imposing obligations upon them: it changes the very nature of the corporation in South Africa.

What changes are mandated by the horizontal application of the Constitution? First, to render corporate law in conformity with the Constitution, the Companies Act should specify that corporations are required to place in their memorandum of association that they recognise that they are bound by the rights in the Bill of Rights and are responsible for their realisation to the extent that they bear responsibility for them. This would ensure that the realisation of rights is one of the prime constraints on the activities of a company.

Secondly, the fiduciary duty of directors to act in good faith, which has traditionally been seen as a duty to act with care and skill in the best interests of the company, should be reconceived as including a duty to act with due care and skill to ensure that the company's activities do not violate fundamental rights. The King II Report suggests that this duty to a wider range of stakeholders could be interpreted to be part of the duty to act in the best interests of the company where these interests are construed widely. However, given uncertainty as to what constitutes a company's interests and the tendency in the commercial world to construe this issue in purely commercial terms, it is suggested that a

96 Section 8(3) of the Constitution.

specific duty be imposed on directors to ensure that their company complies with its obligations to realise the fundamental rights in the Constitution. A precedent for such a measure has recently been adopted by the United Kingdom in its revised Companies Act of 2006. Directors now explicitly have a "duty to promote the success of the company as a whole" and this includes having regard to "the impact of the company's operations on the community and the environment".[97] Such a duty is wider than a fiduciary duty to ensure conformity with human rights but surely includes the latter.

This statutory fiduciary duty could also be supported by the recognition that directors may be held personally liable for violations of human rights. Given that they are in fact the practical decision-makers in a company, it is important not to allow directors to shield themselves behind the separate legal personality of the company. Establishing a principle of personal liability for violations of human rights (whether criminal or civil) would ensure that these considerations are taken into account at the heart of corporate decision-making. For practical purposes, and also for reasons of principle, it may be necessary to limit such liability to directors that have some direct link to the actual violation of rights that takes place, rather than imposing liability on the Board as a whole.

Thirdly, the Companies Act generally establishes financial reporting obligations on the part of companies.[98] Instead of leaving this to the discretion of companies, provisions for non-financial reporting should be included within the duties a company has to fulfil. This need not be an overly onerous requirement, and standards established by bodies such as the African Institute for Corporate Citizenship could be used as the basis for such reporting. In particular, there should be mandatory reporting on the impact on human rights of a company's activities and how it has sought to meet its obligations in this regard. A compliance office within the Registrar of Companies could be set up to establish expertise in monitoring and verifying non-financial reporting.

These are just some of the possibilities for law reform arising out of the horizontality of the Bill of Rights that would ensure that human rights compliance becomes a part of corporate activity in South Africa.

97 See section 172(1)(d) of the United Kingdom's Companies Act (2006) found at http://www.opsi.gov.uk/ACTS/acts2006/pdf/ukpga_20060046_en.pdf

98 The reporting requirements for both public and private companies involve preparing financial statements that must be presented at the annual general meeting of the company (section 286 of the Companies Act). These statements must be distributed to members and debenture holders not less than 21 days before the annual general meeting (section 286 and 288). In the case of a public company, these statements must also be sent to the Registrar of Companies (section 302 of the Companies Act). See HS Cillers et al *Entrepreneurial Law* (2ed). Durban: Butterworths, 2000 at 236-237.

3.5 Extra-Territoriality of the Bill of Rights

One of the most important areas to consider in relation to the obligations of corporations under the Constitution is whether the Bill of Rights applies to corporations where they are based in South Africa but operate beyond South Africa's borders. Some corporations meet their obligations to respect fundamental rights within South Africa's borders. Yet, when such corporations operate beyond the borders of South Africa, where human rights protection is often weaker, they may adopt a different approach and be prepared to violate human rights, or possibly only comply with a lower threshold of protection that these countries offer. South Africa is a major source of investment in the rest of Africa. It is thus important to consider whether the South African Bill of Rights binds corporations beyond South African borders.

In the case of *Kaunda*,[99] the Constitutional Court was approached by South African citizens who were being held on charges relating to mercenary activities. They wanted the court to direct the South African government to seek the release and extradition of these citizens from Zimbabwe and Equatorial Guinea back to South Africa or, alternatively, more limited orders seeking assurance that the governments in these places would ensure the death penalty was not imposed and a fair trial conducted. The majority of the court refused to grant the orders, for two main reasons. First, it held that "[t]he bearers of the rights are people in South Africa. Nothing suggests that it [the Bill of Rights] is to have general application beyond our borders".[100] Secondly, it relied upon the principle of state sovereignty to recognise that the laws of a State ordinarily apply only within its territory.[101]

One of the most important areas to consider in relation to the obligations of corporations under the Constitution is whether the Bill of Rights applies to corporations where they are based in South Africa but operate beyond South Africa's borders.

