



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

Project on Business and Human Rights:
Baseline Report

Prepared for Shell South Africa Energy (Pty) Ltd

Contact: Prof. T Roux
PO Box 84666
Greenside 2034
South Africa
Tel: + 27 11 339 1194
Fax: + 27 11 339 1167
E-mail: theunis@saifac.org.za

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:

- 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?

Increasingly, over the past thirty years, these questions have been addressed in academic literature as well as in the development of a range of voluntary approaches, each seeking to encourage corporations to adhere to human rights standards out of their own initiative. The first part of this report traces and evaluates some of these voluntary developments at the international level. This analysis leads to the recognition of a range of both conceptual and practical deficiencies with these frameworks: these range from the lack of content provided to the obligations of companies to the weakness of enforcement mechanisms. Understanding 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 two main developments in this regard in recent years: first, there is a consideration given to the advent of litigation against transnational corporations claim in damages for violations of human rights that often

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 a recent report by Human Rights Watch titled *On the Margins of Profit Rights at Risk in the Global Economy*, February 2008 (Found at <http://hrw.org/reports/2008/bhr0208/>) at 7

take place in countries outside the jurisdiction where the litigation is initiated. Secondly, we investigate an important recent United Nations initiative towards 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. Key debates in the academic literature surrounding such concepts as 'spheres of influence' and 'complicity' all centre around this fundamental problem.

The third part of this report seeks to draw some of the international experience to bear in the South African context. It also 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 in South Africa. 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 African law and considers three main issues.

- First, it attempts to engage with what exactly is entailed by the 'horizontal' application of the Bill of Rights. It is argued that the questions that arise in the international framework in respect of the notions of 'sphere of influence' and 'corporate complicity' surface at the domestic level in attempting to understand the nature of corporate obligation under the bill of rights. Two main factors are outlined that determine corporate responsibility: first, the impact corporations may have on human rights and secondly, the capabilities of corporations. Further specification needs to occur in relation to each specific right.
- Secondly, the report considers the problem as to whether the human rights obligations of corporations extend beyond the borders of South Africa into other parts of Africa. This question is particularly important given the fact that corporations based in South Africa are heavily involved in business in other parts of Africa where legal systems are weaker and political systems, at times, corrupt. We argue for the 'extra-territorial' application of the human rights responsibilities of corporations and the importance of South African legislation specifically recognising the possibility of corporate misconduct beyond South African borders being actionable within South Africa.

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

- Finally, the report considers the problems inherent in the corporate form itself and how it often immunizes companies from accepting full responsibility for their actions. In particular, the report focuses on the 'principal-subsiary' problem in that corporations often create complex structures that in law suggest a separation between the responsibilities of one company for the actions of another. This allows a principal to claim no responsibility for the actions of the subsidiary despite widespread human rights violations by the subsidiary. Similar problems arise where corporations contract with other corporations in their supply chain that are implicated in human rights abuses. The problem is complex but in our view the responsibility must lie upon a corporation to satisfy a court or tribunal that they were not 'complicit' in human rights violations. 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 and that the implications of such a move are fully captured within the law.

1. PART I: THE VOLUNTARY APPROACHES

Discussion on the human rights responsibilities of transnational corporations began largely in the 1970s as a result of newly decolonised states seeking to assert their rights to economic independence and prevent interference with their political independence.⁵ A UN Commission on Transnational Corporations was initially established by the Economic and Social Council after a report was presented to it by a group of experts.⁶ The commission prepared a UN Draft Code of Conduct imposing certain responsibilities for human rights upon transnational corporations but, in 1992, the code eventually failed to be adopted given major disagreements between industrialised and developing countries.⁷ Given the lengthy period in which this code was developed as well as its

⁵ PT Muchlinski 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD' In: MT Kamminga and S Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law*. The Hague: Kluwer, 2000 at 98.

⁶ Ecosoc Res 1974/1721 of 24 May 1974: 'The Impact of Multinational Corporations on the Development Process and on International Relations, Report of the Group of Eminent Persons to Study the Role of Multinational Corporations in Development and in International Relations, UN doc E/5500/Rev.1/Add1 (1974).

⁷ 'The Capital exporting States were concerned to use the Code primarily as a means of protecting TNCs (transnational corporations) against discriminatory treatment contrary to international minimum standards accepted by these States. The countries belonging to the Group of 77, supported by the then socialist countries were concerned to use the Code as a means of subjecting the activities of TNCs to greater regulation.' See Muchlinski (op cit note 4 above at 100). See also O De Schutter 'The Challenge of Imposing

eventual failure to be adopted, international efforts have focused upon 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.⁸ The guidelines are effectively recommendations to companies based in OECD countries as to their behaviour in other countries.⁹ The principles include a range of issues including information disclosure, bribery, consumer interests, science and technology, environment, 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'.¹⁰ The Guidelines also contain important provisions that impact upon human rights concerns relating to employment standards – for instance, calling for the elimination of child and forced labour – as well as environmental management.

It is important to note that the guidelines are purely voluntary and not binding on enterprises. Nevertheless, the Guidelines do establish various bodies to promote their effectiveness. These include National Contact Points – usually in the form of a government official or office - that are responsible for promoting the guidelines and dealing with issues arising from them within particular countries; and the Committee on International Investment and Multinational Enterprises that is composed of representatives of various states and holds exchanges relating to the guidelines and clarifies their content.¹¹

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.¹² Nevertheless they have several key weaknesses:

Human Rights Norms on Corporate Actors'. In: O de Schutter (ed) *Transnational Corporations and Human Rights*. Oxford: Hart, 2006 at 2-3.

⁸ The most recent version of the guidelines can be found at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

⁹ See J Humer 'The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises'. In: Kamminga and Zia-Zarifi (op cit, note 4 above) at 198.

¹⁰ Principle II(2) of the Guidelines.

¹¹ See Part II of the Guidelines.

¹² 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 for sanctions for non-compliance or incentives for compliance and no remedies for violations are available.
- Monitoring mechanisms do not appear independent and lack transparency.¹³

1.2. ILO Tripartite Declaration

In 1977, the International Labour Organisation's (ILO) governing body – comprising governments, employers and workers - approved the Tripartite Declaration of Principles concerning Multi-national enterprises. The declaration is non-binding and relates primarily to labour matters including health and safety, a minimum age of employment, conditions and benefits of work amongst others.¹⁴ 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 ILO.¹⁵ Monitoring mechanisms include a periodic survey on the implementation of its provisions; and a method of having the guidelines interpreted.

The Tripartite Declaration is significant as a result of business recognising certain obligations on its part for respecting human rights. It also includes 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.¹⁶

¹³ DM Chirwa 'The Long March to Binding Obligations of Transnational Corporations in International Human Rights Law' 2006 SAJHR 22: 84-85.

¹⁴ See the declaration at <http://www.ilo.org/public/english/employment/multi/download/english.pdf>.

¹⁵ Para 8 of the Tripartite Declaration.

¹⁶ See Chirwa (note 13 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 'asks companies to embrace, support and enact, within their sphere of influence a set of core values in the areas of human rights, labour and the environment'.¹⁷ There are ten principles in the Global Compact: two deal with human rights, four with labour standards, three with environmental standards and one with anti-corruption.¹⁸ The human rights principles provide that: 'business should support and respect the protection of internationally proclaimed human rights'; and 'business should make sure that they are not complicit in human rights abuses'.¹⁹ 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.²⁰ The Compact is 'based upon the idea that good practices should be rewarded by being publicised and that they should be shared in order to promote a mutual learning among businesses'.²¹ The Compact promotes policy dialogues, encourages reporting on company practices and promotes information sharing through facilitating local networks.

