Global Business and Human Rights - The UN *"Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" - A Requiem*

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ABSTRACT

On 11 June 2011, the United Nations Human Rights Council endorsed the 'Guiding Principles for Business and Human Rights' as a new set of guiding principles for global business designed to provide a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. This outcome was preceded by an earlier unsuccessful attempt by a Sub-Commission of the UN Commission on Human Rights to win approval for a set of binding corporate human rights norms, the so called "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights". This article identifies and discusses the reasons why the Norms eventually failed to win approval by the then UN Commission on Human Rights. This discussion is important in order to understand the difficulties in establishing binding 'hard law' obligations for Transnational Corporations with regard to human rights within the wider framework of international law. It is crucial to understand possible motives as well as the underlying rationale which lead first to the adoption and then the rapid abandoning of the *Norms*: such a discussion will also shed light on the prospects and trends of concepts of indirect, vague voluntarism of business human rights compliance, as well as on prospects of finding alternative solutions, and finally the rationale and effect of the 'Guiding Principles for Business and Human Rights'.

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1 Introduction and overview

After endorsing the 2011 'Guiding Principles for Business and Human Rights',[1] the Office of the UN High Commissioner for Human Rights issued a press release announcing that "[i]n an unprecedented step, the United Nations Human Rights Council has endorsed a new set of Guiding Principles for Business and Human Rights designed to provide - *for the first time* - [italics added] a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity."[2] While such a categorization may be debatable,[3] there remains little disagreement over the importance of such endorsement by the UN Human Rights Council. The Secretary-General's Special Representative for Business and Human Rights, Professor Ruggie, stated that "[t]he Council's endorsement establishes the Guiding Principles as the authoritative global reference point for business and human rights".[4] This was reinforced by the incorporation of the Guiding Principles and the 'Protect, Respect and Remedy' framework in the 2011 update of the OECD Guidelines for Multinational Enterprises.[5] However, in order to fully understand the importance as well as the novelty of the framework, it is imperative to understand the drafting history leading to this seminal outcome of corporate human rights and particularly the initiative which was the basis for the establishment of the mandate of the Secretary-General's Special Representative for Business and Human Rights.[6]

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[1] These are the guiding principles for States and transnational corporations and other business entities on the implementation of Ruggie's 'Protect, Respect and Remedy' framework.

[2] UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, NEW GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS ENDORSED BY THE UN HUMAN RIGHTS COUNCIL (UN Office of the High Commissioner for Human Rights) (2011), http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf (last visited Sep 13, 2011); for the full text of the Guiding Principles, see UN HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY- GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, JOHN RUGGIE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK (2011), http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf (last visited Jul 12, 2011); UN HUMAN RIGHTS COUNCIL, HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (2011), http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf (last visited Sep 13, 2011)

[3] See *infra* Section 2 for a discussion on previous standards of business and human rights relations.

[4] UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

[5] OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES - 2011 UPDATE IV, http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html (last visited Aug 17, 2011)

[6] John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 819-840, 821 (2007)

In 1998 the Working Group on the Working Methods and Activities of Transnational Corporations was established by a Sub-Commission of the UN Commission on Human Rights.[7] Its mandate was to make recommendations and proposals to the working methods and activities of transnational corporations (TNCs), in order to ensure that these correlate with the economic and social objectives of their host countries and are promoting human rights.[8] The final detailed document and its commentary were approved in August 2003 by the Sub-Commission. The document was named the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (hereinafter *Norms*).[9] The *Norms* were of a far-reaching character that included a duty laid on TNCs[10] to impose

[7] *The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, *in* CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 251-262, 251–252; Dinah Shelton, *Protecting Human Rights in a Globalized World*, 25 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 273-322, 284 (2002) The Sub-Commission on Prevention of Discrimination and Protection of Minorities was renamed in 1999 to be named the Sub-Commission on the Promotion and Protection of Human Rights. SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS - 58TH SESSION, GENEVA (7 - 25 AUGUST 2006), http://www2.ohchr.org/english/bodies/subcom/index.htm (last visited Jul 6, 2011)

[8] SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE RELATIONSHIP BETWEEN THE ENJOYMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE RIGHT TO DEVELOPMENT, AND THE WORKING METHODS AND ACTIVITIES OF TRANSNATIONAL CORPORATIONS 4 (d) (1998), http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-1998-8.doc (last visited Jul 22, 2011) During the subsequent years, the mandate of the working group was expanded several times. In 2001 the mandate was extended for another three years, and the authority to compile a list of human rights instruments and norms pertaining to transnational corporations was included. SUB-COMMISSION ON HUMAN RIGHTS, THE EFFECTS OF THE WORKING METHODS AND ACTIVITIES OF TRANSNATIONAL (2001), http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-2001-3.doc (last visited Jul 22, 2011)

