UN's HUMAN RIGHTS NORMS FOR TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES: AN IMPERFECT STEP IN RIGHT DIRECTION?

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I. INTRODUCTION

The United Nations (UN), in its life of forty-eight years, has faced several challenges[1] as promoter of human rights in international arena. One such challenge has been to ensure that even non-state actors such as transnational corporations (TNCs)[2] respect human rights, at least within their respective spheres of activity. The UN, in a way, was alive to this when it constituted a Commission on Transnational Corporations in mid-70s.[3] Though the vision of the Commission to draft an agreeable code for TNCs failed to materialise due to various reasons,[4] the UN continued to pursue the issue of social responsibility of TNCs in different forms and forums.[5] The approval of the Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms/Norms) by the Sub-

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[1] The challenges related not only to ascertaining the 'content' of human rights but also to their effective 'enforcement'.

[2] The UN has preferred the usage of the term TNCs to multinational corporations (MNCs), multinational enterprises (MNEs) or supranational entities. See generally CYNTHIA D. WALLACE, LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE 10-12 (1982). For the sake of conformity and consistency, I have used TNCs in the same sense as defined by the Norms, and it denotes all the above variations of corporate entities.

[3] E.S.C. RES. 1913, U.N. ESCOR, 57TH Sess., Supp. No. 21, U.N. Doc. E/5570/ADD. 1 (1975).

[4] *See* PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 593-96 (1995).

[5] Since 1993 the issues related with TNCs are dealt with by the United Nations Conference on Trade and Development (UNCTAD). The issue of TNCs' social responsibility, including the obligation to observe human rights norms, is squarely dealt with in at least two of the papers issued by the UNCATD, i. e., *Social Responsibility of Transnational Corporations* (1999), available at http://www.unctad.org/en/docs//poiteiitm21.en.pdf (last visited Oct. 15, 2003); and *Social Responsibility* (2001), available at http://www.unctad.org/en/docs//pstieiitd22.en.pdf (last visited Oct. 15, 2003). Presently, the Sub-Commission of Human Rights deals with TNCs and the interactions of trade and human rights, which in turn has constituted a working group on TNCs.

Commission on the Promotion and Protection of Human Rights[6] in August 2003 represents a new vigour on the part of the UN in regulating corporate human rights abuses. This development, together with the launch of Global Compact,[7] clearly reflects the necessity as well as urgency on part of the UN to revive its relevance[8] in a new world order in which states no longer enjoy the monopoly as violators of human rights.[9]

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[6] Sub-Commission on the Promotion and Protection of Human Rights, 55th Session, Agenda Item 4, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003, available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/64155e7e8141b38cc1256d63002c55e8?Opendocument (last visited Oct. 27, 2003) [hereinafter UN Norms].

[7] The UN Secretary General Kofi Annan proposed the Global Compact, consisting of nine principles in the areas of human rights, labour and environment, on 31 January 1999 at the World Economic Forum in Davos. The Compact calls upon business enterprises to embrace, support, and enact a set of core values in the above three areas. *See* Alexis M. Taylor, *The UN and the Global Compact*, 17 N.Y.L. SCH. J. HUM. RTS. 975, 978-79 (2001).

[8] The Secretary General Kofi Annan said: "I see the Compact as a chance for the UN to renew itself from within, and to gain greater relevance in the twenty-first century by showing that it can work with non-state actors, as well as states, to achieve the broad goals on which its members have agreed." *Global Compact: Report on Progress and Activities* (Draft), 3, available at http://www.iccwbo.org/home/global_compact/ProgressReport%20July%203.pdf (last visited Sept. 15, 2003) [hereinafter *Compact Progress Report*]. Being alive to changing needs, the General Assembly of the UN has now passed a resolution, *Towards Global Partnerships*, G.A. Res. 55/215, U.N. GAOR, 55th Sess., U.N. Doc A/55/228 (2000), authorizing continued engagement of the UN with the private sector, including the Global Compact initiative.

[9] This is clear from two facts. First, since early 90s there is a spur in cases filed against TNCs for human rights abuses all over the world generally and in the US in particular under the Alien Tort Claims Act. See for a discussion of some of these human rights violating corporate activities, Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 51-53 (2002); Aaron X. Fellmeth, Wiwa v. Royal Dutch Petroleum Co.: *A New Standard for the Enforcement of International Law in the U.S. Courts?*, 5 YALE HUM. RTS. & DEV. L.J. 241, 244-45 (2002); Ariadne K. Sacharoff, *Multinationals in Host Countries: Can they be Held Liable under the Alien Tort Claims Act for Human Rights Violations*?, 23 BROOK. J. INT'L L. 927, 958-64 (1998); John C. Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 464-65 (2000); Lena Ayoub, *Nike Just Does It and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 400 11 (1999); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 131-36 (2002); Mahmood Monshipouri, Claude E. Welch, Jr. & Evan T. Kennedy, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 HUMAN RIGHTS QUARTERLY 965, 973-77 (2003). Second, of the largest 100 economies in the world, 51 are TNCs and only 49 are states. Nicola Jagers, *The Legal Status of the Multinational Corporation under International Law*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 260 (Michael K. Addo ed., 1999). The 2003 survey shows that there are now 72 TNCs in the list of 100 largest economic entities. Paul Sheehan, *A Rising Force in Capital and Culture*, SYDNEY MORNING HERALD, January 3-4, 2004, at 21. *See also* Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, available at http://www.globalpolicy.org/socecon/tncs/top200.htm (last visited Oct. 20, 2003).

The UN Norms, however, have not received the attention of academia they deserved; the release/approval of the Norms is not followed by the searching academic critiques.[10] Though the Norms undoubtedly represent an improvement in terms of both *formulation* and *implementation* of human rights standards over earlier such attempts at the international level, they still fall short of what is required for evolving an effective international regulatory regime of corporate human rights responsibility. In this article I intend to analyse the provisions as well as omissions of the UN Norms. The central objective of the analysis is to highlight the operational shortcomings, and also explore the possible approaches that could be taken to remedy them before the Norms come up for consideration and further action before the UN Commission on Human Rights in March 2004. By way of caveat, it should be noted that I do not make any claim of offering final and/or detailed solutions to such shortcomings; the primary idea being to put an academic debate into motion.

I begin in Part II by briefly explaining how the Norms make a departure from the *past*, and could be characterised, in view of such departure, as an improvement over their predecessor as well as other current regulatory regimes of corporate human rights responsibility. Part III first reviews the human rights obligations of TNCs as laid down in the Norms, and then highlights the two operational difficulties that they might face: the one of which is the result of (over)-reference to international human rights instruments whereas the other relate to putting universal standards of human rights into practice. Regarding the first issue, I will argue it is desirable that the human rights obligations of TNCs are enumerated, as far as possible and in an inclusive manner, in a schedule to the Norms. As far as the second difficulty is

[10] My search on Lexis and Westlaw did not yield even a single entry which addressed these Norms. On search through Google, I could, however, found an article by Carolin Hillemanns published in a web-

concerned, despite a claim for universality of human rights and the common standards flowing from such universality, it is necessary for the UN Norms to acknowledge a distinction between, what I term, "aspirational" and "operational" standards of human rights. The former signifies general objectives whereas the latter translates those objectives into concrete measurable units. The Norms could possibly lay down only the aspirational standards, the exact contours of which are to be determined by making further rules at municipal levels.

The provisions of the Norms related to implementation of TNCs' human rights obligations are dealt with in Part IV. Though the Norms make a promising start by employing multiple monitoring techniques both at national and international levels, they neither invoke multiple sanctions to enforce obligations against TNCs nor go far enough in establishing a vigorous enforcement mechanism. Moreover, it is equally vital that the Norms also devote some attention to the procedural issues associated with implementation of human rights standards. It is fundamental to the success of the UN Norms that, at least, the rules regarding the application of the doctrine of *forum non conveniens* and the liability of a parent corporation for human rights violations by its subsidiaries are reexamined and agreed upon. Part V sums up the analysis, including the arguments, and also throw some light on the future treatment of the Norms.

II. NATURE OF UN NORMS: DEPARTURE FROM THE 'PAST'?

The starting point for an analysis of the provisions and omissions of the UN Norms should, in my view, be the relevance of their place in an international mechanism of

based journal. *Infra* note 15.

TNCs' accountability for human rights violations. After all, what was the need for these new (TNCs would also claim 'additional')[11] norms when various international initiatives already exist?[12] The answer to this question must be found with reference to the provisions of the Norms as compared with the provisions of their predecessor[13] and other current regulatory regimes of corporate responsibility.[14]

The relevance of the UN Norms lies in the fact that they represent a shift in the paradigms "that have to date dominated the discourse of corporate social responsibility"[15] and have been responsible for ineffective regulation of corporate conduct impinging upon human rights.[16] I argue that the Norms present the most

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[11] *See, for example*, the response of the United States Council for International Business (USCIB), *Talking Points on the Draft "Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"*, available at http://209.238.219.111/USCIB-text-Talking-Points.htm (last visited Dec. 23, 2003). USCIB is also critical of the Norms on the ground that, among others, they (i) blur the line between voluntary and legal actions; (ii) are "predicted on the belief that human rights can best be advanced by circumventing national political and legal frameworks"; (iii) extend far beyond issues of "basic" human rights; (iv) impose impractical obligations. *Compare* Sir Geoffrey Chandler, *Commentary on the United States Council for International Business 'Talking Points' on the Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, who considers USCIB's response to be "misleading and factually inaccurate", available at http://209.238.219.111/Chandler-commentary-on-USCIB-Talking-Points.htm (last visited Dec. 23, 2003).