The Global Compact has been highly successful in attracting signatories with 3700 businesses participating in 120 countries as at February 2008. It has as a result brought some degree of awareness of corporate responsibility for human rights to many businesses and provided some impetus for change of policies.²² Nevertheless, a number of key weaknesses of the initiative remain:

- It is purely voluntary and the Compact 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 unclear what the extent and range of responsibilities are that fall upon corporations and 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;

¹⁷ See the statement on the website found at www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/index.html

¹⁸ Ibid.

¹⁹ Principle 1 and 2 of the Global compact *ibid*.

²⁰ See www.unglobalcompact.org/AbouttheGC/index.html

²¹ De Schutter (note 1 above) 10-11.

²² See Chirwa (note 13 above) 90.

- Adherence to the Compact is often a good public relations exercise for companies without much substance.

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 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 web-sites and annual reports assessing compliance with these codes.²³

One of the benefits of individual codes of conduct is that they are flexible and thus adaptable to the particular conditions of a particular business. In a study of a Code of Conduct implemented by Adidas with its suppliers in China, it was found that the implementation of such a code was variable and very much depended upon the attitude of the suppliers. Nevertheless, the writers of the study concluded that the 'codes of labour practice can be a valuable tool for implementing core labour standards among multinationals' contractors in developing countries'.²⁴ Whilst the study had certain difficulties with it that made a more positive finding likely, it does provide some evidence for the fact that a well-implemented code can have a positive impact on the realisation of at least core labour and employee rights.²⁵

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

- Since they are developed by companies themselves, there is little transparency in their development and implementation
- Some companies report on compliance whilst others do not. Reporting is however controlled by the companies themselves, subject to potential bias and difficult to verify.
- Codes do not include a uniform set of human rights and thus may fail to encourage adherence to even certain basic minimum standards.

²³ 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.

²⁴ Ibid. at 230.

²⁵ Ibid. at 230-232.

- 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.²⁶

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. Yet, these initiatives obscure a number of central problems that they fail to address.

The first set of problems is fundamental and relates to the very conceptual problem with the notion that responsibilities for human rights protection are assumed voluntarily. The very logic of having a right entails that others have a duty not to violate that right.²⁷ The notion of having a duty precisely 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.

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 responsibility that corporations have for the realisation of human rights. Clarification thus needs to be

²⁶ Ibid. at 233-236.

²⁷ 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’.

obtained as to the nature of the responsibilities that corporations have. This may be referred to as the 'content' question.

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 seem 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.

These problems with voluntary initiatives have led some to advocate for the imposition of binding obligations upon corporations for human rights responsibilities. Two important developments have occurred in this regard that shall be discussed: first, the possible imposition of civil liability upon corporations for human rights abuses committed in other countries; secondly, the development of a document by the UN Sub-commission on Human Rights termed the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'.

2.2. Transnational Human Rights Litigation

One of the most effective methods of imposing binding obligations upon corporations is to allow for civil liability to be imposed upon such a body for violations of human rights. It is important that such an action 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 in the other more developed countries where the principal company has 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 Control Act (ATCA). The statute states that 'district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.²⁸The Supreme Court has upheld the enforceability of this law under certain conditions in the case of *Sosa v Alvarez-Machain*.²⁹ The case concerned the unlawful detention and abduction of the respondent (Alvarez-Machain) from Mexico to the United States for the purposes of standing trial. The Supreme Court held that a claim under ATCA was competent in law and that that torts that formed part of the 'law of nations'

²⁸ 28 USC § 1350 (1948).

²⁹ (03-339) 542 US 692 (2004).

would have been recognised in the common law of the time.³⁰ However, courts today are not restricted to making decisions based upon the 'law of nations' as it was in the 18th century but must rather base the cause of action on international law as it is currently. The court, however, set a high standard for a norm to cross the threshold of being a 'violation of the law of nations' for ATCA purposes. Essentially, any claim today must, in the words of the court, 'rest on a norm of international character accepted by the civilised world and defined with a specificity comparable to the features of the 18th century paradigms we have recognised'.³¹ The majority of the court did not find a violation of such a norm in this particular case but suggested that a more egregious case of arbitrary detention may have met the test.³² Consequently, it appears that the ATCA may be used but only in circumstances where there are particularly serious human rights violations that constitute binding rules of customary international law or violate a treaty.

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 case of *Doe v Unocal*.³³ 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 for the Ninth Circuit overturned a decision that the claim should be ruled out of court (in a summary judgment) on the basis that Unocal did not have direct control over the Myanmar military. It found that violations of rights that took place met the threshold standard of serious violations of the 'law of nations' required by ATCA. The problem in this case 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.

The court then held that forced labour was a form of slavery and state action was not required in this regard. Similarly, the murder, rape and torture that occurred had been performed in furtherance of slavery and thus state action was not required for the commission of these crimes either. Once that had been determined, the court held in a

³⁰ Ibid. at 724.

³¹ Ibid. at 725.

³² Ibid. 735-738.

³³ 41 ILM 1367 (2002)

landmark holding that, although the human rights abuses were committed by the Myanmar military, it was not necessary directly to commit such crimes, but one was prohibited from 'aiding and abetting' those committing these crimes.³⁴ The standard for aiding and abetting was 'knowing practical assistance, or encouragement that has a substantial effect upon the perpetration of the crime'.³⁵ The court found that a reasonable factfinder could find Unocal guilty of aiding and abetting the commission of these crimes.

The Unocal case demonstrates the importance of domestic remedies for violations of human rights in other jurisdictions. As with other litigation of this nature, the case never got to be heard at trial as a settlement was reached between the parties. Nevertheless, the possibilities of civil liability led to the incentive on the part of Unocal to settle.

The case, however, also demonstrates some of the problems 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.³⁶
- Secondly, the 'state action' requirement generally applies apart from 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 will claim it lacks liability for the actions of a subsidiary in another country. Principles need to be developed upon which liability can be imposed upon a principal for the actions of its subsidiary. In an earlier application relating to whether Unocal's corporate partner Total could also be sued for the activities of its subsidiaries in Myanmar, the court found that that the level of control exercised by Total over its subsidiaries was not sufficient to establish liability for the principal. The subsidiaries were also held to be insufficiently important to Total's overall operations to render it responsible for their activities.³⁷

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'. The principle holds that a court has the discretion to refuse to assert jurisdiction over a matter where

³⁴ Ibid. at 1375

³⁵ Ibid.

³⁶ 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.

³⁷ *Doe I v Unocal Corp* 27 F Supp 2d 1174 (CD Cal 1998).

there is a more appropriate forum available to the parties, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.³⁸ The doctrine has been a successful line of defence for many corporations to litigation faced in their home states.³⁹ The doctrine can help shield companies from liability for transgressions overseas by themselves or their subsidiaries or sub-contractors and ‘continues to pose a daunting impediment to transnational human rights litigation in the US’.⁴⁰ On the other hand, there has been some contraction of the principal in recent years. In *Wiwa v Royal Dutch Petroleum*⁴¹, the court was concerned with alleged human rights abuses by the government with which oil companies were complicit in Nigeria. Despite the corporations not being incorporated in the United States, the court found that given the economic resources of the corporations, their relationship with a leading oil corporation in the US, their having litigated before in the US, and the convenience of New York (amongst other reasons), that there was no more appropriate forum and the case could proceed.⁴²

Similarly, a centrally important case was *Lubbe v Cape Plc*⁴³ brought in the United Kingdom by a group of 3000 persons who claimed personal injuries for exposure to asbestos and related products as a result of the company’s operations in South Africa. The House of Lords overturned an earlier decision that South Africa was the more appropriate forum for the claim on two main grounds: first, it was unclear that the plaintiffs would be able to obtain professional representation and expert evidence necessary to make out their case which would deny them any justice;⁴⁴ and secondly, the novelty of class actions in South African law of this kind and the lack of established procedures there to deal with such claims placed the balance in favour of English courts given that this would be a further disincentive for bodies to finance these proceedings.⁴⁵ The decision significantly places emphasis upon whether substantive justice will be done and helps prevent a situation where application of the *forum non conveniens* rule effectively results in the end of litigation given the lack of accessibility of legal services in developing countries.⁴⁶

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

- Litigation is time-consuming and there is no guarantee of success;

³⁸ *Lubbe v Cape Plc* [2000] 4 All ER 268 at 274.