[9] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR, NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS (2003), http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument (last visited Mar 2, 2009); Carolin F. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 10 GERMAN LAW JOURNAL 1065-1080, 1071 (2003); David Weissbrodt & Maria Kruger, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 901-922, 901–915 (2003); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law*, 37 COLUMBIA HUMAN RIGHTS LAW REVIEW 287-389, 287 (2006); Ruggie at 820; David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUMAN RIGHTS LAW REVIEW 447-497, 467–468 (2006); Olga Martin-Ortega, *Business and Human Rights in Conflict*, 22 ETHICS & INTERNATIONAL AFFAIRS 273-283, 280–281 (2008); Troy Rule, *Using Norms to Change International Law: UN Human Rights Laws Sneaking in through the Back Door*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 325, 328 (2004)

[10] Although the *Norms* apply to TNCs and other business enterprises, for reasons of parsimony and being concise, the term TNCs in this chapter relates also to other business enterprises, unless it is expressly stated otherwise.

human rights obligations upon States, even if States failed to ratify the human rights instruments establishing these duties.[11]

The draft document of the *Norms* represented a significant departure from the prevailing trend among international organisations when dealing with the often difficult relationship between business and human rights: that of voluntary compliance.[12] The *Norms* were designed to constitute a 'non-voluntary', comprehensive framework, creating direct obligations for TNCs and supplemented by a rigid enforcement mechanism including the monitoring by non-State actors (NGOs and TNCs themselves). The document was prepared in accordance with the mandate that the Working Group received and was in line with the background reports upon which it was supposed to structure its work. Many scholars have hailed the document for being the path breaking initiative that might, for the first time, succeed in ending corporate abuses of human rights.[13]

This explicit support of the *Norms was* contradicted by the often fierce opposition from various States and from the majority of the business community which greeted the *Norms* at their formal introduction as discussion paper after their

[11] Backer at 371–380; Ruggie at 825–826; Kinley & Chambers at 452

[12] Such approaches were prevalent within the UN Draft Code of Conduct for Transnational Corporations (UNCTC, TRANSNATIONAL CORPORATIONS, SERVICES AND THE URUGUAY ROUND 231–243 (United Nations) (1990), http://unctc.unctad.org/data/e90iia11a.pdf (last visited Sep 13, 2011) see particularly art. 4); the International Labour Organisation in the Tripartite Declaration (LXI INTERNATIONAL LABOUR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (1977), http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/triparti.htm (last visited Aug 24, 2011); LXXXIII INTERNATIONAL LABOUR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (2000), http://www.ilo.org/empent/Publications/WCMS_101234/lang--en/index.htm (last visited Aug 24, 2011); INTERNATIONAL LABOUR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (2006), http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (last visited Aug 24, 2011)); as well as in the OECD in its Guidelines for Multinational Enterprises (*The OECD Guidelines for Multinational Enterprises*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 89-106, 98–106; OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, http://www.oecd.org/dataoecd/56/36/1922428.pdf (last visited Aug 17, 2011); Organization for Economic Co-Operation and Development)

[13] See Surya Deva, *UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction*, 10 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 493-524, 497 (2004); Julie Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, 37 JOHN MARSHALL LAW REVIEW 1205-1252 (2004); Hillemanns at 1065; Weissbrodt & Kruger; David Weissbrodt, *Business and Human Rights*, 74 UNIVERSITY OF CINCINNATI LAW REVIEW 55-74, 55 (2005)

approval by the Sub-Commission.[14] Most States expressed strong reservations emphasising their desire not to depart from the traditional framework of international law, which stresses the central and pivotal role of the State as legal subject of public international law. The *Norms* were eventually abandoned in 2005 and the task of regulating transnational corporate accountability was transferred to other UN organs.[15]

This article discusses possible reasons for why the Norms failed to win approval by the UN Commission on Human Rights. This discussion is necessary for us to understand the difficulties in installing 'hard law' governing obligations of TNCs with regard to human rights within the wider framework of international law. It is crucial to understand possible motives as well as the underlying rationale which lead first to the adoption and then the rapid abandoning of the *Norms*: such a process will also shed light on the prospects and trends of concepts of indirect, vague voluntarism, as well as on prospects of finding alternative solutions.