[12] *See, for example*, the *ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977) reprinted in 17 *ILM* 422 (1978), the revised version of 2000 is reprinted in 41 *ILM* 186 (2002) [hereinafter *Tripartite Declaration*]; the *OECD Declaration and Decisions on International Investment and Multinational Enterprises*, reprinted in 15 *ILM* 967 (1976), the revised version of 2000 is available at http://www.olis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c1256991003b5147/$FILE/00085743.PDF (last visited Aug. 30, 2003) [hereinafter *OECD Guidelines*]; and the Global Compact (1999). Besides, regulatory regimes/initiatives also exist at national and regional levels. See, for example, the Alien Tort Claims Act 1789 (US); and the EU'S GREEN PAPER ON PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY (2001), *available at* http://www.ibeurope.com/Database/Factsheets/F051csr.htm (last visited Aug. 30, 2003).

[13] A reference could be made to the final draft of the UN Code of Conduct on Transnational Corporations proposed in 1990 by the United Nations Commission on Transnational Corporations. *Draft of the UN Code of Conduct on Transnational Corporations*, UN ESCOR, Doc. E/1990/94 (1990). The Code never came into force. *See generally* KWAMENA ACQUAAH, INTERNATIONAL REGULATION OF TRANSNATIONAL CORPORATIONS: THE NEW REALITY 108-20 (1986); MUCHLINSKI, *supra* note 4, at 592-97.

[14] *Supra* note 12

[15] Carolin Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 4 GERMAN LAW JOURNAL 1065, at 1068 (2003), available at http://www.germanlawjournal.com (last visited Oct. 23, 2003).

[16] *See generally* Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 1-57

promising human rights norms for TNCs to date because of at least six factors. First, instead of being limited to labour and/or environmental rights,[17] the UN Norms attempt to draw a comprehensive list of human rights obligations. Besides a general obligation "to respect, ensure respect for, prevent abuse of, and promote human rights recognized in international as well as national law",[18] the specific obligations relate to the right to equal opportunity and non-discriminatory treatment; the right to security of person; the right of workers; the respect for national sovereignty and human rights; and the obligations with regard to consumer and environmental protection. The general obligation to respect "international human rights" becomes a potent provision in view of another provision in paragraph 23 which provides that a reference to "international human rights" in the UN Norms includes all civil, cultural, economic, political and social rights.

Second, the Preamble to the Norms makes a clear, specific and unequivocal reference to the UN Charter, the Universal Declaration of Human Rights (UDHR) and other international treaties to deduce obligations for TNCs.[19] This provides a stronger and more widely accepted basis of human rights responsibility generally, and a *jus cogens* basis regarding some human rights.[20] In view of the UN Norms' reliance on the said international covenants, one commentator has concluded that the Norms "thus

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(2003) [hereinafter Deva, *Human Rights Violations by MNCs*]. I have argued, in brief, that the existing international framework of corporate accountability "does not prescribe clear human rights standards, is based upon flawed premises, relies excessively on states to enforce obligations and offers no sanctions in case of non-compliance. In sum, the four-fold inadequacy of the system makes it ineffective." *Id*., 56.

[17] Though the *Tripartite Declaration* makes a reference that the multinational enterprises "should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly" (*supra* note 12, para 8), the thrust of its provisions is undoubtedly on labour and employment rights. Same could be said about the *OECD Guidelines*, despite the fact that after the 2000 review a recommendation on human rights finds a place in para II.2. *Supra* note 12.

[18] *Supra* note 6, para 1.

[19] The reference to various international conventions, for the purpose of reliance, is quite elaborate and covers a wide range of civil, political, social, economic and cultural rights. *Id.*, the Preamble.

represent a restatement of existing international human rights law" which "already does or should apply to companies' conduct".[21] Though an academic argument could be made that the UDHR or other international covenants apply to non-state actors including TNCs,[22] one should not, however, lose sight of the fact that those international covenants were never drafted to *directly*[23] apply to TNCs and therefore, nowhere provided for any enforcement mechanism in case TNCs fail to observe the obligations.[24] Further, the very fact that there is a move towards framing human rights norms "specifically" directed to TNCs also makes it clear there exist certain gaps in the prevailing state-focal international regulatory regime.[25] The UN Norms, therefore, does more than merely stating the existing; they not only formulate obligations directed clearly and directly to TNCs but also lay down the provisions for their implementation.

Third, in terms of the nature of obligations also, the Norms clearly make an encouraging advancement vis-à-vis the prior or existing corresponding instruments.

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[20] *See generally* B. Simma & P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992).

[21] Hillemanns, *supra* note 15, at 1070.

[22] Henkin argues with reference to the application of UDHR to corporations: "Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all." Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 25 (1999). *See also* ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 91-101 (1993) (argues that the European Convention of Human Rights and certain UN Conventions cover the protection of human rights against the actions of private bodies and individuals).

[23] Though it can be argued that the courts have 'indirectly' tried to make private actors accountable, i.e., failure of state to prevent human rights violations by private persons, including corporations, within its territory amounts to violation of a state's mandate under the international conventions. See, e.g., *Guerra v Italy*, 26 E.H.R.R. 357 (1998). *See also* David Kinley, *Human Rights as Legally Binding or Merely Relevant?*, *in* COMMERCIAL LAW AND HUMAN RIGHTS 25, 40-41 (Stephen Bottomley & David Kinley eds., 2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 470 (2001).

[24] An ICHRP report concludes that only the ILO and OECD enforcement mechanism were designed with companies in mind. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 117 (2002) [hereinafter ICHRP, BEYOND VOLUNTARISM].

[25] Ratner argues that "a system in which state is the sole target of international legal obligations may not be sufficient to protect human rights." Ratner, *supra* note 23, at 461.

As TNCs could violate human rights in several ways (including by failing to act),[26] it is insufficient to draft obligations in conventional "negative" terms, i.e., that TNCs should/shall not violate human rights. The UN Norms try to overcome this problem by imposing "positive" obligations on TNCs.[27] TNCs shall not only refrain from directly or indirectly contributing to, and benefiting from, human rights violations but also "use their influence in order to promote and ensure respect for human rights."[28]

Fourth, the Norms substitute the conventional approach of "should" with "shall" in terms of the compliance of the obligation.[29] Although it may be suggested that the change of terminology may not make much difference in terms of the end result and that strictly speaking the Norms are still not binding, it is still a positive and definite shift in approach, and should make a difference when coupled with provisions for implementation of the norms.[30] This shift is also a tacit acceptance of the fact that the

[26] Deva, *Human Rights Violations by MNCs*, *supra* note 16, at 8. *See also* Lu, below n 138, 605-06; Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 348-49 (2001) (examining silent complicity as the basis of liability).

[27] This is clear from the use of terms obligation to "promote" and "protect" human rights in para 1. *See also* para 12 where an obligation is constructed in terms of not only respecting but also contributing to the realization of human rights. *Supra* note 6. See, for an argument why TNCs should be under positive obligations, Surya Deva, *Human Rights Standards and Multinational Corporations: Dilemma Between "Home" and "Rome"*, 7 MEDITERRANEAN JOURNAL OF HUMAN RIGHTS 69, 87-89 (2003) [hereinafter Deva, *Dilemma between "Home" and "Rome"*].

[28] Sub-Commission on the Promotion and Protection of Human Rights, 55th Session, Agenda Item 4, *Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2, available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/293378ff2003ceb0c1256d7900310d90?Opendocument (last visited Oct. 27, 2003), Commentary (b) to para 1 [hereinafter Commentary on UN Norms]. See also Hillemanns, *supra* note 15, 1073.

[29] A shift in approach is visible from the use of the term "shall" in paras 2-16, 17 and 19 as well as by the fact that the provisions for implementation are given due importance and place in the UN Norms. *Supra* note 6. *See also* Hillemanns, *supra* note 15, at 1068.

[30] It is important to note that para 14 of the final draft of the UN Code of Conduct on Transnational ``Corporations has chosen "shall" in place of "should." It reads: "Transnational corporations *shall* respect human rights and fundamental freedoms in the countries in which they operate." (Emphasis added). *Supra* note 13.

prevailing "dialogue-cooperation" based approach of voluntary compliance[31] with human rights norms is not proving to be adequate.[32]

Fifth, the UN Norms propose specific provisions for implementation of human rights norms.[33] In fact, this is a corollary to the Norms opting for an obligatory approach to the compliancy of the obligations. Besides asking states to "establish and reinforce the necessary legal and administrative framework for ensuring that the Norms … are implemented by transnational corporations",[34] the Norms propose independent and transparent periodic monitoring as well as verification by national and international (including the UN) mechanisms.[35] This again is a departure from the existing *indirect* mode of implementation in which the responsibility of enforcement lies solely and exclusively with states. A note must be taken of another significant provision of the UN Norms which provides for prompt, adequate and effective reparation to persons and communities adversely affected by failure to comply with responsibilities.[36]

Sixth, the scope of the Norms is not limited just to TNCs, but also covers "other business enterprises,"[37] that is, any business entity, regardless of its legal form and/or area of operation, including a partnership, contractor, subcontractor, supplier, licensee or distributor (hereinafter contractors-suppliers *et al*).[38] The Norms shall apply to such "other business enterprises" if they have any relation with a TNC, the impact of its

[31] *See, e.g.*, the *Compact Progress Report*, *supra* note 8, at 4. "It [the Global Compact] is a cooperative framework based on internationally established rights and principles." It must also be noted that engaging in "policy dialogues" with the business sector is one of the four main areas of activity of the Compact. *Id*. *See also* the OECD Guidelines, *supra* note 12, para I.1.
[32] See Monshipouri et al, *supra* note 9, at 979-82. See also generally Macek, *infra* note 84.
[33] UN Norms, *supra* note 6, para 15-19.
[34] *Id*., para 17.
[35] *Id*., para 16.
[36] *Id*., para. 18. Compensation not as charity but for violation of a right due to omission of duty is crucial. *See infra* note 130.
[37] UN Norms, *supra* note 6, para. 1.