³⁹ *Ibid.* at 943.

⁴⁰ S Joseph *Corporations and Transnational Human Rights Litigation*. Hart: Oxford, 2004.

⁴¹ 226 F 3d 88 (2d Cir 2000)

⁴² *Ibid.* at 99.

⁴³ *Lubbe* (note 36 above).

⁴⁴ *Ibid.* at 279.

⁴⁵ *Ibid.* at 280.

⁴⁶ Joseph (note 39 above) at 118.

- The vulnerability of corporations to litigation will depend on their place of nationality and place of operation and 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 pushing those who abuse rights though does not actively promote incentives for the adoption of 'best practices' in relation to human rights by companies.⁴⁷

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. Yet, as has been pointed out, at present such litigation faces a number of legal obstacles that renders the outcome uncertain. There has been no decision on the merits, with cases where liability is likely to be found being settled.⁴⁸ Some of the legal issues at stake in the litigation are of importance in 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 engage with.

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.⁴⁹ 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'.⁵⁰ 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.⁵¹ The Commission appointed a Special Representative to investigate further some of the issues relating to corporations

⁴⁷ Ibid. at 153.

⁴⁸ Ibid.

and human rights and the appointee – Prof John Ruggie – has released a series of reports in this regard.

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’.⁵² Moreover, this is not a voluntary initiative but a process embarked upon by the United Nations.⁵³ As a result, it is 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 the interpretation thereof.

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 state 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.’⁵⁴

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;⁵⁵ to respect the right to security of the person and not to commit international crimes;⁵⁶ 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;⁵⁷ to respect the national sovereignty of states;⁵⁸ to avoid bribery and corruption;⁵⁹ to ensure the safety and quality of goods;⁶⁰ and to protect the environment.⁶¹ The Norms also include a catch-all provision that is worded as follows:

⁴⁹ Chirwa (note 13 above) at 93.

⁵⁰ See [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En)

⁵¹ Resolution 2004/116, UN Doc E/CN.4/2004/L.11/Add.7 (2004).

⁵² J Nolan ‘With Power Comes Responsibility: Human Rights and Corporate Accountability’. (2005) *The University of New South Wales Law Journal* 28: 581.

⁵³ 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.

⁵⁴ See the Norms found at <http://www1.umn.edu/humanrts/links/NormsApril2003.html> at para 1.

⁵⁵ *Ibid.* at para 2

⁵⁶ *Ibid.* at paras 3-4.

⁵⁷ *Ibid.* at paras 5-9.

⁵⁸ *Ibid.* at paras 10.

⁵⁹ *Ibid.* at para 11.

⁶⁰ *Ibid.* at para 13.

⁶¹ *Ibid.* at para 14.

‘Transnational corporations and other business enterprises shall respect civil, cultural, economic, political, and social rights, and contribute to their realization, in particular the rights to development; adequate food and drinking water; the highest attainable standard of physical and mental health; adequate housing; privacy; education; freedom of thought, conscience, and religion; and freedom of opinion and expression; and refrain from actions which obstruct or impede the realization of those rights.’⁶²

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 national level.
- 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.⁶³

2.3.2. Key Issues

In order to understand the significance of certain features of the Norms, this section will now elaborate on some key issues that were raised in connection with the Norms and decisions made by the Working Committee. The next section will consider a critique of the Norms and a number of outstanding issues.

First, it is important to recognise that one of the key debates concerning the Norms was who they would apply to. Should they only apply to transnational corporations and indeed how was this notion to be defined? In the end, the working committee decided that the Norms were applicable to transnational corporations but also to other business enterprise, ‘regardless of their stated corporate forms or the

⁶² Ibid. at para 12.

⁶³ Ibid. at paras 15-19.

international or domestic scope of their business'.⁶⁴ This is important in that human rights violations can occur through both large and small businesses and the duty to realise these rights has been placed upon all businesses.

Secondly, the question arose as to how to handle contractors or suppliers of large corporations and how far down the line businesses are expected to monitor their business partners. The Norms state that businesses are required to incorporate the Norms into contracts and dealings with their business partners. The Commentary elaborates that businesses should only do business with entities that comply with these norms and if they cannot persuade them to do so, eventually such businesses should stop engaging with this entity in any form of business relationship.⁶⁵

Thirdly, the problem arose as to how to capture the differing obligations of different types of businesses given their large variety and differing capacity to impact upon human rights. The Norms essentially place the primary responsibility for the realisation of human rights upon states. Businesses are said to have an obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights in their 'respective spheres of influence'.⁶⁶ This notion is meant to reflect the notion that responsibilities will vary with the capacity of corporations to 'influence markets, governments, stakeholders and communities' as well as the range of activities of the corporations.⁶⁷ Nevertheless, all businesses have some responsibility for the realisation of human rights standards.

Fourthly, drafters had the difficulty that the Norms were not to be a treaty yet they wished them to be binding and not a voluntary initiative. The drafters therefore adopted the approach that the 'legal authority of the Norms derives principally from their sources in treaties and customary international law, as a restatement of international legal principles applicable to companies'.⁶⁸

Finally, the working group recognised the failure of other initiatives to provide enforcement mechanisms for human rights obligations. Given the lack of such wide-ranging mechanisms, the drafters appear to have relied on a range of possible options for enforcement ranging from self-regulation through the corporation's own internal compliance rules and reporting, to the enforcement by states and the United Nations.

⁶⁴ D Weissbrodt and M Kruger (note 52 above) at 907-909.

⁶⁵ Ibid. at 910-911.

⁶⁶ Para 1 of norms (op cit).

⁶⁷ D Weissbrodt and M Kruger (note 52 above) at 912.

⁶⁸ Ibid. at 913.

2.3.3. 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.⁶⁹ The Special Representative of the Secretary-General who was appointed by the Commission has also produced a strong critique of the Norm's claims about its legal standing. The Norms are said to 'reflect or restate' existing international law relating to corporations and they are said to be non-voluntary. The problem is that these two claims taken together cannot themselves be correct. In the words of Special Representative,

'If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones. What the Norms have done, in fact, is to take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law - hard, soft, or otherwise.'⁷⁰

The problem is that international legal principles have generally mainly applied to states and there are only a limited class of international crimes such as genocide and crime 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.⁷¹ Some have argued that the Declaration of Human Rights envisages in its Preamble that 'every individual and every organ of society...shall strive by teaching and education to promote respect for these rights and freedoms and by progressive

⁶⁹ See note 50 above.

⁷⁰ 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.

⁷¹ '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>.

measures, national and international, to secure their universal and effective recognition and observance'.⁷² This has led some to the claim that the obligations found in the Declaration bind all persons including corporations. However, again it is particularly unclear which obligations bind private parties and particularly companies. It is also generally agreed that the Preamble to the Declaration has not itself entered into customary international law.⁷³ The Special Rapporteur 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.'⁷⁴

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,⁷⁵ 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 outlined above and at times, the Norms impose obligations on corporations that have not been accepted by all states.⁷⁶ 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.⁷⁷

Moreover, in relation to any of the specific obligations that fall upon corporations, they are only required to meet them in so far as they fall within their 'sphere of influence'. 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.⁷⁸ Whilst this may be argued to be a feature of a broad human rights instrument, this lack of specification is damaging to the Norms. For they purport to impose binding obligations on corporations: however, the inability to specify which obligations are binding and when they apply diminishes their claim to realise their purpose. It allows corporations to assert that they are not bound in a particular instance and thus to

⁷² Preamble to Universal Declaration of Human Rights found at <http://www.un.org/Overview/rights.html>.