Ruggie's legislative initiative was defined by one of its drafters as a "non-voluntary set of norms binding upon corporations".[16] Deva sees the importance of the *Norms* in the observation that they constitute a shift in paradigms "that have to date dominated the discourse of corporate social responsibility" and have caused ineffective regulation of corporate conduct resulting in abuses of human rights.[17] The *Norms* were defined by its authors, largely as a restatement of existing obligations of TNCs in respect to human rights under international law. However, some of the

[14] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR

[15] The Commission decided that the *Norms* contained "useful elements and ideas" but added that it had not requested it and that, as a draft proposal, it had no legal standing. The determination of several major industrialized countries to deal with the relation between business and human rights ultimately resulted in the appointment of Ruggie to the post of a special representative to the UN Secretary General, although with a significantly narrower mandate. Backer at 288,331–333; Ruggie at 821; Kinley & Chambers at 449; Martin-Ortega at 281

[16] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR; Hillemanns at 1071; Weissbrodt & Kruger at 901–915; Backer at 287; Ruggie at 820; Kinley & Chambers at 467–468; Martin-Ortega at 280–281; Rule at 328

[17] Deva at 497; Hillemanns at 1068 On the movement of corporate social responsibility and its development see Ronen Shamir, *Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility*, 6 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 531-553 (2010); David Vogel, *Private Global Business Regulation*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 261-282 (2008)

obligations in the *Norms* were a teleological manifestation of an ongoing "progressive development" of the existing principles of international law.[18]

Perhaps, their main novelty, and possibly the main reason for the subsequent controversy over the *Norms*, was the fact that the obligations were to be imposed directly on TNCs rather than requesting or requiring States to implement legislation to regulate the actions of the TNCs within their jurisdiction. While most of the rules in the *Norms* represent already recognized obligations, within the existing frameworks of international law, in the vast majority of cases, they are imposed indirectly on TNCs, through the intermediary of the States.[19] Baxi further argues that the *Norms* reflect duties that apply to States and may not be automatically transposed to apply to TNCs. In that respect he believes that while the *Norms* may be a good vision of *de lege ferenda*, or the aspired law, they do not reflect *lex lata*, or positive existing law.[20]

This article identifies three reasons which most likely may have led to the eventual abandoning of the draft *Norms* by the UN Commission on Human Rights: Firstly, the fact that a large part of the *Norms* constituted a further development of existing international norms, rather than actual codification of existing international law, enabled critics of the *Norms* to argue their incompatibility as legal analogies to otherwise positivist foundations of international law. Secondly, the fact that the *Norms* assigned an important legal role to TNCs (MNCs respectively) as direct addressees and not the States as the traditional addressees of international law blurred the distinction between international public and private legal frameworks, and thus undermined the central role of states as international law subjects. Finally, inherent contradictions within the *Norms* themselves and an overall vagueness in their overall nature and applicability helped to foster opposition against their adoption.

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[18] Weissbrodt & Kruger at 913–915; Carlos M Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 43 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 927-960, 928 (2005); Rule at 326; Hillemanns at 1070

[19] Examples of such documents and treaties are the Convention on the Elimination of All Forms of Discrimination Against Women, and the OECD and UN anti-bribery conventions. See JOHN GERARD RUGGIE, INTERIM REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES, U.N. DOC. E/CN.4/2006/97 (2006) 61 (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises) (2006), http://www1.umn.edu/humanrts/business/RuggieReport2006.html (last visited Oct 18, 2011); Ruggie at 822; Kinley & Chambers at 460; Vazquez at 929–930

[20] Upendra Baxi, *Market Fundamentalisms: Business Ethics at the Altar of Human Rights*, 5 HUMAN RIGHTS LAW REVIEW 1 -26, 14 (2005)

This article will first examine the reasons that led to the formal recognition of the existence for the need to create the *Norms,* secondly comment on the drafting process of the *Norms* with a focus on the stakeholder environment at the time of this process. The third part reviews the main features and novelties introduced in the draft document.[21] Finally, the paper will analyse the responses to the *Norms*, through examining their legal validity and justifications.

2 Legislative context and relevance of the *Norms*

The *Norms'* aimed at "maximizing the good that companies do while eliminating the abuses they commit".[22] Their rationale was to establish (and enforce) a balance between corporate business behaviour and human rights, which acknowledges the positive role corporations can play in regard to economic development and overall prosperity,[23] while preventing the occurrence of corporate human rights violations. One of its drafters, Professor Weissbrodt argues that grave human rights abuses by corporations occur in a variety of business situations and consequently need to be regulated at the supranational level.[24]

As pointed out by Kinley and Chambers, the 1990ies saw widening concerns in respect to increased violations of human rights by TNCs before the background of an increased liberalisation of international trade rules, the increase of foreign direct investment in developing and emerging economies as well as the growing power and influence of MNCs and TNCs.[25] The US scholar Blumberg (2002) describes the impact of such MNC/MNEs on global trade and business:

> "In the modern global economy, the largest corporations conduct worldwide operations. They operate in the form of multinational corporate groups organized in "incredibly complex" multi-tiered corporate structures consisting of a dominant parent corporation, sub holding companies, and scores or hundreds of subservient subsidiaries