activities is not entirely local, or the activities involve violations of the right to security outlined in paragraphs 3 and 4.[39] Such a wide amplitude of the UN Norms should be seen as a response to the problem associated in pinning the precise responsibility of a TNC. As in many situations the *apparent* violator is not a TNC but its subsidiaries, contractors or suppliers, should the concerned TNC be allowed to bypass the liability on technical grounds, e.g., the separation of personality or lack of control? The Norms, thus, try to overcome this problem by directly and squarely placing an obligation, that the contractors-suppliers *et al*[40] of a TNC respect human rights, on the concerned TNC.[41] It must be noted that the obligation of TNCs also extends to ensuring that their contractors suppliers *et al* actually *implement* the Norms in their respective operations.[42] The Norms, therefore, send a clear message to TNCs: either ensure that the entities with whom you do business dealings respect human rights or do not deal with them, for failure to act may attract liability.[43]

The above analysis makes it manifest that the UN Norms represent a progress (and that too in the right direction) over the prevailing regulatory regimes. At the same time, one should not become unduly optimistic from this progress. Despite the above

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[38] *Id*., para. 21.
[39] *Id.*
[40] Though the definition of TNC in para 20 is wide enough to cover even the subsidiaries of a TNC, "subsidiaries" as such are not specifically mentioned along with suppliers-contractors *et al* in para 21. It seems, however, that the subsidiaries of a TNC could still be covered, being a "business enterprise" having a "relation with a transnational corporation". This interpretation could also be supported from the language used in para 15. *Supra* note 6.
[41] Para 1 provides: "… *Within their respective spheres of activity and influence*, transnational corporations and other business enterprises shall have the obligation to promote, *secure the fulfillment of*, respect, *ensure respect of* and protect human rights recognized in international as well as national law, … " (Emphasis added.) *Supra* note 6. *See also* Hillemanns, *supra* note 15, at 1072-73.
[42] This is clear from a provision regarding implementation found in para 15, which lays down: "… Each transnational corporation or other business enterprise *shall apply and incorporate these Norms in their contracts or other arrangements and dealings with* contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise *in order to ensure respect for and implementation of the Norms*." (Emphasis added.) *Supra* note 6.
[43] *See* Commentary on UN Norms, *supra* note 28, commentary (c) to para 15.

vital improvements, as compared with previous instruments, the Norms still suffer from serious theoretical and operational shortcomings, both in terms of formulation and implementation of human rights obligations. These shortcomings, together with the positives, are dealt with below in the next two parts.

III. FORMULATION OF HUMAN RIGHTS NORMS

In this section I first intend to briefly analyse the general as well as specific human rights obligations of TNCs formulated under the UN Norms, and then examine some of the operational difficulties which they might face. I also explore the possible theoretical recourse that could help in overcoming those difficulties. But before proceeding further, two clarifications. First, I have invoked, wherever considered appropriate, the Commentary on UN Norms to understand and state human rights obligations of TNCs because the Norms itself consider the Commentary to be "a useful interpretation and elaboration of the standards contained" therein.[44] Second, as mentioned before, though the Norms are directed towards TNCs and other business enterprises, for the sake of convenience I have used TNCs to indicate both.

A. *Human Rights Obligations*

1. General Obligations

The UN Norms begin by laying down general obligations in paragraph 1. The obligations are two-fold: *primary*[45] responsibility of states and "within their respective spheres of activity and influence" the obligation of TNCs to "promote, secure the

[44] UN Norms, *supra* note 6, the Preamble, 9th para.

[45] Qualifying states' responsibility by 'primary' may, though inadvertently, suggest that the responsibility of TNCs is secondary. Such an implication is avoidable because in view of TNCs emerging status, role and place, their responsibility to respect/promote human rights should also be primary in nature. "Because MNCs have gained powers traditionally vested only in states, they should arguably be held to the same standards that international law presently imposes upon states." Monshipouri et al, *supra* note 9, at 966.

fulfillment of, respect, ensure respect of and protect human rights."[46] The general obligations assume more significance because of two reasons. First, all the Norms that follow are to be interpreted in the light of these general obligations.[47] This interpretational guideline becomes very potent in view of a broader spectrum of duties conceived herein,[48] and should go a long way in a (required) liberal construction of the human rights obligations. Second, the appended commentary clarifies that the obligations apply to corporations and other business enterprises irrespective of the fact where they operate[49] – whether in home or at 'Rome', that is, the host country.[50] This again tries to address, at least at theoretical level, an issue which should have been the starting point of any theory of corporate responsibility.

A difficulty may, however, arise in construing what is the "respective spheres of activity and influence" of TNCs, especially when the Norms do not prescribe any guidelines. For example, would it include the *entire* supply chain, and all the subsidiaries as well as affiliate sister concerns of a TNC? Moreover, whether the spheres of activity of a TNC engaged in, say, construction work would extend to promoting right to education or privacy generally, i.e., outside its activity boundary? As TNCs and human rights activists are likely to plead for opposing interpretations, this aspect requires clarification.

[46] UN Norms, *supra* note 6, para 1.
[47] Commentary on UN Norms, *supra* note 28, commentary (a) to para 1.
[48] *See supra* notes 27 and 28
[49] Commentary on UN Norms, *supra* note 28, commentary (a) to para 1.
[50] Which standards of human rights corporations operating in many countries should follow has been a critical issue of corporate responsibility debate. *See* Clare Duffield, *Multinational Corporations and Workers' Rights*, *in* Stuart Rees & Shelley Wright (eds.), HUMAN RIGHTS AND CORPORATE RESPONSIBILITY – A DIALOGUE 193 (2000); JOHN R BOATRIGHT, ETHICS AND THE CONDUCT OF BUSINESS 379 (3rd edn., 2000). See also Deva, *Dilemma between "Home" and "Rome"*, *supra* note 27.

2. Right to Equal Opportunity and Non-Discriminatory Treatment

The UN Norms mandates TNCs to "ensure equality of opportunity and treatment" in order to eliminate discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability or age.[51] Besides, there is also a *diluted*[52] obligation to eliminate discrimination on the ground of health status (including HIV/AIDS), marital status, capacity to bear children, pregnancy and sexual orientation.[53] The measures that accord special protection to children, or are "designed to overcome past discrimination against certain groups" are, however, considered not a negation but promotion of equality.[54] TNCs are expected to pay special attention "to the consequences of business activities that may affect the rights of women", especially regarding conditions of work.[55]

Though the list of discriminating factors is appreciably extensive, it is difficult to understand why the obligation is made *soft* regarding some equally important variables. For example, despite HIV/AIDS and pregnancy being very potential reasons for discrimination practiced by corporations all over the world,[56] the Norms prescribe no mandatory obligation to desist from such practices. In one respect however, the Norms deserve credit: an express provision for taking affirmative action measures to rectify past discrimination. Such a provision becomes crucial at a time

[51] UN Norms, *supra* note 6, para 2.
[52] 'Diluted' because the obligation is drafted in terms of 'should' and moreover, laid down under the commentary as distinguished from the main text of the relevant paragraph.
[53] Commentary on UN Norms, *supra* note 28, commentary (a) to para 2.
[54] UN Norms, *supra* note 6, para 2.
[55] Commentary on UN Norms, *supra* note 28, commentary (c) to para 2.
[56] A recent survey of about 8,000 high-level executives from firms in 103 countries reveals that "fewer than 6 per cent of businesses surveyed have an HIV/AIDS-specific written policy that has received formal approval". WORLD ECONOMIC FORUM – GLOBAL HEALTH INITIATIVE, BUSINESS AND HIV/AIDS: WHO ME? (2003), available at http://www.weforum.org/pdf/Initiatives/GHI_BusinessAIDSWhoMe_WAD.pdf (last visited Dec. 18, 2003). *See also generally* INTERNATIONAL LABOUR ORGANISATION, TIME FOR EQUALITY AT WORK (2003), available at http://www.ilo.org/public/english/standards/decl/publ/reports/report4.htm (last

when a fear is expressed that the assumption of public services by corporations, in view of states resorting to privatisation and disinvestments, will not be accompanied by adoption of erstwhile states' policies of affirmative actions.[57] But it should be noted that the UN Norms do not make it clear whether this is merely an *enabling* provision, or an obligation requiring taking of positive steps.[58] In the context of corporations, a provision for affirmative action would prove more effective only if it is of the latter category.

3. Right to Security of Person

Paragraph 3 of the UN Norms deals with crimes against the human beings in violation of international human rights and humanitarian law. TNCs, for example, shall neither *engage* nor *benefit* from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, and extrajudicial, summary or arbitrary executions.[59] In addition, the appended commentary provides that besides not producing or selling weapons declared illegal under international law, TNCs which produce and/or supply military, security, or police products/services shall also "take stringent measures to prevent those products and services from being used to commit human rights or humanitarian law violations."[60] These provisions are a reflection of the lessons learnt from the trial of several corporations for their direct

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visited Dec. 18, 2003); Jayanth K Krishnan, *The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India*, 25 HUMAN RIGHTS QUARTERLY 791-819 (2003).

[57] For example, in the context of India, where Articles 15(4) and 16(4)/(4-A)/(4-B) of the Constitution provide for special affirmative action provisions for certain under privileged classes of citizens, an argument is made that the government's policies of liberalization might result in undermining the scope of these provisions.

[58] In the context of provisions for affirmative action in the Indian Constitution, Singh argues that those not merely enabling provisions and could be claimed by citizens against state like any other fundamental right. M P Singh, *Are Articles 15(4) and 16(4) Fundamental Rights?* 3 SUPREME COURT CASES (JOUR) 33 (1994).

[59] UN Norms, *supra* note 6, para 3.

[60] Commentary on UN Norms, *supra* note 28, commentary (a)/(b) to para 3.

or tacit involvement in the commission of above mentioned heinous crimes, since the Second World War to the present day.[61]

The Norms also contain another provision directed at remedying the fallouts of security arrangements made by TNCs on human rights.[62] "Business security arrangements shall be used *only* for preventive or defensive services", and the force applied by security personnel shall be proportional and only when "strictly necessary."[63] It must also be kept in mind that security personnel do not violate important rights of workers/employees such as the rights to freedom of association and peaceful assembly and to engage in collective bargaining.[64] Moreover, TNCs shall establish policies to prohibit the hiring of private militias/paramilitary groups, or working with units of state security forces known for human rights violations.[65] Again, we can see clearly the influence of the human rights violating activities of Enron and Unocal on the drafting of these provisions.[66]

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[61] *See* Ratner, *supra* note 23, at 477-78; Hillemanns, *supra* note 15, at 1073-74; Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 49-50 (2002); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 803-07 (2002). *See also generally* Ramasastry, *supra* note 9; EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001).