⁷³ Business and Human Rights (note 70 above) at 38.

⁷⁴ Note 69 above at 64.

⁷⁵ Nolan (note 51 above) at 583.

⁷⁶ Interim Report (Note 69 above) at 66.

⁷⁷ Nolan (note 51 above) at 595.

⁷⁸ Ibid. at 67.

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. Thus, the failure to provide such clarity is indeed a major deficiency of the Norms. For the scope of corporate obligation is indeed perhaps the major question in this area. The failure to provide guidance on this question thus means that the Norms do not address the major normative problem in this area.

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 it is sufficient for corporations to be silent in the face of such abuse to impose liability. 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 fail to provide guidance in this regard.

Related to 'corporate complicity' is the problem of subsidiaries and supply chains. When are corporations liable for the violations 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 will themselves be responsible for the violations 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'.⁷⁹ Whilst they provide a number of methods of implementation, they still 'fall short at this stage of developing a definitive mechanism for regulating corporate activity with respect to human rights'.⁸⁰ Self-regulation does not really move us beyond the voluntary initiatives: for effective binding norms to exist, there must be mechanisms to ensure compliance. The United Nations compliance mechanisms are underdeveloped: whilst they seem to contemplate treaty bodies requiring reports by States on compliance of the corporations within their territories with these Norms,⁸¹ this provides only a very indirect method of assessing corporate

⁷⁹ D Weissbrodt and M Kruger (note 52 above) at 922.

⁸⁰ Nolan (note 51 above) at 606.

⁸¹ Ibid. at 607

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.

2.4. 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'.⁸² The United Nations Norms represent an attempt to define certain human rights obligations that are directly binding upon corporations. This is an advance on the purely voluntary framework of the past.

Nevertheless, the Norms do not succeed in providing a principled basis upon which to establish the obligations of corporations for human rights based concerns. Its use of the term 'sphere of influence' without more specificity leaves the responsibility of corporations vague and undefined. It is thus necessary to consider the manner in which the responsibility of corporations can be delineated. Since the Norms generated a large amount of controversy, they failed to command consensus and their legal status is unclear. Moreover, the enforcement mechanisms they propose are weak.

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 which 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. This is partially due to South Africa's apartheid history which often saw complicity between corporate power and an evil regime.

It shall be argued that the difficulty of developing principles to guide the application of human rights responsibilities to corporations is a matter that arises once again at the domestic constitutional level. Developing an approach to this issue is thus critical both for international and domestic law. Moreover, it shall be argued that human

⁸² Ibid. at 591.

rights norms should bind actors not only in their activities within South Africa but also beyond South Africa's borders. To clarify the extra-territorial effect of the South African bill of Rights, it is recommended that legislation be passed to ensure corporate compliance with these norms beyond South Africa's borders. Finally, it shall be argued that there is a need for a challenge to the traditional South African legal approach towards the corporate form where human rights violations are concerned. There is a need to consider 'piercing the corporate veil' where corporations seek to hide behind the legal personality of the others. The international debate surrounding 'complicity' is relevant here to determine the principles as to when liability should be imposed on one corporation for the actions of another person.

3. PART II: 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 1973.⁸³ South Africa's pariah status internationally had an impact for corporations doing business in South Africa. For some, apartheid represented an opportunity to make profits and during the 1960s, the economy in South Africa was very strong allowing for the development of corporate wealth based upon the oppression of black South Africans. As time progressed, calls began for a boycott by international companies of South Africa. A number of companies such as Barclays Bank pulled out of South Africa. Others, seeking to avert a total boycott, argued that constructive engagement on the basis of ethical principles would help better than a total boycott to achieve the end of apartheid. Initiatives such as the Sullivan Principles led corporations that did business in South Africa to adopt a list of principles governing their conduct in apartheid South Africa.⁸⁴

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, since 1994 South Africa has been dominated by a voluntaristic framework

⁸³ 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.

⁸⁴ These principles are still adhered to by certain corporations in other contexts and can be found at <http://www.globalsullivanprinciples.org/principles.htm>.

concerning corporate social responsibility.⁸⁵ 'Corporate Social Responsibility is a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'⁸⁶. As a method of recognising their obligations, [m]any large corporations have corporate social investment divisions which, often 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: a percentage of profits is ploughed back into the society either as a result of positive reputational benefits that the corporation sees as flowing from its social programmes or as a result of genuine altruistic motives on the part of shareholders and directors.

This framework of voluntarism has been complimented by developments in relation to corporate governance and, in particular, the King II report that made certain far-reaching recommendations in this regard.⁸⁷ First, it has broadened the notion of stakeholders of a company to include 'the community in which the company operates, its customers, its employees and its suppliers'.⁸⁸ The key challenge for good corporate citizenship is, according to the Report, to 'seek an appropriate balance between enterprise (performance) and constraints (conformance) which takes into account the expectations of shareowners for reasonable capital growth and the responsibility concerning the interests of other stakeholders of the company.'⁸⁹ 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 cost approach started to fall apart'.⁹⁰

Secondly, the Report introduces 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 bottom line of economic profit to embrace social and environmental considerations. Through this notion, it has been recognised that companies have an impact on society and that they have a duty to adopt sound policies that minimise their impact. Thus, the King II Report concludes that 'non-financial issues – social and environmental – can no longer be regarded as secondary to more conventional business imperatives'.⁹¹ The Report recognises that a range of factors are involved in good

⁸⁵ 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

⁸⁶ European Commission Green Paper 'Promoting a European Framework for Corporate Social Responsibility', 18/07/2000, http://europa.eu.int/comm/employment_social/soc-dial/csr/

⁸⁷ 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>

⁸⁸ Ibid. at Para 5.3.

⁸⁹ At para 7.2

⁹⁰ T Mongalo *Corporate Law and Corporate Governance*. Claremont: New Africa Books, 2003 at p. 198.

⁹¹ See King II report at 109 para 8.

corporate citizenship but one of these includes 'recognising the implications of human rights in the company's operation, having a policy, and acting on it'.⁹² However, this section of the report, it is stated, 'can only suggest what to aim for. Impetus will come from the market and society, which will be the ultimate arbiters of corporate behaviour in this regard'.⁹³ The King report focuses mainly on developing reporting guidelines on non-financial matters.

The King II report represents a welcome development in the thinking around corporate responsibilities in the South African Context. 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 in this regard.
- 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. The King Report essentially argues that the fiduciary duties of directors should be exercised in the 'interest of the company as a separate legal person.'⁹⁴ Whilst the Report rejects the notion that this is equivalent to a focus on the interests of shareholders alone, it fails to circumscribe the ambit of duties upon directors and how far they extend. 'Since anything and everything is capable of being interpreted as being in the interests of the company, the duty to act in the best interest of the company may be difficult to monitor and directors may abuse their powers with ease. It is thus pragmatic that some content be ascribed to 'the company' if the duty to act in the interest of the company is to have any meaning at all.'⁹⁵
- 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 and, only where required by bodies such as the JSE, such advice 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'⁹⁶ 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.

⁹² Para 14.9 of King II Report.

⁹³ Ibid. at para 15.

⁹⁴ King II Report at 17.3

⁹⁵ Mongalo (note 90 above) at 212.

⁹⁶ Ibid. at para 13.

- In the unlikely event that a company should report a human right's violation or environmental infringement that is not made known by other means (as this can have the impact of imputing liability to the company), there are also no remedies outlined by the King II Commission for violations.