[21] This review is not meant to be a comprehensive analysis of the various norms listed in the document. For a comprehensive analysis of the various norms in the document, see Hillemanns; Backer; Deva; Baxi; Campagna; Weissbrodt & Kruger; Weissbrodt

[22] Weissbrodt at 58

[23] William H. Meyer, *Human Rights and MNCs: Theory versus Quantitative Analysis*, 18 HUMAN RIGHTS QUARTERLY 368-397, 368–397 (1996)

[24] Weissbrodt at 56–58

[25] Kinley & Chambers at 457

> scattered around the world. The 1999 World Investment Report estimated that there are almost 60,000 multinational corporate groups with more than 500,000 foreign subsidiaries and affiliates"[26]

The possibility of MNCs' indirect liability for human rights violations as aider and abettor was recognized by the UN Sub-Commission on the Promotion and Protection of Human Rights (hereinafter Sub-Commission) which voiced "significant concerns about the conduct of transnational corporations and other businesses".[27]

Weissbrodt follows the traditional notion whereas international law in general and international human rights law (IHRL) in particular, focuses on protecting the individual from violations by governments. He also believes that while new groups of non-State actors, are being subjected by various sub-fields of international law, TNCs and businesses in general remained largely unaffected by these developments.[28] While some international legal documents may be interpreted as applying to corporations, most of them applied to the TNCs only indirectly.[29] However, such indirect regulation did not prevent abuses of human rights by businesses and therefore several international efforts to create frameworks of direct obligations on TNCs were made. These attempts include the unsuccessful attempts to establish a UN Code of Conduct for Transnational Corporations, the OECD Guidelines for Multinational Enterprises,

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[26] Phillip I. Blumberg, *Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems*, 50 THE AMERICAN JOURNAL OF COMPARATIVE LAW 493-529, 493 (2002); Sascha-Dominik Bachmann, *Human rights and global business: the evolving notion of corporate civil responsibility*, INDIAN YEARBOOK OF INTERNATIONAL LAW AND POLICY 193-220 (2009)

[27] Weissbrodt at 64

[28] Such sub fields of international law include individual responsibility in the international criminal tribunals and the ICC, armed opposition groups in international humanitarian law (IHL), terrorists and traffickers in human beings in international criminal law (ICL). See *Id.* at 59–60; SUBMISSION OF CANADA TO THE HIGH COMMISSIONER FOR HUMAN RIGHTS ON THE RESPONSIBILITIES OF BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS 2.2, 3.3–3.4, http://www2.ohchr.org/english/issues/globalization/business/docs/canada.doc (last visited Jul 20, 2011); but see S. R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE LAW JOURNAL 443-545, 377–388 (2001)

[29] Among such documents one can recall the OECD Guidelines, ILO's Tripartite Declaration, the Convention on Combating Bribery, as well as the Warsaw Convention. Organization for Economic Co-Operation and Development; LXI INTERNATIONAL LABOUR ORGANIZATION; INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (1969), http://www2.ohchr.org/english/law/cerd.htm (last visited Sep 13, 2011); CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR (1929), http://www.dot.gov/ost/ogc/Warsaw1929.pdf (last visited Sep 13, 2011) Generally see Vazquez; but see David Kinley & Junko Tadaki, *From talk to walk: The emergence of human rights responsibilities for corporations at international law*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931-1023, 946–947 (2004)

the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and the Global Compact initiative.[30] The new *Norms* seemed to remedy this lack of accountability: scholars were referring to the adoption of the *Norms*, after their final drafting and their eventual disappearance from the agenda of the UN, as one of the "most promising human rights norms for TNCs to date".[31] The German government described the *Norms* as a "useful contribution to the ongoing debate on ways and means of integrating business enterprises in the international endeavours to promote and protect human rights and sustainable development"[32] The drafting initiative was supported by many NGOs.[33] Furthermore, several transnational businesses, which participated in the "Initiative for Respect" and the "Ethical Globalisation Initiative", volunteered to participate in the "pilot project" for the *Norms*, as part of their wider commitment to human rights.[34]

The *Norms* drew heavily from existing human rights documents[35] and it seems that their overall aim was to fill a void in the existing frameworks of international law, by providing a single, comprehensive and constituting set of human rights norms with binding effect for all corporations. They were designed to serve as an accessible legal

[30] UNCTC at 231–243; LXI INTERNATIONAL LABOUR ORGANIZATION; Organization for Economic Co-Operation and Development; Weissbrodt & Kruger at 903; PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 474–476 (Oxford University Press Second Edition) (2007); Kinley & Chambers at 455–456; Ratner at 454–459; Ruggie at 819; Campagna at 1206–1207; John Gerard Ruggie, *Global-governance.net: The Global Compact as Learning Network*, 7 GLOBAL GOVERNANCE 371-378 (2001); John Gerard Ruggie, *The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact*, 5 JOURNAL OF CORPORATE CITIZENSHIP 27-36 (2002); UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/ (last visited Sep 13, 2011)