[62] UN Norms, *supra* note 6, para 3.

[63] Commentary on UN Norms, *supra* note 28, commentary (b) to para 4.

[64] Commentary on UN Norms, *supra* note 28, commentary (c) to para 4.

[65] Commentary on UN Norms, *supra* note 28, commentary (d) to para 4.

[66] The report of Human Rights Watch on Enron documents in detail how Enron/Dabhol Power Corporation violated civil-political right with the help on Indian police. HUMAN RIGHTS WATCH, THE ENRON CORPORATION: CORPORATE RESPONSIBILITY IN HUMAN RIGHTS VIOLATIONS (1999), available at http://www.hrw.org/reports/1999/enron/ (last visited March 10, 2003). It should further be noted that one of the charges leveled against Unocal before the US courts is that it aided/abetted the Burmese military force to carry out forced dislocation, forced labour, rape etc. *See* John Cheverie, *United States Court Finds Unocal may be Liable for Aiding and Abetting Human Rights Abuses in Burma*, 10 HUMAN RIGHTS BRIEF 6 (2002).

4. Rights of Workers

The UN Norms make elaborate provisions regarding workers' rights. TNCs are supposed to provide a safe and healthy working environment,[67] and are mandated not to use forced or compulsory labour as forbidden by the relevant international instruments, national legislations, and international human rights/humanitarian law.[68] A special provision obligates TNCs to respect the right of children to be protected from economic exploitation.[69] TNCs shall not only create and implement a plan to eliminate child labour[70] but also not employ any person under the age of 18 in any type of work that is hazardous, interferes with child's education, or is likely to jeopardize the health, safety or moral of young persons.[71]

Besides the above rights, two more provisions deserve special mention. First, TNCs shall provide workers with remuneration "that ensures an adequate standard of living for them and their families."[72] The remuneration should be freely agreed upon or fixed by national laws/regulation, whichever is higher,[73] and keep in mind the

[67] UN Norms, *supra* note 6, para 7. The relevant commentary further provides that TNCs "shall make available information about the health and safety standards relevant to their local activities." Commentary on UN Norms, *supra* note 28, commentary (b) to para 7. Such a provision is very important because most of times corporations do not disclose information about the possible negative effects of their activities on the health/safety of employees, consumers and general public. For example, in Bhopal catastrophe the failure of UCC/UCIL to provide prompt and adequate information about the negative effects of MIC and other gases proved fatal as far as victims are concerned.

[68] UN Norms, *supra* note 6, para 5. It is also provided that employers shall have resort to prison labour only as a consequence of a conviction in a court of law, provided that the work/service is carried out under the supervision and control of a public authority. Commentary on UN Norms, *supra* note 28, commentary (c) to para 5.

[69] UN Norms, *supra* note 6, para 6. "Economic exploitation" is defined in an expansive manner to include employment "in a manner that is harmful to their health or development" or in any occupation "before a child completes compulsory schooling and, except for light work, before the child reaches 15 years of age." Commentary on UN Norms, *supra* note 28, commentary (a) to para 4.

[70] Commentary on UN Norms, *supra* note 28, commentary (d) to para 6.

[71] Commentary on UN Norms, *supra* note 28, commentary (b) to para 6. TNC may, however, employ persons aged 13 to 15 years in light work in national laws or regulations permit. Commentary on UN Norms, *supra* note 28, commentary (c) to para 6. Such a provision though might be misused by TNCs in view of the fact that they often enjoy more bargaining power than many developing countries.

[72] UN Norms, *supra* note 6, para 8.

[73] Commentary on UN Norms, *supra* note 28, commentary (a) to para 8.

principle of equal remuneration for work of equal value.[74] Second, the TNCs shall ensure freedom of association and effective recognition of the right to collective bargaining of their employees/workers,[75] especially in those countries which do not fully implement international standards concerning those rights.[76] It should be noted that a sincere commitment on the part of corporations to respect the rights to freedom of association and collective bargaining could go a long way in protecting rest of the workers' rights.

It is clear from a brief review of workers' rights that the Norms seek to achieve lofty goals and make extensive provisions to attain those goals. Critics, however, argue that the intended results might not be achieved as ambiguity in the provisions affords enough room for corporations not to follow the provisions in spirit. For example, with the reference to the provision for fair and reasonable remuneration[77] it is argued that the Norms "leave it open to anyone to interpret what are an adequate standard of living and a just wage" and "continue to base their wage criteria on the notion of national conditions."[78] Though the first point regarding ambiguity deserve consideration, a suggestion for having equal global wages, both in North and South, is more difficult to defend as well as pursue. Even if workers in North and South work for same number of hours and under similar circumstances, it will be both unrealistic and unreasonable to argue that they should be given same wages, for the wages

[74] Commentary on UN Norms, *supra* note 28, commentary (e) to para 8.
[75] UN Norms, *supra* note 6, para 9. TNCs are also supposed to respect the right to workers to strike. Commentary on UN Norms, *supra* note 28, commentary (b) to para 9.
[76] Commentary on UN Norms, *supra* note 28, commentary (e) to para 9.
[77] On reading para 8 with commentary (a), it seems that remuneration would be "fair and reasonable" only if it ensures an adequate standard of living for workers and their families. UN Norms, *supra* note 6, para 8.
[78] *See, for example*, The JUS Semper Global Alliance – Living Wages North and South, *Corporate Social Responsibility and Human Rights* (September 2003), 2, available at http://www.jussemper.org/Resources/Corporate%20Activity/Resources/CSRandHRnorms.pdf (last visited Dec. 19, 2003).

awarded to workers at any two given places would command different purchasing power to satisfy basic needs. It is still necessary though to agree on common variables with reference to which fair and reasonable wages could be determined at national level. This is further explained below with reference to a distinction which should be drawn between *aspirational* and *operational* standards of human rights.

5. Respect for National Sovereignty and Human Rights

Under the umbrella of "respect for national sovereignty and human rights", the Norms stipulate obligations on a wide range of issues – from adherence to rule of law to abstaining from corruption, from promoting right to development to respect for national laws/regulation, from promoting social, economic and cultural rights to positive contribution for human rights realisation generally.[79] The most striking feature of these provisions is their treatment of TNCs, together with other state organs, as vehicle of developing a society wedded to rule of law, transparency, accountability and sustainable development and in which people's civil, political, economic, social and cultural right are realised. Despite the fact that TNCs obligations are subject to the limitations of "their resources and capabilities",[80] it represents a departure from the traditional role of TNCs in society in at least three respects. First, the human rights obligations of TNCs instead of being limited to mere civil and political rights now also encompass second and third generation human rights, that is, both individual and collective social, economic and cultural rights. Second, the scope of obligations is clearly broadened; TNCs shall be subject to both negative and positive obligations. Third, TNCs are expected to respect/promote human rights not

[79] UN Norms, *supra* note 6, paras 10-12.
[80] *See* Commentary on UN Norms, *supra* note 28, commentary (a) to para 10.

only of those who are affected by their activities directly (workers/consumers) but also of those affected indirectly, invisibly and/or in the longer run (society as such).

It will be worthwhile to note some of the obligations which demonstrate the above shift. TNCs are, for example, expected to enhance the transparency of their activities in regard to payments made to government/public officials.[81] They are also obligated to respect the rights of indigenous people, including "to own, occupy, develop, control, protect and use their lands, other natural resources, and other cultural and intellectual property."[82] Moreover, TNCs shall contribute to the realisation, in particular, of the rights to development; adequate food and drinking water; the highest attainable standard of physical/mental health; adequate housing; privacy; education; freedom of thought, conscience and religion; and freedom of opinion and expression.[83]

The above provisions undoubtedly reflect a paradigmatic shift in terms of the appropriate role and place of corporations in society generally and regarding human rights in particular.[84] But the Norms merely paint this picture with a broad brush; it is not clear how TNCs are expected to put these expectations into practice. Various issues would require clarification or concretisation before TNCs actually deliver the desired goods. For example, whether only those TNCs whose activities come in direct contact or conflict with certain human rights are under a positive obligation, or all operating TNCs are under a general obligation to promote *all* the human rights? It seems that the Norms tend to adopt, in my view rightly, the second option, but in that

[81] Commentary on UN Norms, *supra* note 28, commentary (a) to para 11.
[82] Commentary on UN Norms, *supra* note 28, commentary (c) to para 10.
[83] UN Norms, *supra* note 6, para 12.

case it will be necessary that corporate law, which governs the establishment and working of corporations, both at national and international level is amended to provide for taking into account the impact of corporate decisions/activities on human rights in society. The Norms are, however, silent on this issue. Unless it is precisely clear what we want TNCs to do, any further talks about the efficacy of the proposed regime will be premature as well as unsound.

6. Obligations with Regard to Consumer Protection

As the activities of corporations also come in conflict with consumers' various (human) rights,[85] the Norms make specific provision to address this issue. TNCs shall not only act in accordance with fair business, marketing and advertising practices, including relating to competition and anti-trust matters, but also take all necessary steps to ensure safety/quality of the goods and services provided.[86] An important aspect is that TNCs are also expected to observe the precautionary principle,[87] and also disclose, in cases where a product is *potentially* harmful, all appropriate information on the contents and possible hazardous effects of the products through proper labelling, informative and accurate advertising and other appropriate

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[84] *See, for example*, Erin Elizabeth Macek, *Scratching the Corporate Back: Why Corporations have no Incentive to Define Human Rights* 11 MINNESOTA JOURNAL OF GLOBAL TRADE 101 (2002).