The JSE has also developed a Socially Responsible Investment (SRI) Index which assesses companies based on their triple bottom line performance. Companies apply for inclusion in the index and are assessed against a number of defined criteria and indicators.⁹⁷ The index has exposed a wider range of companies to the notion of triple bottom line reporting but 'despite media coverage of the Index as well as the interest expressed by a range of listed companies, the anticipated increase in the number of companies participating in the second round of the Index did not materialise. The reasons include questionnaire fatigue and uncertainty as to the benefits of participating in the index.'⁹⁸ The Index is also voluntary and largely has reputational benefits for the companies concerned. It also only applies to the larger companies rather than including the business practices of all corporates.

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

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 African law. 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'.⁹⁹ This is often taken as asserting that the traditional protections that a bill of rights grants exist between individuals and the state: what is often referred to as the 'vertical relationship'.¹⁰⁰ However, the Constitution of South Africa goes beyond a purely vertical relationship to assert a degree of 'direct horizontal application' between

⁹⁷ Interview with Nicky Newton-King *The Sustainable Business Handbook: Smart Strategies for Responsible Companies* 3ed. Cape Town: Triologue, 2006 at 83.

⁹⁸ Sonnenberg, D and Hamann, R Implications of the JSE Socially Responsible Investment Index for corporate social responsibility in South Africa. *Development South Africa* (2006) 23 (2): 305-320.

⁹⁹ Constitution of the Republic of South Africa Act 108 of 1996.

¹⁰⁰ I Currie and J de Waal *The Bill of Rights Handbook*. Lansdowne: Jutas, 2005 at 33.

individuals and other individuals: significantly, this includes legal persons.¹⁰¹ 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’. When attempting to apply a provision of the Bill of Rights to a natural or juristic person, section 8(3) provides that a court ‘(a) in order to give effect to a right in the Bill must apply or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)’. 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’.

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.¹⁰² Where there has been writing on the topic, it has focused on the rights that the Bill of Rights confers upon corporations.¹⁰³ This is perhaps a result of the fact that the Constitutional court has in certain cases pronounced upon the protections the Bill of Rights affords corporations. Thus, in the Hyundai case, the court held that ‘the right to privacy is applicable, where appropriate, to a juristic person’.¹⁰⁴ Yet, since juristic persons are not the bearers of human dignity, ‘[t]heir privacy rights can never be as intense as those of human beings’.¹⁰⁵ Juristic persons thus do enjoy the right to privacy, ‘although not to the same extent as natural persons’.¹⁰⁶

Similarly, the court has held in the First National Bank case that a juristic person may enjoy the right to property.¹⁰⁷ This seemed to be on the basis that the ‘property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons’.¹⁰⁸ This is an important statement in that it recognises that the interests of natural persons are primary in the protection of

¹⁰¹ 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).

¹⁰² This is true in respect of journal articles as well, 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.

¹⁰³ See Blackman et al *Commentary on the Companies Act*. Cape Town: Juta, 2007 at 4-116-118 and M Havenga ‘Corporations and the Right to Equality’. (1999) *THRHR* 62: 495-507. Surprisingly, Constitutional law texts have also focused mainly on the rights rather than the obligations of juristic persons: see S Woolman ‘Application’ in S Woolman et al (eds) *Constitutional Law of South Africa*. Cape Town: Jutas, 2006: 31-39 to 31-42 and Currie and De Waal (note 100 above) at 36-39.

¹⁰⁴ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545(CC) at [17].

¹⁰⁵ *Ibid.* at [18].

¹⁰⁶ *Ibid.*

¹⁰⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at [45]

¹⁰⁸ *Ibid.*

fundamental rights and that the protection of corporations is essentially derivative from the protection of the fundamental rights of natural persons.

The reasoning of the court here seems to be that the attribution of rights to corporations is necessary in order to protect the rights of natural persons effectively. Recognition of the primacy of natural persons is, however, critical in our jurisprudence not simply for the purposes of attributing rights to corporations but also for the purpose of recognising corporate responsibilities for human rights protections. If the dignity and consequent rights of natural persons are primary in our law, then it must follow that corporations must have duties to ensure that such rights are protected. The nature and extent of the impact of corporate activity on the rights of natural persons will thus be a critical factor in imposing binding legal responsibilities upon corporations.

The Bill of Rights is clear that there are situations where it envisages horizontal application of the Constitution. This may take place in several ways: the Bill of Rights may itself be the source of a cause of action against a corporation; on the other hand, the Bill of Rights may itself be the catalyst for a reform of statutory and common law rules necessary to ensure enforceable obligations upon companies for human rights realisation. A number of critical questions remain relating to the horizontal application of the South African Bill of Rights to companies. We shall consider two main questions in this section. The first issue considers developing principles to establish the nature of corporate obligations for human rights realisation. We argue that debates in the international sphere relating to the concept 'sphere of influence' arise in South African law in this context. To ensure binding obligations upon corporations, it is necessary to clarify the factors that can lead to the imposition of corporate liability. Secondly, we argue that the horizontal application of the Bill of Rights should be seen to have an important impact upon company law and the very manner in which corporations are conceived. Far from being purely motivated by profit, horizontal application of the Bill of Rights requires that the respect and protection of human rights be factored into the very objectives of corporations. This suggests a need for a reform of certain rules of company law.

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). It reads as follows: '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'.

First, it is important to recognise that this section of the Bill of Rights has been poorly drafted: the section is meant to determine the application of the Bill of Rights to private persons. Yet, the main determinant as to whether the rights apply is their 'applicability'. This is circular and without the clause of the section following the word 'applicable', the section would be entirely unhelpful in determining the range and extent of corporate obligation.

Secondly, 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. Finally, the last part of section 8(2) is critical and the segment that does all the work. 'Taking into account' suggests that the factors that are listed to determine applicability are not necessarily exhaustive: however, there is no criterion other than the circular notion of 'applicability' that helps us to determine which additional factors would be relevant. The two factors that are outlined are the 'nature of the right' and the 'nature of any duty imposed by the right'.

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. It is possible to read these factors as entirely circular as well: the 'nature of the right' could refer to 'a type of right that can be of application to private persons'. 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. This means that courts, when deciding whether to apply a right to 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 lack of any general principles in the Bill of Rights upon which to make such a determination leaves the exact nature of the obligations upon private persons, and corporations deeply uncertain. This perhaps explains the dearth of academic writing on the topic though the need for such writing is evident given the uncertainty the Constitutional provisions engender.

The Constitutional Court has only once directly addressed section 8(2) and direct horizontal application in *Khumalo v Holomisa*.¹⁰⁹ The case concerned whether the common law of defamation as developed by the courts is inconsistent with the Constitution. The applicants argued that the right to freedom of expression requires that in an action for defamation a plaintiff who wishes to recover damages may only do so where s/he alleges and proves the falsity of the alleged defamatory statement. To allow a claim where no such allegation is made would be an unjustifiable infringement of the right. 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. The Court ultimately lays out a two-stage process to addressing this claim. The first stage relates to section 8(2) and requires a determination as to whether or not the right or obligation is applicable to a natural or juristic person. Once it is found that such a right or obligation is applicable, then section 8(3) requires the court to develop the common law to the extent that legislation does not give effect to that right. In this case, the court found that the right to freedom of expression was of direct horizontal application but it found that the common law as it currently stood was consistent with the Constitution.

In applying section 8(2), the Court held that the applicants are members of the media 'who are expressly identified as bearers of constitutional rights to freedom of expression'¹¹⁰ and that the law of defamation affects the constitutional right in question. The court then goes on to say the following: 'Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by s 8(2) of the Constitution'.¹¹¹ The Court here, although very tersely, outlines three features of the right to freedom of expression that render it capable of direct horizontal application in this case.