[31] See Deva at 497; Campagna; Hillemanns at 1065; Weissbrodt & Kruger; Weissbrodt at 55

[32] GERMAN RESPONSE TO OHCHR NOTES VERBALE OF 19 MAY 2004 AND 22 JULY 2004 REGARDING CHR DECISION 2004/116—RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, http://www2.ohchr.org/english/issues/globalization/business/docs/germany.pdf (last visited Jul 12, 2011)

[33] The list of NGOs supporting the initative included Amnesty International, Human Rights Watch, Oxfam, and the Prince of Wales International Business Leaders Forum. See Weissbrodt & Kruger at 906

[34] These businesses were: ABB, Barclays Bank, National Grid Transco, Novartis, Novo Nordisk, MTV and The Body Shop International, Gap Inc., Hewlett-Packard, Statoil. *Id.* at 907; Kinley & Chambers at 461; Weissbrodt at 72–73

[35] Many existing human rights documents are mentioned in the Preamble to the *Norms*, *inter alia* the Universal Declaration of Human Rights; Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights. See the full list at U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at 3–7. See also Kinley & Chambers at 451; Rule at 333.

document which could be applied even by non experts of IHRL, particularly corporate directors. Deva further explains that the need to draft the *Norms* as a separate document, relying on other conventions and applying them to TNCs, is in fact an evidence of the presence of certain gaps in the existing legal framework.[36] On the other hand, one must question whether this need truly existed or were the *Norms* yet another redundant document. Campagna observes that the fact that the envisaged duty of TNCs to 'respect, protect and ensure human rights' worldwide, under the framework of the *Norms*, constituted a formal recognition of legal principles of international human rights law as evolved since World War II and particularly since the end of the Cold War.[37]

3 Drafting History

The *Norms* were not the first attempt to regulate the connection between business and human rights.[38] They were preceded by a number of initiatives within the legal framework of the OECD and UN.[39] However, these 'soft law' 'CSR' styled initiatives did not seem to be sufficient to eliminate corporate abuses of human rights at a grand scale. In 1998 a Working Group on the Working Methods and Activities of Transnational Corporations was established by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[40] The Sub-Commission itself was created by ECOSOC in 1947 as a think-tank for the UN Commission on Human Rights.[41] Its mandate is to study cases of human rights violations, to examine obstacles to human rights protection and develop new international standards.[42] The Working Group was made up of five members, who participated in its work as independent experts.[43] The Sub-Commission mandated the Working Group in Resolution 1998/8 *inter alia*

> "to make recommendations and proposals relating to the methods of work and activities of transnational corporations in order to ensure that

[36] Deva at 499
[37] Campagna at 1222
[38] Kinley & Chambers at 455
[39] See supra note 19 and the accompanying text thereto.
[40] Ragnwaldh & Konopik at 251–252
[41] It is important to note that the Sub-Commission is composed of 26 members, nominated by their countries, who do not act as country representatives but rather as independent experts.
[42] Kinley & Chambers at 456
[43] Weissbrodt & Kruger at 905

> such methods and activities are in keeping with the economic and social objectives of the countries in which they operate, and to promote the enjoyment of economic, social and cultural rights and the right to development, as well as of civil and political rights".[44]

The Working Group drew from prior work which was based on three background reports.[45] The first report of 1995 elaborated on the economic environment conditions, presenting how the global strategies of the TNCs were having an adverse effect on the promotion of human rights, particularly international labour and trade union rights, by emphasising the gradual shift of power from States to TNCs: "[t]he activities and methods of work of TNCs have implications for the effective enjoyment of a number of human rights".[46]

A second report of 1996, focused on the possibilities of subjecting a corporation as a whole to a single jurisdiction. It particularly noted that while each subsidiary can in principle be subject to the national regulation of its host country,

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[44] SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES at 4(d) During the subsequent years, the mandate of the Working Group was expanded several times. When the mandate was further extended in 2001, the Sub-Commission's Resolution 2001/3 provided more detail on the expected outcome of the Working Group in paragraph 4. "(b) Compile a list of the various relevant instruments and norms concerning human rights and international cooperation that are applicable to transnational corporations; (c) Contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights; (d) Analyse the possibility of establishing a monitoring mechanism in order to apply sanctions and obtain compensation for infringements committed and damage caused by transnational corporations, and contribute to the drafting of binding norms for that purpose;" SUB-COMMISSION ON HUMAN RIGHTS; Weissbrodt & Kruger at 904–905; Kinley & Chambers at 463