[85] Consumers' rights to information, health and safety, and clean environment are directly affected by corporate decisions/activities. For example, a study conducted by Chapman & Carter demonstrates how Australian tobacco industry strived hard to avoid, delay and dilute health warnings on cigarettes. S Chapman & S M Carter, *"Avoid Health Warnings on All Tobacco Products for Just as Long as We Can: A History of Australian Tobacco Industry Efforts to Avoid, Delay and Dilute Health Warnings on Cigarettes*, 12(Suppl III) TOBACCO CONTROL JOURNAL iii13-iii22 (2003). Also, a recent investigation indicates that pharmaceutical companies are investing millions of dollars into patient advocacy groups and medical organisations in order to expand markets for their products. Gary Hughes & Liz Minchin, *Drug Firms Fund Disease Awareness*, SYDNEY MORNING HERALD, Dec. 13-14, 2003, 5; Gary Hughes & Liz Minchin, *Sugar-Coating the Message*, SYDNEY MORNING HERALD, Dec. 13-14, 2003, 30.

[86] UN Norms, *supra* note 6, para 13. *See also* Commentary on UN Norms, *supra* note 28, commentary (a) to (e) to para 13.

[87] UN Norms, *supra* note 6, para 13. *See also* Commentary on UN Norms, *supra* note 28, commentary (c) to para 13. 'Precautionary principle' means that lack of full scientific certainty should not be used as a justification for not taking or delaying a step which could have enhanced the safety/quality of the goods or services, especially when doing so may result in irreversible harm.

methods.[88] These provisions will become immensely relevant in the time to come, for example, in the context of genetically modified products, or breast implants technology.

7. Obligations with Regard to Environmental Protection

The UN Norms also respond to the growing concern about corporations' indifference to sustainable development while taking business decisions as well as formulating short/long term policies. Accordingly, TNCs shall carry out their activities in accordance with laws, practices and policies of the country of operation as well as international agreements, principles and standards regarding environmental perseverance in order to contribute to "the wider goal of sustainable development."[89] TNCs are required to assess periodically the impact of their activities on environment and human health,[90] especially of certain groups such as children, older person, women and indigenous people.[91] Further, best management practices and technologies must be adopted to reduce the risk of accidents and damage to the environment.[92]

As TNCs operate in countries placed at different levels of development and consequently having varying levels of environmental standards, it becomes problematic and often full of business dilemmas as to which standards out of three – home, host or international – should they follow. Though the Norms mandates TNCs to observe both international and host standards, in many situations the host standards

[88] Commentary on UN Norms, *supra* note 28, commentary (e) to para 13.
[89] UN Norms, *supra* note 6, para 14.
[90] Commentary on UN Norms, *supra* note 28, commentary (c) to para 14.
[91] Commentary on UN Norms, *supra* note 28, commentary (d) to para 14. TNCs are also required to make the impact reports accessible, in a timely manner, to the affected groups, concerned national/international institutions and to the general public. *Id.*
[92] Commentary on UN Norms, *supra* note 28, commentary (g) to para 14.

are as good as non-existent or are not enforced.[93] As far as the international standards are concerned, they are generally so vague and general that it is quite easy to comply with their words without adhering to the spirit.[94] In such a scenario, it is worth exploring whether TNCs should not follow the higher of home or host standards, irrespective of the fact where they operate.[95]

B. *Operational Difficulties: A Response*

Despite making a commendable effort to formulate human rights obligations for TNCs, the UN Norms, in my view, might face several operational shortcomings. Two of such possible difficulties are dealt with below.

1. (Over)-reference to International Human Rights Law/Instruments?

The Norms make frequent reference to numerous international treaties, which are negotiated as well as signed by states and are directed primarily towards states. This approach is problematic due to several reasons. At the outset, the approach is circular. Instead of laying down ascertainable and guidable human rights standards, it leads the *consumers* of the Norms – from TNCs to NGOs, states, and victims – to several national and international instruments. In other words, the questions such as what are the obligations of TNCs in a given case and whether they violated those obligations cannot be determined with reference to the UN Norms. Though at places the

[93] For example, India had no "specific" law dealing with environmental pollution, hazardous substances, or violations of human rights in 1984, at the time of the Bhopal accident. In fact, the Bhopal catastrophe led to the enactment of the Environment Protection Act of 1986, the Public Liability Insurance Act of 1991, and the National Environment Tribunal Act of 1995. Similarly, Myanmar had no law specifically dealing with the environment, human rights, or forced labor in 1993 when Unocal entered into a joint venture project in Myanmar. Later, Myanmar passed the Protection of Wild Life, Wild Plants and Conservation of Natural Areas Law of 1994.

[94] It will be overoptimistic to assume that precise environmental obligations for TNCs are ascertainable, for example, from the Stockholm Declaration (1972) or the Rio Declaration (1992).

[95] *See generally* Deva, *Dilemma between "Home" and "Rome"*, *supra* note 27.

appended commentary try to give concrete shape to some of the obligations,[96] on the whole that is highly inadequate. A reference to state oriented international instruments to deduce TNCs' human rights obligations might present another difficulty when it comes to TNCs' positive obligations.[97] Whether the positive human rights obligations of TNCs, especially regarding socio-economic and cultural rights, are expected to be equivalent to that of states, which were conceived as original and primary targets of such international instruments?[98] If TNCs' positive obligations are not as extensive as that of states, which seems to be a more probable as well as acceptable stand,[99] then it will be logical to stipulate their obligations separately.

I argue, therefore, that though there is no need to redefine human rights *especially* for corporations and it is perfectly legitimate to rely upon international instruments 'negotiated-signed-applicable' to states to construct human rights obligations for TNCs,[100] it may still be necessary to deduce specific obligations of TNCs with reference to the referred international instruments. This is also required because TNCs could not possibly violate certain human rights enumerated in state-focal international

[96] *See, for example*, commentary (a) to (c) to para 6 and commentary (f) to para 7. Commentary on UN Norms, *supra* note 28.

[97] See, for example, Sarah Joseph, *Pharmaceutical Corporations and Access to Drugs: The "Fourth Wave" of Corporate Human Rights Scrutiny*, 25 HUMAN RIGHTS QUARTERLY 425, 436-38 (2003) (examining the complex question which arise regarding the human rights obligations of pharmaceutical companies).

[98] For example, a pharmaceutical company should have positive obligations only regarding those human rights which are directly related to its core business (e.g., right to health), or qua all human rights generally (e.g., right to adequate housing or food/drinking water).

[99] For obvious reasons TNCs cannot be equated to states as far as the nature and extent of human rights obligations are concerned. Donaldson argues that "corporation is an economic animal" and therefore, "it would be unfair, not to mention unreasonable, to hold corporations to the same standards of charity and love as human individuals." THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 84 (1989). *See also* Deva, *Dilemma between "Home" and "Rome"*, *supra* note 27, at 95-96.

[100] Raz argues that 'there is no closed list of duties which correspond to the right …. *A change of circumstances may lead to the creation of new duties based on old right*.' JOSEPH RAZ, THE MORALITY OF FREEDOM 171 (1986) (Emphasis added).

treaties.[101] Therefore, in my view, subject to the limitation regarding putting universality in operation discussed below, it is desirable that the human rights obligations of TNCs are enumerated, as far as possible and in an inclusive manner, in a schedule to the Norms. Doing so will not only bring certainty in terms of what is to be followed and consequent higher rate of compliance, but will also be an economically efficient way of regulation.

2. Human Rights Standards: Putting Universality in Operation?

The Norms acknowledge, among others, the universality of human rights,[102] which in the context of TNCs *also* mean that they should observe the same standards of human rights whether operating in "home" or at "Rome". Though this article is not the appropriate place to join an already intensive and extensive debate over universality (or lack of it) of human rights generally,[103] I intend to explore this additional TNCs-related dimension of universality which arise because of the fact that TNCs, unlike states, operate in more than one country. Agreeing that TNCs shall pay fair and

[101] *See, for example*, Article 11 of the UDHR and Article 14(2) of the ICCPR [right to be presumed innocent when charged for a penal offence]; Article 12 of the ICCPR [liberty to leave and enter his own country]. Ratner, however, contemplates the situations in which corporation could involve in violation of even such rights. Ratner, *supra* note 23, at 492-3.

[102] UN Norms, *supra* note 6, the Preamble, 13th para. Besides universality, "indivisibility, interdependence and interrelatedness of human rights" are also acknowledged. *Id.*

[103] Out of a vast literature, one can refer to HENRY J STEINER & PHILIP ALSTON (eds.), INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, MORALS, POLITICS 192-255 (1996); Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AMERICAN POLITICAL SCIENCE REVIEW 303 (1982); Yash Ghai, *Human Rights and Governance: The Asian Debate*, 15 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 1 (1994); Michael Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUMAN RIGHTS QUARTERLY 468 (1997); Abdullahi Ahmad An-Na'im, *Human Rights in Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARVARD HUMAN RIGHTS JOURNAL 13 (1990); A D RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM (1990); Rein Mullerson, *Universal Human Rights in the Multicultural World: Reasons and Excuses for, and Circumstances Conducive to their Gross and Systemic Violation*, *in* MEGHNAD DESAI & PAUL REDFERN (eds.), GLOBAL GOVERNANCE: ETHICS AND ECONOMICS OF THE WORLD ORDER 133(1995); Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 HUMAN RIGHTS QUARTERLY 316 (1996); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 91-118 (2002); Fernando R Teson, *International Human Rights and Cultural Relativism, in* PHILIPS ALSTON (ed.), HUMAN RIGHTS LAW 117 (1996); Michael Goodhart, *Origin and Universality in the Human Rights Debate: Cultural Essentialism and the Challenge of Globalisation* 25 HUMAN RIGHTS QUARTERLY 935 (2003).

reasonable remuneration, whether fair and reasonable would quantify into 'same' wages, say, at a factory in India and in the US? Again agreeing that TNCs shall contribute to the realisation of, say, the right to drinking water (or access to highest attainable standard of health, for that matter), what type of and level of contamination will make the water not suitable for 'drinking' (or in case of right to health, by which yardstick highest attainable standard will be judged)? Such examples, which could be easily multiplied with reference to various provisions in the Norms, demonstrate that there are operational difficulties associated with universal human rights. How such difficulties could be overcome, to the satisfaction of the affected parties having conflicting interests?