The holding of the Court does not rule out all extra-territorial application but is limited to the proposition that the Bill of Rights does not have extraterritorial effect where this would involve a violation of the principle of state sovereignty.[102] It is not exactly clear when a court will hold that the extra-territorial effect of the Bill of Rights involves a violation of State sovereignty. Nevertheless, the limitation of the ruling is important and allows for extra-territorial application in relation at least to certain state activities.[103]

99 *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC).

100 Ibid. at [37].

101 Ibid. at [38].

102 Ibid. at [45].

103 Woolman "Application' in Woolman et al Constitutional Law of South Africa. Cape Town: Jutas, 2007, at 31-118.

A similar point applies to section 8(2) and the actions of private actors beyond South Africa's borders. It is possible to see the extraterritorial application of the Bill of Rights to companies not as a violation of state sovereignty but as a requirement of South African domestic law that binds South Africans wherever they may be, for several reasons.[104]

First, the logic of human rights protection does not allow for the prioritisation of only those within particular borders. If the fundamental interests of human beings deserve protection, then it is all human beings with those interests that qualify for that protection.[105]

Secondly, the regulation of private actors only occurs where they have a particular nexus to the concerned state. Thus, where a parent company with de facto control of another company exists in a particular state, then obligations may be imposed upon the parent company. Thus, extraterritorial regulation is not being suggested for companies with no link to South Africa; rather, the claim is that if one wishes to do business in South Africa, then one is required to observe the fundamental norms of South African society both here and abroad.

... the logic of human rights protection does not allow for the prioritisation of only those within particular borders.

Thirdly, human rights are no longer considered merely an internal matter of domestic law, partly as a result of the South African struggle against apartheid. Developments in international law have recognised limitations on state sovereignty for purposes of human rights protection.

Finally, all states have a duty to ensure respect for human rights that includes a duty to ensure that the entities within their sovereign territory respect human rights. By enacting an extraterritorial law, home states have the ability to help host states enforce their human rights obligations against corporations. Extra-territoriality can thus be seen as a "matter of cooperation amongst states rather than a source of conflict and friction".[106]

The question then arises as to why the home state of a corporation should regulate compliance with human rights where such regulation does not exist in the state where the actual violation is taking place (the host state). In fact, there are several reasons. First, the home state is often in a much stronger position to enforce human rights legislation than weaker states that lack bargaining power with major corporations. Often the choice for host states will be to waive the application of these laws or to lose significant investment. Secondly, the home state model allows for regulation of the parent corporation, which is almost always more effective than regulating subsidiaries. Thirdly,

104 Much of the discussion has been influenced by S Deva 'Acting Extraterritorially to tame multinational corporations for human rights violations: Who should 'Bell the Cat'?' (2004) *Melbourne Journal of International Law* 5: 37, 47-49.

105 See D Bilchitz *Poverty and Fundamental Rights*. Oxford: Oxford University Press, 2007 at 69-71.

106 Deva (note 104 above) at 49.

home states often have more developed legal systems and a greater availability of legal resources to ensure that challenges are made when violations occur. Finally, home states often have higher standards of human rights protection. [107]

The use of the United States Alien Tort Claims Act provides an example of the importance of extra-territorial jurisdiction. Despite the fact that no claim has been decided on its merits, this Act has led to a number of settlements in cases of major human rights violations. It has also led to high-profile litigation, with the companies concerned seriously worried about the reputational damage such litigation inflicts. The mere existence of the legislation encourages a culture of corporate responsibility and ensures the enforceability of binding human rights obligations.

For all these reasons it makes sense for South Africa to enact a statute to give the courts jurisdiction over the actions of South African companies in countries beyond South Africa's borders. Such jurisdiction could involve criminal sanction for international crimes and delictual liability for other human rights violations. Whilst the Constitution may be read to impose such liability, the lack of clarity in the wake of *Kaunda* suggests that a statute is needed to remove any doubt. Such a statute would have a major impact on corporate actions beyond South Africa's borders: a culture of impunity would be prevented from taking root and an enduring commitment to the horizontal application of the Bill of Rights would be solidified.