[45] Backer at 322; SUB-COMMISSION ON HUMAN RIGHTS; SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE RELATIONSHIP BETWEEN THE ENJOYMENT OF HUMAN RIGHTS, IN PARTICULAR, INTERNATIONAL LABOUR AND TRADE UNION RIGHTS, AND THE WORKING METHODS AND ACTIVITIES OF TRANSNATIONAL CORPORATIONS (1995), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G95/130/59/PDF/G9513059.pdf?OpenElement (last visited Jul 6, 2011); SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, THE IMPACT OF THE ACTIVITIES AND WORKING METHODS OF TRANSNATIONAL CORPORATIONS ON THE FULL ENJOYMENT OF ALL HUMAN RIGHTS, IN PARTICULAR ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE RIGHT TO DEVELOPMENT, BEARING IN MIND EXISTING INTERNATIONAL GUIDELINES, RULES AND STANDARDS RELATING TO THE SUBJECT-MATTER (1996), http://shr.aaas.org/article15/Reference_Materials/E_CN.4_Sub.2_1996_12_Eng.pdf (last visited Jul 6, 2011); SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, WORKING DOCUMENT ON THE IMPACT OF THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS ON THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, PREPARED BY MR. EL HADJI GUISSÉ, PURSUANT TO SUBCOMMISSION RESOLUTION 1997/11 (1998), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/128/35/PDF/G9812835.pdf (last visited Jul 6, 2011)

[46] SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; Backer further argues that the report goes further and essentially defines the State as "any amalgamation of power that can assert the power normally exercised by, or otherwise coerce entities that are recognized as states." In accordance with this analysis, the TNCs are to be treated on a level similar to States and should therefore have some of the responsibilities according to their role. Backer at 322–323

there is no single national regulation, which the entire TNC is subject to, as "[t]he global reach of TNCs is not matched by a coherent global system of accountability."[47] Backer also identifies the focus on positive social role of corporations as a novelty of this report.[48]

Of particular importance was the third report by El-Hadji Guissé in 1997. According to Backer, El-Hadji Guissé's work with and through the Working Group provided the foundations and perspectives for what eventually became the *Norms*. The report presented as a thesis that TNCs were 'vehicles' in the transfer of wealth away from the poor to the rich, which in fact represents a market failure in need of fundamental correction. The report claimed that while the *raison d'etre* of the TNCs is to make profit, this is not enough for the system of values on which our existence is based. Therefore, the report emphasised the importance of regulating and restraining the actions of TNCs through national regulation and international cooperation of States.[49] One must note, however, that unlike the *Norms* that followed and deviating from the other two background reports, this document concerned solely responsibilities and duties of States, to regulate the conduct of TNCs, rather than establishing direct responsibilities for TNCs themselves.[50]

The process of discussion and drafting was lengthy; with the mandate of the working group being renewed and altered several times.[51] The Working Group began preparing the *Norms* in August 1999. It held annual public hearings and met in Geneva between 2000 and 2003. Selected representatives from business, the unions, NGOs, the scholarly community and other interested persons participated in these meetings and were involved in the drafting of the document. The various drafts were also published on the internet and in the UN publications.[52]

The final detailed document and its commentary were introduced and approved in August 2003 by the Sub-Commission. The Sub-Commission sent the *Norms* to its parent body, the UN Commission on Human Rights, which was replaced

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[47] SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES at 22; Backer at 325–326
[48] Backer at 325
[49] SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; Backer at 326–327
[50] On the direct linkage between international law and TNCs in the Norms see Backer at 374–375
[51] Weissbrodt & Kruger at 903–905; SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; SUB-COMMISSION ON HUMAN RIGHTS
[52] Weissbrodt at 67–68; Hillemanns at 1069–1070

by the UN Human Rights Council in March 2006. By an action without a vote, on April 22, 2004, the Commission on Human Rights significantly narrowed the original objectives and methodologies of the *Norms*. It recommended that ECOSOC should confirm the importance of the question of the responsibilities of transnational corporations with regard to human rights; requested that the new Office of the High Commissioner for Human Rights (OHCHR) compile a report setting out the scope and legal status of current initiatives, and standards relating to the responsibility of transnational corporations; and to affirm that the *Norms* have no legal standing, had not been requested by the Commission and that the Sub-Commission should not perform any monitoring function of the *Norms*.[53] The Commission disseminated the document for further commenting, as was recommended by the Sub Commission. Between March and September 2004, the Commission received more than ninety such comments. The 2004 session of the Commission welcomed the *Norms*, while noting that it had not actually asked for such a document and that as a draft before the Commission, the document did not have any legal status on its own.[54]

4 Progressive Development, Novelties and Shortfalls

The *Norms* were, in many ways, a new standards setting legal document. Although reflecting and drawing from already existing human rights obligations, the *Norms* incorporated notions of progressive development and novel conceptions of human rights protection. The *Norms* attempted to establish direct responsibility of TNCs for human rights violations, utilising existing frameworks of international law. They aimed to establish an explicit duty for TNCs to promote human rights from 'top to bottom', even in respect to corporations registered in non state parties. These norms were designed to constitute a 'non-voluntary' framework, which was far more codified than any voluntary framework, but fell short of being mandatory remaining to constitute 'soft law' instead of 'hard law'. This section will discuss these novelties and contradictions.