Even if we assume arguendo that human rights are universal, it seems that in case of many human rights universality is only in terms of *aspiration* and not regarding the *content of aspiration*; in fact, a push for pressing universality also regarding the content of rights might result in negation rather than promotion of human rights. For example, there is a universal right to food but it is doubtful whether there is a universal right to a particular type of food. Similarly, the right to safe and healthy working environment or the right to fair and reasonable subsistence wages is universal only in abstract terms and in each case the quantification of what is safe and healthy or fair and reasonable is bound to vary from place to place. Thus, in order to operationalise the abstract universality and/or to ascertain the content of human rights, certain adjustments to local social, political, economic and cultural conditions are to be made.[104] A distinction, therefore, need to be drawn between aspirational and

[104] For example, Wright argues how local cultural differences might be used to promote human rights, and a failure to recognise such differences might in fact result in subverting human rights. SHELLEY WRIGHT, INTERNATIONAL HUMAN RIGHTS, DECOLONISATION AND GLOBALISATION: BECOMING HUMAN 88-93, 111, 213-14 (2001).

operational standards of human rights. A note of caution, however, is required in *localising the universality* in such a manner. As the objective of this exercise is to promote human rights, it should be ensured that only those local differences are given weight which help in fulfilling the intended objective; the differences which do not respect human dignity should be treated as irrelevant.[105]

In view of the above distinction proposed between aspirational and operational standards of human rights, the Norms could only possibly lay down aspirational standards of human rights. Such aspirational standards would require to be translated into concrete measurable operational standards at municipal level. Unfortunately, the Norms do not recognise this distinction and consequently try to achieve an impossible balance between generality and specificity. In the absence of UN Norms not adopting the distinction between aspirational and operational standards, they might prove ineffective not only in guiding the conduct of TNCs but also working as touchstone with reference to which violation of human rights could be measured. Recognition of such a distinction, on the other hand, is likely to increase the efficacy of the UN Norms.

IV. IMPLEMENTATION OF HUMAN RIGHTS NORMS

Lack of implementation strategy and effective sanctions have been the most critical lacunae of the existing international regimes of corporate responsibility for human rights violations.[106] Being conscious of this aspect, the UN Norms, after some initial

[105] *See* Deva, *Dilemma between "Home" and "Rome"*, *supra* note 27, at 77-78.

[106] With reference to the Global Compact, Alston makes an apt remark, which holds true regarding other regulatory instruments as well: "[T]he more puzzling nature of the proposal [i.e., Global Compact] is that it *reduces the focus to a very soft and dialogue-based effort to promote human rights.*" Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815, at 837 (2002) (emphasis added) [hereinafter Alston, *Resisting the*

debate during drafting stage,[107] make a departure from the past approach of merely voluntary implementation. Paragraphs 15 to 19 deal with "general provisions of implementation". Out of these, only first three paragraphs (15-17) relate to implementation procedures stricto sensu; while paragraph 18 elaborates the obligation to provide for reparation to the victims adversely affected by non-compliance with the Norms, paragraph 19 lays down the rule that the Norms shall not be "construed as diminishing, restricting, or adversely affecting the human rights obligations" of states and/or TNCs under national or international laws.[108] I begin below with an analysis of the provisions related to multiple implementation techniques as well as reparation and then move on to examine some of the lacunae which may seriously hamper the efficacy of the prescribed implementation mechanism.

A. *Techniques and Modes of Implementation*

The UN Norms try to combine multiple implementation techniques for ensuring that TNCs comply with their human rights obligations. On a closer scrutiny of the relevant provisions, one can also notice that these techniques seek to implement two different types of obligations: direct and indirect. Paragraphs 15 and 16 are aimed at implementing direct obligations of TNCs and I will, therefore, call it the "direct mode". The mode is direct because it treats TNCs under a *direct* obligation to respect/promote human rights and seeks to enforce such obligation by invoking

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Merger]. *See also* William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501, at 503-04 (2001); and the Letters from Lawyers Committee for Human Rights, to the Global Compact Office (Oct. 21, 2001, Nov. 2001, April 7, 2003) available at http://www.lchr.org/workers_rights/wr_other/LCHR_to_UN_Oct_01.pdf, http://www.lchr.org/workers_rights/wr_other/LCHR_to_UN_Nov_01.pdf, http://www.lchr.org/workers_rights/wr_other/joint_ltr_UN_040703.pdf (last visited Sept. 15, 2003).

[107] *See* Hillemanns, *supra* note 15, 1068-69.

[108] In case of a choice between the Norms and "more protective interests", para 19 confers priority on the latter. Commentary (a) to para 19 also makes it clear by providing that "[i]f more protective standards are recognized or emerge in international or state law or in industry or business practices, those more protective standards shall be pursued." Commentary on UN Norms, *supra* note 28.

internal as well as external techniques. Paragraph 17, on the other hand, is directed at implementing indirect obligations, i.e., the obligation of states to ensure that all entities, including TNCs, within their jurisdiction respect human rights rather than implementing TNCs' obligations to respect human rights.[109] This can, therefore, be termed as "indirect mode" to distinguish it from the first one.[110] I believe that the distinction between the two modes is vital. To draw an analogy, it is the distinction between saying that minor children shall not drive and that parents shall ensure that their minor children do not drive. The distinction, in other words, is that in the former case the proposed mechanism, whether national or international, will be enforcing obligations imposed *directly* on TNCs whereas in the latter what the mechanism will be enforcing is only an *intermediary/indirect* obligation, i.e., states' obligation to ensure that TNCs within their territory respect human rights.[111]

1. Direct Mode

The direct mode adopts a two-fold strategy of implementation. First, TNCs "shall adopt, disseminate and implement internal rules of operation in compliance with the Norms".[112] As here the emphasis is on TNCs adopting and applying the Norms themselves, I will call this the strategy of "internalisation". The strategy of

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[109] *See* Danwood M Chirwa, *Obligations of Non-State Actors in Relation to Economic, Social and Cultural Rights under the South African Constitution* 7 MEDITERRANEAN JOURNAL OF HUMAN RIGHTS 29, 43-49 (2003) (discussing the emerging jurisprudence of indirect obligations).

[110] It appears the indirect mode is added in the last stage of the drafting as a provision for this is not found in the *Draft Norms on Responsibility of Transnational Corporations and Other Business Enterprises*, U.N. Commission on Human Rights, 54th Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2002/WG.2/WP.1 (2002), available at http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/8af5cb0c00839902c1256c010054b660/$FILE/G0213899.pdf (last visited Oct. 4, 2003).

[111] Such an obligation on states is discernable, among others, from para I of the Norms: "States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, *including ensuring that transnational corporations and other business enterprises respect human rights*." (Emphasis added). *Supra* note 6. *See also* Chirwa, *supra* note 109; *supra* note 23.

internalisation is directed towards developing a corporate culture of respect to human rights. TNCs should give appropriate training to their managers and workers as an initial step for building such a culture.[113] More importantly, such human rights culture is not to be confined to the narrow legal structure of TNCs but has to extend to their contractors-suppliers *et al*, as TNCs are obligated to apply and incorporate the Norms in the relevant contracts/business arrangements.[114] TNCs shall either ensure that their business partners comply with human rights obligations or cease to work with them.[115] Though TNCs might contend that this is an impractical expectation, the Norms rightly place the obligation directly and squarely on TNCs because only TNCs are in a position/power to achieve this result.

Second, TNCs "shall be subject to periodic monitoring and verifying by United Nations, other international and national mechanisms already in existence or yet to be created."[116] It can be termed "external" strategy in view of the focus being on external agencies keeping an eye on the conduct of TNCs. Though the Norms have not elaborated upon the details of proposed monitoring/verification, the appended commentary suggests that the UN human rights treaty bodies should monitor implementation of these Norms, among others, through the "creation of additional reporting requirements for states."[117] A role is also envisaged for other UN special agencies, including the Commission on Human Rights and the Sub-Commission on

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[112] UN Norms, *supra* note 6, para 15. TNCs are also obliged to "periodically report on and take other measures fully to implement the Norms." *Id*. It is, however, not very clear to whom such reporting is to be made.
[113] Commentary on UN Norms, *supra* note 28, commentary (b) to para 15.
[114] UN Norms, *supra* note 6, para 15. *See also* Commentary on UN Norms, *supra* note 28, commentary (a) and (c) to para 15.
[115] Commentary on UN Norms, *supra* note 28, commentary (c) to para 15.
[116] *Id*., para 16.
[117] Commentary on UN Norms, s*upra* note 28, commentary (b) to para 16.

the Promotion and Protection of Human Rights.[118] But it is surprising that there is no specific mention of the Global Compact despite the fact that it is a UN initiative especially directed towards corporate social responsibility. Moreover, the reliance on state reporting to ensure that TNCs comply with the Norms is too optimistic to be realistic, [119] more so when states act in connivance with TNCs on many occasions.[120]

It can be said that though the Norms rightly take cognizance of the necessity of putting in place an *external* international regulatory regime to make TNCs accountable for human rights violations, they fall short of moving in the right direction. For example, it requires thorough investigation whether a new international body is created for this purpose[121] or the existing institutions, including the WTO, are moulded to enforce human rights obligations against TNCs.[122] What is, however, appreciable that the commentary to paragraph 16 not only encourages trade unions and NGOs to invoke the Norms for their actions/dealings with TNCs, but also hope

[118] Commentary on UN Norms, s*upra* note 28, commentary (b) to para 16.

[119] The mechanism is already under serious stress to prevent human rights abuses even by states. *See* James Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, *in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 4-11 (Philip Alston & James Crawford eds., 2000) (highlights some of the factors responsible for this stress). *See also Final Report on Enhancing the Long-Term Effectiveness of the UN Human Rights Treaty System*, U.N. ESCOR, 53rd Sess., Agenda Item 15, U.N. Doc. E/CN.4/1997/74, at ¶ 37-52; the Commission on Human Rights Resolution 2000/75, 56th Sess. (2000); *UN Human Rights Treaties: Facing the Implementation Crisis*, International Law Association, *in* THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY 682-90, (Anne F. Bayefsky ed., 2000).