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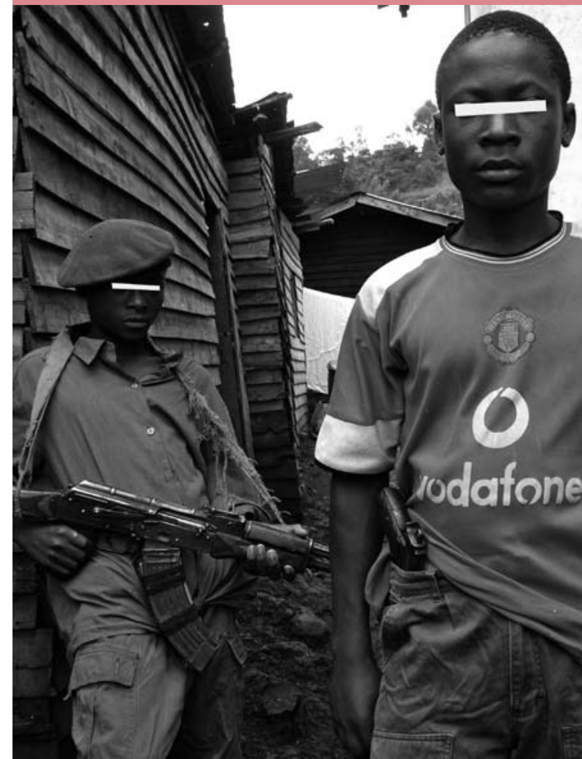

3.6 Beyond Formalism: Piercing the Corporate Veil

As discussed above, corporate legal personality can be used as a means to avoid responsibility. This is not a new insight but one that has been recognised by company lawyers since the inception of the company. In order to avoid a corporate form being used to avoid liability for a range of practices, the courts have long recognised that there are circumstances in which the "corporate veil" should be pierced to establish the true nature of transactions. The problem, however, has been that, if the veil is pierced too readily, then the benefits of separate legal personality disappear.[108]

107 These reasons are contained in ibid. at 50-51.

108 *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 1995 (4) SA 790 (A) at 803-4.

The rules on piercing the corporate veil are of importance to the human rights obligations of companies as the corporate form can be used to avoid these responsibilities.

In South African law, piercing of the corporate veil is generally allowed where the corporate personality of a company is used as a device to cover fraud or improper conduct. In such circumstances, personal liability may be attributed to those who misuse the separate legal personality of a company.[109] Similarly, courts may refuse to recognise the separate legal personality of a subsidiary where this is merely a "device" to evade a director's fiduciary duties to the principal company.[110] Here, the importance of preserving separate legal personality has "to be balanced against policy considerations which arise in favour of piercing the corporate veil".[111]

The rules on piercing the corporate veil are of importance to the human rights obligations of companies as the corporate form can be used to avoid these responsibilities. In particular, two similar methods can be used by companies to disavow responsibility. First, a principal may claim to be separate from a subsidiary and thus not be responsible for its actions. Secondly, a company may disavow responsibility for the actions of suppliers or sub-contractors.

These ideas have recently crystallised in the Ruggie framework around the notion that a company has a responsibility to exercise due diligence such that it takes steps to "become aware of, prevent and address adverse human rights impacts".

As we have seen above, these questions have been of particular importance at the international level in developing more binding norms upon corporations. In the context of transnational litigation, this issue arose in one of the preliminary stages of the litigation in *Doe v Unocal*. Similarly, in the United Nations Norms, companies are required to incorporate human rights standards in their dealings with subsidiaries and sub-contractors.

It is thus necessary to consider when a company should be responsible for the actions of another. Whether the corporate veil should be pierced or not should depend according to some authors on the degree of control exercised by a parent over the subsidiary. Thus, according to a strict interpretation of this requirement, "[p]iercing as traditionally understood, is appropriate where the two corporations each in fact form part of the same business enterprise, such that the 'veil' between them is recognised as artificial". [112] Weaker interpretations of the control requirement would require that corporations actively inform themselves of the activities of their business partners or subsidiaries and that they

109 C Visser et al. *Gibson South African Mercantile and Company law*. Cape Town: Jutas, 2003 at 261.

110 See *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

111 *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 1995 (4) SA 790 (A) at 804.

112 A Wilson (note 1 above) at 66.

act to prevent human rights violations. A failure of vigilance on the part of a prime contractor or parent corporation may be sufficient for the imposition of liability.[113] These ideas have recently crystallised in the Ruggie framework around the notion that a company has a responsibility to exercise due diligence such that it takes steps to "become aware of, prevent and address adverse human rights impacts".[114]

Given the complex ways in which corporations often structure their transactions, it is suggested that the courts adopt a similar approach to that taken in "piercing the veil" cases. The law should be reformed to allow for delictual liability not only in the case of direct violations of rights by the company itself, but also through a subsidiary or sub-contractor. The central enquiry in any such case must be whether in substance rather than in form the parent company can be said to be responsible for the actions of the subsidiary (or contractor). Such responsibility should occur not simply in cases of direct intentional involvement in the abuses but also in cases where the parent company was negligent in failing to ensure that such abuses did not take place. The Constitutional Court has already developed the common law relating to vicarious liability in relation to damages claims against the state for wrongful actions of employees.[115] Such a development could also take place in relation to corporate responsibility, not only for natural persons but also for subsidiary juristic persons.