[53] Backer at 331

[54] Kinley & Chambers at 451, 463; Weissbrodt at 64–68; Baxi at 2; One should note, however that although the Commission was correct that it did not ask for this document, the Sub-Commission had full powers to ask for its drafting as it did. See the Resolutions of the Sub-Commission defining the Mandate of the Working Group: SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; SUB-COMMISSION ON HUMAN RIGHTS

The Preamble of the *Norms* essentially reiterates the fundamental character of Corporate Social Responsibility as a means to promote and protect human rights.[55] The *Norms* are basically a furtherance of the human rights principles already found in the *Universal Declaration on Human Rights* (UDHR) of 1948.[56] Campagna thinks that the legal foundations of the duty of TNCs to promote and protect human rights, as defined in the *Norms*, derive directly from the UDHR.[57] As part of the attempt to characterise the *Norms* as a document of mere codification of already established principles of customary international law, rather than a progressive development thereof, the Preamble contains an open, non-exhaustive list of the sources of international treaties and conventions, which establish the legal basis for TNCs obligations to human rights, some of which, arguably, even reach the level of *jus cogens*.[58] In Baxi's view, this also raises the problem of intelligibility, as not everyone among the stakeholders of corporate human rights protection, certainly among the CEOs in the business community, are familiar with the full range of human rights instruments referred to in the *Norms*.[59] Consequently, the Preamble of the *Norms* does

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[55] Backer at 341

[56] Hillemanns at 1072; U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at Preamble

[57] Campagna at 1208; See also Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOKLYN JOURNAL OF INTERNATIONAL LAW 17-26, 24–25 (1999) presenting the thesis upon which to build the obligations of the corporations to the UDHR. U.N. Doc. UN GENERAL ASSEMBLY, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), http://www.un.org/en/documents/udhr/index.shtml (last visited Jun 13, 2011) Preamble; see also the response of Germany to the Norms, claiming that the UDHR does apply direct obligations on TNCs Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the Other International Organizations in Geneva It is, however, questionable whether the UDHR is part of customary international law. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 287-398, 322–335 (1996); Campagna at 1209 And whether the application of UDHR norms to non-State actors is not an overstretching thereof. See Deva at 498; but see *Filartiga v. Pena-Irala*, 630 F. 2d; Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 339-349, 340–341 (2001)

[58] Baxi at 3 claims that these references to prior textual enunciations are very characteristic of soft law documents and represent a process of "self-generating normative cannibalism, or self-devouring conspicuous consumption. This reliance on what the drafters of the *Norms* believed to be established principles of international law, allowed them to ground their presentation of the *Norms* as a restatement of existing international law. U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR Preamble; Deva at 498

[59] As one may recall, the text of the Norms refers to at least 56 previous human rights instruments Baxi at 3–6; but see Rule, who claims that one of the advantages of the Norms, is the fact that they present in a single document, the entire array of human rights applicable to TNCs Rule at 330 Baxi also claims that this intensive reliance on existing instruments of human rights, raises the problem of optimality – while too little references to previous human rights instruments weakens the legitimacy of the current instrument, too much references makes the instrument self-defeating. Baxi claims that these references to prior textual enunciations are very characteristic of soft law documents and represent a process of "self-generating normative cannibalism, or self-devouring conspicuous consumption". Baxi at 3

not only serve as an introduction to the document, but also explains the core substance of the *Norms*.[60]

The operative (main) part of the *Norms* is divided into seven main categories. It presents a comprehensive list of human rights obligations relevant to TNCs. The *Norms* do not set down so called 'negative' duties[61] (whereas TNCs should refrain from violating human rights), but rather introduces as 'positive' duties for TNCs the duty to promote and ensure respect for human rights,[62] and thus supplements the traditional, horizontal scale of State 'sponsored' human rights protection.