[120] Clapham and Jerbi point out three types of corporate complicity: direct, indirect, and silent. Clapham & Jerbi, *supra* note 26, at 342-49. *See also* Ramasastry, *supra* note 9, at 100-04 (examining in detail the nature and level of corporate complicity with states that should give rise to civil and criminal liability); Ratner, *supra* note 23, at 500-06.

[121] *See, for example*, the proposals cited by Meyer and Stefanova. Meyer & Stefanova, *supra* note 106, at 520-21. See also Monshipouri et al, *supra* note 9, at 983-86.

[122] I have elsewhere argued that the proposed international mechanism could be based upon a partnership between the UN and the WTO. Deva, *supra* note 16. *See also* Ernst-Ulrich Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT'L L. 621 (2002). *Contra* Alston, *Resisting the Merger*, *supra* note 106; Robert Howse, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 EUR. J. INT'L L. 651 (2002).

that the Norms could be used as benchmarks of ethical investing.[123] Such a provision is important because the success of any mechanism aimed at enforcing human rights obligations on TNCs requires, in addition to traditional enforcement tools, evolution and employment of new enforcement strategies.

2. Indirect Mode

Under the indirect mode, the Norms expects that "states should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms" are implemented by the TNCs.[124] It is interesting to note that this is the only provision that is drafted in terms of 'should', a deviation which is difficult to explain especially when the obligation of states to respect and promote human rights also includes the responsibility to ensure/secure respect from other natural or legal persons operating within its territory.[125] The appended commentary elaborates further the above expectation of the UN Norms: the governments should not only make these Norms widely known but also use them as a model for initiating legislations or taking administrative processes, including national human rights commissions.[126] Whether this provision makes any difference or not, will depend to a large extent on how the courts, both municipal and international, make use of this *directory* mandate.[127]

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[123] Commentary on UN Norms, *supra* note 28, commentary (c) to para 16. It could be said that by introducing the notion of "ethical investment" the Norms are catching up with a global trend towards promoting ethical or socially responsible investment. For example, the Australian Securities and Investment Commission is currently in the process of finalising guidelines regarding product disclosure statements (PDS). See *Disclosure about Labour Standards and Environmental, Social and Ethical Considerations in Product Disclosure Statements – Draft ASIC s1013DA Guidelines for Product Issuers*, available at http://www.asic.gov.au (last visited Sep. 15, 2003). *See also generally* AUSTRALIAN GOVERNMENT'S DEPARTMENT OF THE ENVIRONMENT AND HERITAGE, CORPORATE SUSTAINABILITY – AN INVESTOR PERSPECTIVE: THE MAYS REPORT (2003).

[124] UN Norms, *supra* note 6, para 17.

[125] UN Norms, *supra* note 6, para 1. See also Chirwa, *supra* note 109.

[126] Commentary on UN Norms, *supra* note 28, commentary to para 17.

[127] *See supra* note 23.

B. *Provision for Reparation*

In case TNCs fail to comply with the Norms, they shall provide reparation to individuals, entities and communities adversely affected by such failure.[128] The reparation, which may take the form of restitution, compensation and rehabilitation for any damage done or property taken, must be prompt, effective and adequate.[129] This provision is significant because of at least three reasons. First, it implies that victims of corporate human rights abuses shall have a *right* to claim compensation. Thus, TNCs should no longer be able to present payment of monetary compensation as a sign of mercy shown to the victims.[130] Second, as the compensation could be claimed even by communities, presumably for violation of collective rights, this will take care of those situations when it is difficult to attribute harm to identifiable individuals. Third, the provision expressly acknowledges that reparation, in order to serve any real purpose, should be prompt, effective and adequate.

Despite the above positives, one difficult issue survives regarding the adequacy of compensation. Courts, both at municipal and international levels, face an obvious difficulty in quantifying damages for human rights violations, especially when victims and TNCs belong to countries placed in vastly different stages of economic development. It seems that the guidance offered by the Norms – that courts, while determining damages, shall apply the Norms in pursuance to national/international law[131] – does not reach to the root of the problem. The quantification of damages invariably raises the question about the value of life, say, of a worker in an Indian

[128] UN Norms, *supra* note 6, para 18.
[129] UN Norms, *supra* note 6, para 18.
[130] For example, in the *Bhopal* case the settlement order of the Supreme Court read: "The aforesaid payments [of $470 million] shall be made to the Union of India as claimant and *for the benefit of all victims of the Bhopal gas disaster … and not as fines, penalties, or punitive damage*." Union Carbide Corp. v Union of India A.I.R., 1990 S.C. 273, 275 (India) (emphasis added).

factory qua a worker employed in a similar factory in the US or Europe. To put it differently, whether the loss of life should have same monetary value everywhere or not? Another ambiguity remains regarding the objectives sought to be achieved by the provision for reparation; it is not clear whether deterrence is one of the underlying themes. If deterrence is one of objectives behind reparation, which in my view should be, then there should be a specific provision for awarding punitive damages. If so, what should be the test for determining punitive damages; whether the proportionality of the harm caused or the economic capacity of the concerned TNC should play any role in this regard?[132]

C. *What is still Lacking?*

Effective and efficient implementation of the Norms holds the key to the extent of their success in achieving the intended objective. Though the Norms make a sincere attempt in formulating the provisions for implementation, in my view they fall short of what is required. In my view, the UN Norms suffer from at least following three glaring omissions which might seriously hamper the prospect of their viable enforcement.

1. Multiple Sanctions

As explained above, the Norms stipulate implementation provisions. But which coercive measures could follow if certain TNCs fail to implement the mandate of the

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[131] UN Norms, *supra* note 6, para 18.

[132] The Indian Supreme Court in *M.C. Mehta v. Union of India A.I.R.*, 1987 S.C. 1086, laid down a principle of punitive damages that is worth considering. Justice Bhagwati observed that "the measure of compensation in the kind of cases referred to in the preceding paragraphs [i.e., liability of an enterprise dealing with hazardous or inherently dangerous activity] must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise." *Id*. at 1099-1100.

Norms? It seems that the response of the Norms to such a situation is two-fold. First, the expectation is that states will establish the necessary legal framework to ensure that TNCs comply with their human rights standards under the Norms and also otherwise.[133] It is logical to assume that provisions related to sanctions could be part of such legal framework. It can, however, be said that administering sanctions solely or even predominantly through states might not fulfill the desired results. Past experiences show that on many occasions, if not always, states either act in complicity with TNCs[134] or tacitly align with them.[135] This is besides the fact that any municipal system will always find it difficult to impose sanctions on a transnational entity.[136]

Second, TNCs which fail to implement the Norms are obligated to pay reparation to those adversely affected.[137] Reparation is undoubtedly an important, and from the perspective of victims also useful, remedy, but it is doubtful whether reparation alone could coerce TNCs to respect the Norms. Ideally, the UN Norms should employ three types of sanctions against TNCs: civil, criminal and social. Reparation under the Norms seems to be used only as a civil remedy as it is unclear whether it is also intended to be utilised as a criminal sanction. It is important that the Norms not only resort to criminal sanctions against TNCs (and their human hands) but also effectively

[133] UN Norms, *supra* note 6, para 17.
[134] *See, for example*, the activities of Enron in India and Unocal in Myanmar.
[135] *See, for example*, the response of the US government which is clear from the following two facts. First, the US Department of State, in a letter submitted to the District Court of Columbia, has taken the stand that the adjudication of human rights violation case against ExxonMobil Corporation by the US courts might have "serious adverse impact on significant interests of the United States". Second, on 8 May 2003 the US Justice Department, in an amicus curie brief submitted in *Unocal* case before the Court of Appeal for the Ninth Circuit, has questioned the very basis of judicial invocation of the ATCA against the US based MNCs for redressing human rights violations abroad. The brief is available at http://www.hrw.org/press/2003/05/doj050803.pdf (last visited Dec. 12, 2003). *See generally* Elliot J Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 153 (2003).
[136] For example, UCC and its officials are successfully avoiding the pending criminal proceedings in India. See also Deva, *supra* note 16, at 48-49 (explaining various substantive and procedural difficulties associated with state-based regulation of TNCs).
[137] UN Norms, *supra* note 6, para 18.

invoke social sanctions – by which I mean outcast of the concerned corporation from the market through blacklisting/ban on commercial dealings, and also pressure emanating from consumers, investors, media and NGOs[138] – to enforce the human rights obligations against TNCs.[139] Further, it is equally vital that these multiple sanctions flow, wherever possible, from international as well as non-state sources, including market forces.

2. Enforcement Mechanism

A strong enforcement mechanism is sine qua non for effective implementation of the Norms. Being alive to this, the Norms conceive of multiple monitoring and verification mechanisms, both at national and international levels.[140] But it seems that the idea is still undeveloped; no definite and/or viable framework for such a mechanism is ascertainable from the Norms, and the appended commentary invite the Sub-Commission on Human Rights and other UN bodies "to develop additional techniques for implementing and monitoring these Norms."[141] If the Norms are adopted in its present form, that is, without any concrete mechanism to supervise the implementation, it will undoubtedly make a mockery of the Norms, framed admittedly in "non-voluntary" terms and supported for the first time with implementation provisions. Therefore, an enforcement mechanism should be put in place before the Norms being adopted. It is equally critical that the mechanism is both effective and efficient, that is, it could not only preempt human rights violations but also offer speedily an adequate remedy to the victims in cases of violation. For

[138] See Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law* 38 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 603, 607, 613, 624 (2000); Macek, *supra* note 84, at 110-15; Monshipouri et al, *supra* note 9, at 986-87.
[139] Though the commentary to paras 15 and 16 indicates that the Norms conceive a role for civil society organs and stakeholders generally, that role still needs to be clearly demarcated and instutionalised.
[140] UN Norms, *supra* note 6, para 16.

example, the suggestion of monitoring implementation by existing human rights treaty bodies through additional state reporting requirement[142] is likely to prove neither effective nor efficient.[143]

3. Response to (Mis)use of Procedural Issues

At least two procedural issues – *forum non conveniens*[144] and the liability of a parent corporation for human rights violations by its subsidiaries[145] – have often been (mis)used by TNCs to avoid or delay their responsibility for human rights violations.[146] The judicial response to these two issues has also, by and large, helped the cause of TNCs rather than the victims.[147] But the UN Norms do not address these

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[141] Commentary on UN Norms, s*upra* note 28, commentary (b) to para 16. Para 16 too contemplates monitoring and verification also by national/international institutions "yet to be created."