First, the court refers to the 'intensity of the right'. The meaning of this phrase is unclear, yet perhaps it suggests that the importance of the right is a factor determining whether it should be of direct horizontal application.¹¹² Freedom of speech the court holds is 'integral to a democratic society' and 'it is constitutive of the dignity and autonomy of human beings'.¹¹³ This is a strange criterion, however, upon which to decide application:

¹⁰⁹ 2002 (5) SA 401 (CC).

¹¹⁰ *Ibid.* at [33].

¹¹¹ *Ibid.*

¹¹² Currie and De Waal (note 100 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 previously in the judgment.

¹¹³ *Khumalo* at [21].

it may be that there are degrees of importance to the rights in the Bill of Rights though presumably all rights contained therein have a high degree of importance in our constitutional order. Moreover, the importance of a right such as a citizenship right does not determine that it is of direct application between private parties if its very essential features do not render it capable of such application.

Secondly, the court refers 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 application 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. This is of particular importance in the context of companies given that the increasing power of corporations currently provides them with the potential to have a large impact upon fundamental rights.¹¹⁴ The factor though also 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 refers to the nature of the parties before it and whether the right has a particular importance to them. The role of the private party within the broader society can also be considered. Thus, given that freedom of expression is of critical importance to the media and the media plays a fundamental role in South African democracy, the right was held to apply directly to the dispute concerning the law of defamation.

In some cases, courts will not have to engage with these features as the Constitutional Court did in *Khumalo* as the right contains an 'internal application' provision that renders it clear that it applies between private parties. This is most particularly clear in the case of the right to equality where private parties are expressly forbidden to discriminate unfairly on the listed grounds.¹¹⁵ Where no such provision exists, however, Cockrell argues that 'a court is required to make a value judgment regarding whether it would be appropriate, as a matter of political morality, for the constitutional right under consideration to impose burdens on private agencies'.¹¹⁶ However, to leave the matter there is to leave us without any clear idea as to when rights are binding upon private parties and, in particular, upon corporations. For the approach becomes purely 'agent-relative and context-sensitive, inasmuch as [the direct application of rights] against private agencies will depend on the circumstances of the case and the characteristics of

¹¹⁴ Nolan (note 51 above) at 581 and A Cockrell Butterworths Human Rights Compendium (RS 13 Oct 2003) ch3 at 3A2

¹¹⁵ Section 9(4) of the Constitution.

¹¹⁶ Cockrell (note 116 above) at 3A8.

the particular person'¹¹⁷. What we see happening in a rudimentary fashion in Khumalo represents 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 grappled with at an international level in trying to make sense of the notion of 'sphere of influence'. It is recognised that corporations do not have the same obligations as the state; they are therefore said to have obligations to realise human rights within their 'spheres of influence'. Dissatisfaction with the vagueness of this notion and the consequent unclarity it engenders for the imposition of obligations upon corporations has led the UN to task its Special Representative with the task of trying to render it more precise. In a recent report, he states that '[s]phere of influence is not about what rights companies must respect but rather about when and where companies must take steps to ensure they respect human rights'.¹¹⁸ However, the two questions outlined here cannot really be separated: the problem, as outlined by the South African Constitution, is that there is a clear relationship between the features of a particular right and whether it imposes responsibilities on corporations. An understanding of the underlying justification and elements of the right thus is of importance to determining its applicability to corporations.

However, this is not the only factor that is of importance in determining the application of responsibilities for rights protections to companies. 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'.¹¹⁹ 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.

Lehr and Jenkins argue that the notion of influence lumps together ideas of 'proximity, impact, control, benefit and political influence'.¹²⁰ Proximity refers to the connection

¹¹⁷ Ibid. at 3A8.

¹¹⁸ 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>.

¹¹⁹ 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>.

¹²⁰ Ibid.

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 user'. 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. Causation though at times is 'unclear' or 'indirect': for instance, the harm is often caused through a supply chain or through a number of companies acting together. This leads on to a consideration of control which considers how 'tightly coupled it is to the harm's immediate cause' and the ability the company has 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.¹²¹ '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 given its power to have an impact on government policy and actions in relation to human rights. In a recent workshop convened to discuss this concept, several other factors were suggested that are of relevance to determining the human rights responsibilities of corporation which include knowledge of the violation, the duration thereof as well as the severity of the violation.¹²² No clear conclusions were reached but it was suggested the Special Representative continue exploring the concept.

It seems that 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 non-state actors and in particular in this study to corporations. A clear normative theory needs to be developed which provides the basis for the attribution of such responsibility. Nevertheless, in the absence of such a theory, it is submitted that considering the factors that have been suggested above, there are two main factors (that are interrelated) 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 main principle involves the impact or potential impact of corporations on the enjoyment of rights by natural persons. This is a critical consideration and, where such impacts are strong, will be a major basis for a finding of corporate responsibility to avert negative impacts and possibly take positive measures to ensure realisation.
- Secondly, from the perspective of the corporations themselves, their own capacities, capabilities or functions they perform within our societies are the critical concern for determining the range of their responsibilities.

¹²¹ See I Tofalo 'Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations'. In O De Schutter Transnational Corporations and Human Rights (note 1 above).

¹²² Ruggie report (note 118 above) at 7.

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

3.4. Horizontal Application: Requiring A Reform of the Corporate Structure and Corporate 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, which is to say, engages in open and free competition, without deception or fraud.'¹²³ Recent developments in the international sphere as well as domestic initiatives, have challenged this very limited understanding of the responsibility of companies. Notions of the 'triple bottom line' are meant to recognise corporate responsibilities that go beyond simply making profit. Yet, often these ideas are recognised as excellent ideals but they lack any binding force. Moreover, some have argued that the very nature of the corporate form itself is inimical to recognising wider social responsibilities.

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'.¹²⁴ 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'.¹²⁵ In terms of the common law, directors have a fiduciary duty of good faith to act in the best interests of the company as well as a duty to conduct the affairs of the

¹²³ 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.

¹²⁴ HS Cilliers et al *Entrepreneurial Law*. Durban: Butterworths, 2000.

¹²⁵ See Corporate Watch Report *What's Wrong with Corporate Social Responsibility* (2006) at 9.

company with care and skill.¹²⁶ Of course, the question arises as to what the best interests of the company are and, as has been outlined above, part of the developments heralded by the King II Report is to construe the interest to embrace wider societal concerns. Nevertheless, it is clear that a conflict may arise between acting in the financial interests of the company and embracing social and environmental considerations.¹²⁷ The desire for profitability may clash with the social responsibilities of a company and its very nature renders it likely to favour the interests of the shareholders.¹²⁸

It is our view that 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'.¹²⁹ All exercises of public power are subject to the constraints of the Constitution.¹³⁰ In relation to the Bill of Rights, this is confirmed for the institutional structures of our society by section 8(1) which binds all public bodies.

We would argue that the same applies to private bodies and that the Constitution of South Africa now constrains the actions of private bodies within its ambit. Using the same language as section 8(1), it is evident that the actions of private bodies must conform to the Bill of Rights to the extent that it is applicable. 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 has important implications for corporations. There is no reference to the Bill of Rights in the Companies Act 61 of 1973 despite several amendments post-1994. Nevertheless, 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 must conform to constitutional constraints. This means that the notion of creating a structure which can pursue profits at the expense of human rights is no longer legally meaningful. Inherent in the structure of a company now is the implicit demand

¹²⁶ See JT Pretorius et al *Hahlo's South African Company Law*. Kenwyn: Juta: 1999 at 278 and *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) at pp.163-165.

¹²⁷ See Interview with Malcolm Gray in the *Sustainable Business Handbook* (note 97 above) where he states that 'bad companies can make good investment'.