The central enquiry in any such case must be whether in substance rather than in form the parent company can be said to be responsible for the actions of the subsidiary (or contractor). Such responsibility should occur not simply in cases of direct intentional involvement in the abuses but also in cases where the parent company was negligent in failing to ensure that such abuses did not take place.

In particular, the delictual test for negligence should be adapted to include the following considerations: (a) Would a reasonable company in the same circumstances as the parent company have taken steps to acquire knowledge of the human rights violation? (b) Would such a company have foreseen the possibility of the human rights violation? (c) If so, would a reasonable company in the position of the parent company have taken steps to guard against the possibility of the violation? (d) Did the actual parent company in question fail to take steps which it should have taken to guard against the possibility of the violation?[116] This test suggests that it is not sufficient for a company to claim no knowledge of the violation: rather, it must demonstrate that as a parent

113 Ibid. at 66-67.

114 J Ruggie 2008 Report (note 57 above) at [56].

115 See NK v Minister of Safety and Security 2005 (6) SA 419 (CC).

116 The traditional test for negligence in South African delict law is: (a) would a reasonable person, in the same circumstances as the defendant have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; (b) would a reasonable person have taken reasonable steps to guard against such an occurrence?; and (c) Did the accused fail to take the steps which he should reasonably have taken to guard against it? See see *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 and J Van Der Walt and JR Midgley *Delict Principles and Cases*. Cape Town: Butterworth, 1997 at 133. A similar test is used in criminal law: see J Burchell and J Milton *Principles of Criminal Law*. Cape Town: Jutas, 1994 at 299.

This test suggests that it is not sufficient for a company to claim no knowledge of the violation: rather, it must demonstrate that as a parent company it was reasonable to have made no further enquiries to establish whether human rights violations were occurring

company it was reasonable to have made no further enquiries to establish whether human rights violations were occurring. This is particularly important in establishing a duty upon corporations to ensure they are informed about the processes involved in the conducting of businesses such that they can avert human rights violations. It is suggested as well that the onus of proof be upon a parent company to establish that it was not complicit in the actions of its subsidiaries or sub-contractors rather than upon the person suffering from the violation. This would place a duty upon corporations to be vigilant in ensuring that none of their activities led to human rights violations.[117]

117 Similar measures are discussed in A Wilson (note 1 above) at 66-67.

part 4

CONCLUSION: PROPOSALS FOR LAW REFORM

The dominant approach to corporate responsibility for human rights has been to encourage voluntary adoption of standards governing corporate conduct in this area. This report has argued that such an approach is both inadequate and incoherent. The observance of human rights is not a voluntary matter but one of legal obligation. The chief difficulty in this area is to identify principles for determining the scope of corporate obligations in relation to particular human rights concerns. This report has identified two main factors – the potential impact of the corporation and its own capabilities – as being central to determining the nature of corporate responsibility in relation to a particular right. This abstract approach needs to be supplemented by further research on the ambit of corporate responsibility in relation to each right in the Bill of Rights.

This report has sought to address the implications of the horizontal application of the Bill of Rights in South Africa for corporations. It has proposed a number of law reforms that will give substance to the shift in company law clearly envisaged by the Constitution. A summary of these proposals follows.

In relation to statute law reform, this report suggests the following:

- The Companies Act should be amended to require corporations to state in their memorandum of association that they recognise that they are bound by the rights in the Bill of Rights and are responsible for their realisation to the extent that they bear responsibility for them.

It is hoped that this report will contribute to understanding the appropriate constitutional limits on corporate power, and also to the harnessing of such power for the realisation of human rights.

- An explicit fiduciary duty should be placed upon directors to avoid violating human rights in the management of companies and to assist in the realisation of human rights where this falls within the company's ambit of responsibility.
- Consideration should be given to the possible imposition of personal liability upon directors for the violation of fundamental rights.
- All companies should be required to report on non-financial issues and in particular the impact that they have on human rights. A compliance office should be set up to monitor these reports.
- A separate statute should be passed rendering companies responsible for their actions that violate human rights, not only within South Africa but beyond. Courts should have jurisdiction to impose delictual liability upon companies that violate human rights beyond South Africa's borders.

In relation to the common law, this report suggests that:

- Pending the adoption of the above statutory measures, judges, in suitable cases, should develop the common law so as to achieve the same results.
- In particular, judges should begin to develop standards in suitable cases for the imposition of liability upon corporations where parent companies attempt to hide behind subsidiaries and sub-contractors.
- Judges should also begin to develop principles and standards that can help clarify the nature of corporate human rights obligations.

This report is intended as a catalyst for discussion in South Africa about the manner in which binding obligations for human rights can be imposed on corporations. The law reform measures it suggests are not meant to be exhaustive, and additional suggestions are to be welcomed. It is hoped that this report will contribute to understanding the appropriate constitutional limits on corporate power, and also to the harnessing of such power for the realisation of human rights.

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