[142] Commentary on UN Norms, s*upra* note 28, commentary (b) to para 16.

[143] It is anybody's guess how an already burdened, and in need for reforms, mechanism would cope up with more than 60,000 TNCs operating in the world. *See* Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 452 (2001) (citing UNCTAD's 1999 World Investment Report).

[144] Cassels argues that the 'doctrine [of *forum non conveniens*] shields multinationals from liability for injuries abroad'. JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL 144 (1993). Similarly, Justice Doggett, while rejecting the plea of *forum non conveniens* in a case brought by the farm workers of Costa Rica against Shell Oil and Dow Chemicals, observed that the doctrine is not really about convenience but connivance to avoid corporate responsibility; *Dow Chemicals Co. v. Domingo Castro Alfaro* 786 SW 2d 674, at 680 (1990, Texas SC). *See also generally* D Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction* 103 LAW QUARTERLY REVIEW 398 (1987); UPENDRA BAXI (ed.), INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE 1-30 (1986); Jaqueline Duval Major, *One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992); Rogge, *infra* note 147.

[145] A cocktail of two principles of corporate law – separate personality and limited liability – achieve this effect, as demonstrated by many cases. In fact, the UN Centre on Transnational Corporations recognised this as early as in 1988: "A further complication arises from the concept of limited liability in corporate law, … This often precludes the extension of liability to the parent entity for the actions or omissions of the affiliate, and also tends to limit the exercise of jurisdiction over the parent entity by either the home or host country in respect of the actions of the affiliate." UN CENTRE ON TRANSNATIONAL CORPORATIONS, THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS 22 (1988).

[146] Besides these two issues, conflict of jurisdiction and choice of law are other problematic areas.

[147] A more positive judicial attitude is though visible in some recent cases. *See, for example, Connelly v. RTZ Corp plc* [1997] 4 All ER 335 (HL); *Lubbe v. Cape plc* [2000] 1 WLR 1545 (HL). But it is still unclear whether this represents a uniform policy shift all over the world. See also generally Peter Prince, *Bhopal, Bougainville and OK Tedi: Why Australian Forum non Conveniens Approach is Better* 47 INTERNATIONAL & COMPARATIVELY LAW QUARTERLY 573 (1998); Malcolm J Rogge, *Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua and Aguinda* 36 TEXAS INTERNATIONAL

important procedural issues, in the absence of which any implementation mechanism, even if equipped with multiple sanctions, can hardly deliver justice to the victims.

The Norms should, therefore, respond to the above procedural challenges by offering principled[148] guidelines to be followed by courts. For example, on the issue of the liability of a parent corporation for human rights violations by its subsidiaries, the Norms could adopt the enterprise theory rather than the entity theory as the basis of liability.[149] This will ensure that the courts instead of deciding the issue afresh in each and every case, which is not only time consuming but also leads to inconsistent decisions, may determine the question of liability swiftly and in accordance with a predictable principle rather than wagering between various principles.[150] This will also send a signal to those parent corporations which conduct more hazardous business through financially weaker subsidiaries[151] and then keep *distance by design* with them in order to exploit a principle of corporate law which is probably out of tune with the present day reality of TNCs.[152]

LAW JOURNAL 299 (2001); Winston Anderson, *Forum non Conveniens Checkmated? - The Emergence of Retaliatory Legislation* 10 JOURNAL OF TRANSNATIONAL LAW & POLICY 183 (2001).

[148] Borrowing from Dworkin, I use "principle" in the sense of "a standard that is to be observed … because it is requirement of justice or fairness or some other dimension of morality." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1978).

[149] *See generally* Philip I Blumberg, *Assessing Human Rights against Multinational Corporations under the United States Law: Conceptual and Procedural Framework* 50 AM. J. COMP. L. 493 (2002) [hereinafter Blumberg, *Conceptual and Procedural Framework*]; Philip I Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities* 28 CONNECTICUT LAW REVIEW 295 (1996). *See also* D Aronofsky, *Piercing the Transnational Corporate Veil: Trends, Developments and the Need for Widespread Adoption of Enterprise Analysis* 10 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW & COMMERCIAL REGULATION 31 (1985).

[150] Courts in different cases have invoked, or have been urged to invoke, the doctrine of agency, attribution, alter ago, or piercing of corporate veil to mitigate the rigour of the principle of separate personality.

[151] *See* Nina A Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts* 102 COLUMBIA LAW REVIEW 1203, 1205, 1246 (2002) and the material cited in notes 179-182 therein. *See also* A Ringleb & S Wiggins, *Liability and Large Scale, Long-Term Hazards* 98 JOURNAL OF POLITICAL ECONOMY 574 (1990).

[152] *See* PHILIP I BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 1-20 (1993).

Similarly, the existing predominant judicial approach to the doctrine of *forum non conveniens* also require adjustment, at least when cases are tried by municipal courts, so as to prevent its abuse for evading liability for human rights violations. The Norms should take a lead in this regard. Blumberg suggests that presence of international human rights should be considered among the public interest factors to be taken into consideration by courts while hearing the plea of *forum non conveniens*.[153] It can further be argued that since realisation of human rights is no longer a matter internal to national boundaries, in cases involving human rights violations the doctrine of *forum non conveniens* should be invoked only when courts are of the view that a particular forum is clearly and grossly inconvenient to the defendant.[154]

V. CONCLUSION

Many actors – from states[155] to international institutions,[156] academia, media and civil society organs[157] – are engaged in a search for evolving an effective as well as efficient regulatory framework of TNCs' accountability for human rights violations. The UN initiatives hold a prominent, if not central, place in such a quest; the Norms being the most recent, and also to date most promising, effort on the part of the UN.

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[153] Blumberg, *Conceptual and Procedural Framework*, *supra* note 149, at 526.

[154] *See generally* Prince, *supra* note 147 (arguing that the Australian approach of "clearly inappropriate forum" is better than the approach of "most suitable forum" adopted by the courts in the US/UK).

[155] *See, for example*, the Corporate Code of Conduct Bill 2000 (US), H.R. 4596, 106th Cong. (2d Sess. 2000), *available at* http://thomas.loc.gov/cgi-bin/query/z?c106:H.R.4596: (last visited Oct. 6, 2003); the Corporate Code of Conduct Bill 2000 (Australia), *available at* http://parlinfoweb.aph.gov.au/piweb/Repository/Legis/Bills/Linked/13020235.pdf (last visited Oct. 6, 2003). Both the Bills, however, could not be passed as law.

[156] One can easily identify the initiatives on the part of the OECD, ILO, UN and the EU. *See supra* notes 5, 6, 7, 12, and 13

[157] The efforts of the part of Human Rights Watch, Corporate Watch, Greenpeace, Business for Social Responsibility, Corporate Social Responsibility Forum, etc., have been commendable, and also contributed for putting the issue of corporate social responsibility on the centre stage. *See* Anne-Marie Slaughter, *A Liberal Theory of International Law* (2000) 94 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 240, 243. *See also* Frieda De Koninck, *How Can We Influence the Practices of Transnational Actors? The "Clean Clothes" Campaign: How Can We Fight for Economic and Social Rights when Faced to Transnational Actors?* in SOCIAL ALERT, ECONOMIC, SOCIAL AND CULTURAL

The Norms seems to have benefited from the exposure of the infirmities of its predecessor as well as other current regulatory regimes of corporate human rights responsibility, as they apparently seek to remedy some of those infirmities. However, certain lacunae still survive which, in my view, might hamper the efficacy of the Norms and neutralise the edge which they claim over their counterparts.

I have argued in this article that though the Norms revive the hope for establishing a legally binding international regime of corporate responsibility for human rights violations, they represent an imperfect step, albeit in the right direction. It is critical for the efficacy of the Norms that imperfections related to both formulation and implementation of TNCs' human rights obligations are further deliberated upon thoroughly before any move towards the adoption of the Norms. In sum, it is argued that the Norms should not only deduce human rights obligations of TNCs from state-focal international treaties and maintain a distinction between aspirational and operational standards of human rights, but also establish a robust enforcement mechanism which invokes multiple sanctions. Besides, the Norms should also take the lead in responding to hindrances posed by the procedural issues related to *forum non conveniens* and the liability of a parent corporation for human rights violations by its subsidiaries.

Though at this stage it is difficult to predict with certainty whether the UN Commission on Human Rights will adopt the Norms in March 2004, or whether they will become legally binding *stricto sensu* in the near future, in my view it might be more appropriate that some of the issues raised herein are deliberated upon further

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RIGHTS: A CHALLENGE FOR PEACE AND DEVELOPMENT IN A GLOBAL WORLD 58-70 (2002), available at http://www.paxchristi.net/PDF/DEC06E02.pdf (last visited Dec. 15, 2003).

before a formal adoption of the Norms. As far as the binding nature of the Norms is concerned, it will be ideal if they take the shape of a legally binding instrument; but this is not to suggest that the non-binding Norms could not contribute, in some way, to rectify the current state of TNCs' impunity for human rights violations. What is more important, however, that a healthy debate amongst all the affected parties on an issue of vital significance ensues, and if that happens, the present article would achieve its modest objective of highlighting the positives and exposing some of the inadequacies of the Norms.