¹²⁸ Some have attempted to argue that there is a business case for corporations to respect human rights and wider social responsibilities. The evidence for this, however, is inconclusive: see JD Margolis and HA Elfenbein 'Do Well By Doing Good? Don't Count on It'. (Jan, 2008) *Harvard Business Review* at 19-20.

¹²⁹ *Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at [44].

¹³⁰ *Ibid.* at [51] and [85] ff.

that it respect and protect human rights to the extent that is applicable to it. The applicability of the bill of rights to corporations thus goes beyond purely imposing obligations upon the corporation: it changes its nature.

Since all conduct is subject to law and law is ultimately subject to the constraints of the Constitution, the notion of unconstrained self-interest ceases to exist in our law. Self-interest always has to be interpreted through the prism of the Constitution. Thus, a corporation no longer can claim that corporate social responsibility is voluntary: rather, the exercise of corporate power is only allowed provided that it does not violate the social responsibilities of corporations. The radical nature of this change perhaps has not been noticed before but it is a logical outcome of the direct horizontal application of the bill of rights to corporations (and private actors more generally).

Some may argue, however, that these considerations are pretty abstract and question how this in fact impacts upon the common law and statutory position of companies. Statutes cannot be amended without legislative action: yet, we contend that it would be desirable to reform the Companies Act to reflect the changed legal nature of companies as well as to clarify shifts that have occurred through the application clause of the Constitution. Failing this, the court has 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'.¹³¹

What changes do we initially see as being mandated by the horizontal application of the Constitution? The argument that has been made in this text suggests that indeed many of the rights in the Bill of Rights are binding upon companies at least to an extent: yet, as has been mentioned, corporate law and constitutional law have largely proceeded as separate disciplines. To render corporate law in conformity with the Constitution, we believe 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 already place the realisation of rights as one of the prime constraints on the activities of the company and require such a recognition to be placed in a company's founding documents.

Secondly, the fiduciary duty of directors to act in good faith has been a duty to act in the best interests of the company. Similarly, the duty to act with care and skill has been a duty based on the company's interest. It is important explicitly to place a duty upon directors to act with due care and skill to ensure that company activities do not violate

¹³¹ Section 8(3) of the Constitution.

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 the vagueness of what constitutes a company's interest and the tendency in the commercial world to construe this in purely commercial terms, we suggest that a separate duty be placed upon directors to ensure at least that they conform with their obligations to realise fundamental rights in the Constitution to the extent they are required to. This again also explicitly recognises that corporations must function within the constraints of the Constitution.

Perhaps this duty can be backed up with the recognition that directors may also bear personal liability for violations of human rights. Given that they are in fact the practical decision-makers in a company, ultimately, if directors are allowed to shield themselves behind the separate legal personality of the company, this may not be an effective deterrent to human rights violations. Establishing a principle of personal liability upon directors 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. 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 such liability upon the whole board of a large multi-national.

Thirdly, the Companies Act generally establishes financial reporting obligations on the part of companies.¹³² 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 impacts 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 the non-financial reporting.

These are some 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.

¹³² 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.

The text of the Constitution does not distinguish between actions by private parties either here or abroad. It seems to apply across the board. The Constitutional Court has not yet had an opportunity to address this question directly; it has, however, considered whether or not the Bill of Rights binds the actions of the South African government beyond South Africa's borders.

*Mahomed v President of the Republic of South Africa*¹³³ ('Mahomed') was the first case to consider this question. The case concerned a person who was handed over by South African officials to agents of the United States for alleged terrorist activities in Kenya. Mahomed was then transported to the United States where he stood trial and could have been subject to capital punishment. The Constitutional Court held that the manner in which Mahomed left South Africa was unlawful and that he should not have been handed over to the US government without an assurance that the death penalty would not be imposed. Despite Mahomed already being in the United States, the court directed that the government request that the United States not impose or carry out the death penalty. Even though Mahomed was a foreigner and already beyond South Africa's borders, the Court found that the government still had a duty to ensure that his human rights were respected. The judgment thus suggests that the South African government may have duties to persons – even if they are not citizens – beyond South Africa's borders.

However, in the case of *Kaunda*¹³⁴, the majority of the court retreated from its more expansive position in *Mohamed*. The Court was approached by 69 South African citizens who were being held on charges that related to mercenary activities. They wanted the court to direct the South African government to seek the release and extradition of these

¹³³ 2001 (3) SA 893 (CC)

¹³⁴ *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC).

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'.¹³⁵ Secondly, it relied upon the principle of state sovereignty to recognise the laws of a State ordinarily apply only within its territory.¹³⁶ 'For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our national have under the Constitution, would be inconsistent with the principle of State sovereignty'.¹³⁷

Whilst some of the court's reasoning, suggested that the Bill of Rights does not have extra-territorial application, it expressly recognised that its holding did not have that wide-ranging effect and in fact considered the possible effect of its ruling on the situation where South African companies do business abroad. The court distinguished between the extraterritorial infringement of a right by an organ of State or private person 'in circumstances which do not infringe the sovereignty of a foreign State, and an obligation on our government to take action in a foreign State that interferes directly or indirectly with the sovereignty of that State'.¹³⁸ It expressly recognised that claims in the former category may 'be justiciable in our courts, and nothing in this judgment should be construed as excluding this possibility'.¹³⁹

The holding of the court thus stands for the proposition that the Bill of Rights does not have extraterritorial effect where this would involve a violation of the principle of state sovereignty. Where this is not the case, it may have such effect. 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 as section 8(1) provides that the Bill of Rights binds the actions of all branches of government. It does not seem that these provisions 'give the state a free ride to act outside the borders of South Africa'.¹⁴⁰

¹³⁵ Ibid. at [37].

¹³⁶ Ibid. at [38].

¹³⁷ Ibid. at [44].

¹³⁸ Ibid. at [45].

¹³⁹ Ibid.

¹⁴⁰ 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 African borders. It is indeed possible to see the extraterritorial application of the Bill of Rights to companies beyond South Africa's borders not as a violation of state sovereignty but as a requirement of South African domestic law that binds South Africans wherever they may be. I now consider several important reasons for the extra-territorial application of the Bill of Rights to juristic persons.¹⁴¹

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.¹⁴² Thus, the concern of the Bill of Rights must not only be with those within South African borders but with the human rights of all.

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.

Thirdly, human rights are not currently considered merely an internal matter 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 right and this also involves a duty to ensure that the entities within one's 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'.¹⁴³

The question then arises as to why the home state of a corporation should enact extra-territorial regulation of human rights where such regulation does not exist in the state where the actual violation is taking place (the host state): should the obligation to ensure respect for human rights not fall upon a host state? However, there are a number of

¹⁴¹ 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.

¹⁴² See D Bilchitz *Poverty and Fundamental Rights*. Oxford: Oxford University Press, 2007 at 69-71.

¹⁴³ *Ibid.* at 49.

reasons to prefer the home state (such as South Africa). First, the home state is often in a much stronger position than weaker states that lack bargaining power with major corporations to enforce human rights legislation. Often the choice will be to waive the application of these laws or to lose significant investment.

Secondly, the home state model allows one to regulate the parent corporation which then controls all its subsidiaries. This allows for a stronger impact than merely regulating subsidiaries. Thirdly, home states also often have more developed legal systems and a greater availability of resources to ensure that challenges are made where violations occur. Finally, home states often have higher standards of human rights protections that ensures that the better standards of human rights protection occur in host states.¹⁴⁴

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 the merits, the Act has led to a number of settlements in cases of major human rights violations. It has also led to high profile litigation highlighting abuses with companies seriously concerned about the reputational damage such litigation does. The mere existence of the legislation encourages a culture of corporate responsibility and ensures the enforceability of binding human rights obligations.

We believe that South Africa should enact a statute to enable the courts here to have extra-territorial jurisdiction over the actions of companies in countries beyond our borders. Such jurisdiction could involve criminal sanction for international crimes with delictual liability imposed for other human rights violations. Whilst the Constitution may be read to impose such liability, the lack of clarity engendered by Kaunda suggests that a statute is needed for the purpose. If this is lacking, courts could be enabled in terms of section 8(3) of the Bill of Rights to develop the common law to recognise such extraterritorial jurisdiction. This will have a major impact on corporate actions beyond South African borders: a culture of impunity will be prevented from taking root and once more an enduring commitment to the horizontal application of the Bill of Rights will be solidified.

3.6. Beyond Formalism: Piercing the Corporate Veil

As was 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

¹⁴⁴ These reasons are contained in *ibid.* at 50-51.

used to avoid liability for a range of practices, the courts have thus recognised that there are circumstances in which they would be prepared to 'pierce the corporate veil' and establish the true nature of transactions. The problem for the doctrine has always been that if the veil is pierced too readily then the benefits of separate legal personality disappear: thus, it has been held that 'our courts should not lightly disregard a company's separate personality but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it'.¹⁴⁵

Nevertheless, South African law recognises that there are circumstances in which the corporate 'veil' may be pierced. This will generally be allowed where the corporate personality of a company is used as a device to cover fraud or improper conduct and personal liability may consequently be attributed to those who misuse the separate legal personality of a company.¹⁴⁶ Similarly, courts may refuse to recognise the separate legal personality of a subsidiary where it is merely a 'device' to evade a director's fiduciary duties to the principal company.¹⁴⁷ In such circumstances, the importance of preserving separate legal personality would 'have to be balanced against policy considerations which arise in favour of piercing the corporate veil...And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie'.¹⁴⁸

This discussion of 'piercing the veil' is of importance to the human rights obligations of companies as the corporate form can be used as a method 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 to a subsidiary and not responsible for its decisions. The subsidiary violates certain rights but the principal nevertheless benefits through this. Secondly, a company may contract with suppliers or sub-contractors: they proceed to violate human rights whilst the company in question profits from it whilst disclaiming responsibility in this regard.

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, we saw that this issue arose in one of the preliminary stages of the litigation in *Doe v Unocal*. The court there developed standards as to when a principal would be liable for the actions of its subsidiary. Similarly, we see in the United

¹⁴⁵ *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 1995 (4) SA 790 (A) at 803-4.

¹⁴⁶ C Visser et al. *Gibson South African Mercantile and Company law*. Cape Town: Jutas, 2003 at 261.

¹⁴⁷ See *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

¹⁴⁸ *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 1995 (4) SA 790 (A) at 804.

Nations norms that companies are required to incorporate human rights standards in their dealings with subsidiaries and sub-contractors: yet, the Norms do not provide a clear ground for the attribution of responsibility of one company for the actions of another.

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'.¹⁴⁹ 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 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.¹⁵⁰

It is also important to recognise in this area the different forms of involvement that corporations may have in the commission of human rights violations. These are often classed under the notion of 'complicity' in discussions in the international arena. Academics have identified different types of complicity that exist on a continuum. Direct complicity is when the corporation actively assists in the violations of human rights either through its own actions or assistance to other persons.¹⁵¹ Indirect complicity is when a corporation through its lawful activities in a country gives financial support or moral support to a country whose regime commits violations of human rights. This could involve, for instance, banks lending money to repressive regimes or supplying them with the tools to suppress dissent.¹⁵² Beneficial complicity is where a corporation benefits from violations of human rights even though it does not give any specific support for it.¹⁵³ Silent complicity is where a corporation remains silent and inactive in face of human rights violations.¹⁵⁴

As is pointed out by one writer, 'if every act which could have effect of benefiting a human right's perpetrator is considered to extend responsibility to its agent, regardless of the degree of proximity between the act and the abuser's benefit and also regardless of

¹⁴⁹ A Wilson (note 1 above) at 66.

¹⁵⁰ Ibid. at 66-67.

¹⁵¹ C Chiamenti 'Corporations and the International Criminal Court'. In O De Schutter (ed) (note 1 above) at 308.

¹⁵² I Tofalo (note 121 above) at 344-346.

¹⁵³ Chiamenti (note 152 above) at 308.

¹⁵⁴ Ibid.

the agent's intent, we could all be accomplices of all human rights violations'.¹⁵⁵ There is thus the need to establish some form of more proximate causation or control in order to establish complicity. The last two categories of complicity are thus unlikely to provide the basis for founding corporate liability or for piercing the corporate veil. Clearly direct complicity would impose liability but usually this would not be evident in the case of parent companies. It is thus critical to determine standards in relation to where indirect complicity is sufficient to impose liability.

Given the complexity 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 by 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 ensuring that such abuses did not take place. The Constitutional Court has developed the common law relating to 'vicarious liability' particularly in relation to when damages can be claimed against the state for wrongful actions of employees.¹⁵⁶ Such a development could also take place in relation to corporate responsibility not only for natural persons but also for subsidiary juristic persons.

The enquiry for negligence can be adapted from the South African law to require the following enquiries: (a) would a reasonable company in the same circumstances as the parent company, have taken reasonable steps to acquire knowledge of the human rights violations?; (b) Would such a company have foreseen the reasonable 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 a violation?; and finally (d) did the actual parent company in question fail to take steps which it should have done to guard against the possibilities of violation?¹⁵⁷. This test suggests that it is not sufficient for a company to claim no knowledge of the violations: rather, it must demonstrate that as a parent company it was reasonable to have made no further

¹⁵⁵ Tofalo (note 121 above) at 356.

¹⁵⁶ See *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC).

¹⁵⁷ 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 law; (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 *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: Juta, 1994 at 299.

enquiries to establish whether human rights violations were occurring. This is particularly important in establishing a duty upon corporations to ensure they are informed as to 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 corporations to establish that it was not complicit in the violations 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 its activities lead to human rights violations.¹⁵⁸

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 for the inadequacy and incoherence of such an approach in respect of human rights concerns. The observance of human rights cannot be by election but places responsibilities upon all actors in society for their observance. The chief difficulty in this area is to identify principles for determining the scope of corporate obligations in relation to particular human rights concerns. We 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. Further research needs to supplement this more abstract approach and consider in detail the ambit of corporate responsibility in relation to each right.

The implications of the horizontal application of the Bill of Rights in South Africa upon corporate responsibilities has not adequately been considered. In order to draw out these implications and to ensure corporations recognise that these obligations are not voluntary, we suggest that it is important for a number of reforms to take place both of statutory law and the common law. Whilst the exact ambit of responsibility remains as yet unclear, the adoption of these reforms will encourage vigilance upon corporations who will seek to avoid negative publicity and litigation.

In relation to statute, we suggest the following:

- The Companies Act should be amended to require corporations 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.

¹⁵⁸ Similar measures are discussed in A Wilson (note 1 above) at 66-67.

- An explicit fiduciary duty should be placed upon directors to avoid violating human rights in the operation 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 common law, we suggest that:

- In the absence of the above-mentioned measures being adopted, judges, in suitable cases, interpret many of these measures into the common law as a result of the horizontal application of the bill of rights.
- Judges 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. We have suggested in the text the manner in which such an approach could be conceived.
- Judges begin to develop principles and standards that can help clarify the nature of corporate obligations.

This report can be seen as a catalyst for discussion in South Africa as to the manner in which binding obligations for human rights can be imposed upon corporations. The law reform measures we suggest are only some possibilities that may occur and we would welcome additional suggestions. Our proposals also allow for the continuation of important voluntary initiatives adopted by corporations with a particular focus upon corporate social investment. It is to be hoped that in this manner, the power of corporations can be placed within constraints such that they do not harm the fundamental interests of persons and, hopefully in some cases, actively promote their development.