"General Obligations" in Part A of the *Norms* list the following responsibilities: the duty of due diligence to ensure that business activities do not directly or indirectly contribute to human rights abuses; the duty to ensure that corporations do not benefit from such abuses; a duty to refrain from undermining efforts to promote human rights; to use their influence to promote human rights; the obligation to assess their human rights impact; and the overall responsibility to avoid complicity in human rights abuses.[63] These obligations are significant and impact on the "the remainder of the Norms shall be read in light of this paragraph".[64] Article 1 recognises States as the traditional holders of the *primary* responsibilities "to promote, secure the fulfilment 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."[65] The *Norms*' overall impact, however, is more radical: they essentially consign States to the background, in scenarios of TNC transnational business responsibilities. TNCs may

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[60] Backer at 342–343 substantiates his claim that the Preamble is part of the substantive obligations of the *Norms* based on the fact that the *Norms* are to be the elaborated and interpreted according to the Preamble. However, this characterises the role of every Preamble according to the Vienna Convention on the Law of Treaties, and therefore contradicts Backer's claim, as the role of the Preamble is specifically designed to differ from the role of the substantive part. See ILM (1969), 679 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (1980) Art. 31

[61] Negative duties are the duties to refrain from doing something i.e. "not to obstruct the right to demonstrations"; while positive duties are duties to do something actively i.e. "to provide free education". See f.e. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS QUARTERLY 156-229, 184 (1987)

[62] Deva at 497–499

[63] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at General Obligations

[64] UN Doc. E/CN.4/Sub.2/2003/38 (2003) UN ESCOR, COMMENTARY FOR THE NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS (2003), http://www1.umn.edu/humanrts/links/CommentApril2003.html (last visited Jun 15, 2011) art 1(a); Deva at 502

[65] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR art. 1; Weissbrodt at 64–65

even operate against the interest of a State in order to attain the 'greater, internationally-derived good'.[66]

The definition of "primary role", or rather the lack of it, has caused significant reservations against such – perceived - demotion in the role of the States. Baxi argues that there are several interpretations that may be assigned to the term "primary responsibility" which significantly influence the scope of the role of the States and their obligations according to this document.[67] The United States Council for International Business criticised the *Norms*, for the fact that they "represent a fundamental shift in responsibility for protecting human rights – from governments to private actors, including companies – effectively privatizing the enforcement of human rights laws."[68] This critique is aimed at the key nature of the *Norms*, as it was intended to improve human rights protection in cases where states failed to act, hereby widening the scope of applicability of the international human rights law by including situations where corporations have larger influence than the States:[69]

> "[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."[70]

The Commentary on the Norms on the responsibilities of transnational corporation, clarifies that *Norms* should apply regardless of where TNCs operate and what the level of human rights protection in the respective State is.[71]

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[66] Backer at 373

[67] Even if one claims that the explanation for the lack of commentary on this term relates to the fact that the *Norms* are focusing on TNCs, one can still understand the role of the States as either active or passive. Baxi at 9–10

[68] Vazquez at 929; *The Human Rights Responsibilities of International Business*, , http://www.uscib.org/index.asp?DocumentID=2794 (last visited Jun 29, 2011)

[69] Kinley & Chambers at 465–472; COMMENTS BY AUSTRALIA IN RESPECT OF THE REPORT REQUESTED FROM THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS BY THE COMMISSION ON HUMAN RIGHTS IN ITS DECISION 2004/116 OF 20 APRIL 2004 ON EXISTING INITIATIVES AND STANDARDS RELATING TO THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, http://www2.ohchr.org/english/issues/globalization/business/docs/australia.pdf (last visited Jul 12, 2011)

[70] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at A art. 1; Campagna at 1225

[71] UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003) UN ESCOR art. 1(a); Deva at 502

The *Norms* lay down as specific rules and obligations for corporations the right to equal opportunity and non-discriminatory treatment, the right to security of persons, rights of workers, respect for national sovereignty and human rights, obligations with regard to consumer protection and obligations with regard to environmental protection.[72]

Of particular interest is part E of the *Norms*, where the TNCs are identified as possible multipliers for the development of a global business society wedded to the rule of law, transparency, accountability and sustainable development, in which the people's civil, political, economic and cultural rights are realised. This represents a novelty in three main aspects. Firstly, instead of limiting the TNCs' obligations to civil and political rights, it includes both civil and collective social, economic and cultural rights of the second and third generations of human rights. Secondly, as mentioned above, this applies positive obligations upon TNCs which creates 'quasi' horizontal status. Thirdly, TNCs are expected to respect and promote even rights of those affected only indirectly, invisibly and/or in the longer run from their activities.[73]

Part H deals with general provisions of implementation of the *Norms*.[74] Deva distinguishes between the direct and indirect parts of the implementation of the *Norms* as defined here. TNCs, themselves, are both expected to internalise the culture of the *Norms*, as well as being subject to periodic monitoring and verifying by different bodies. Indirectly, the *Norms* are to be promoted through the amendments of the national legal frameworks by the States, to ensure that TNCs implement the *Norms*.[75] Backer claims that through the general provisions, the *Norms* exploit the flexibility of private law making to maximise the efficiency of implementation, without the interference of State actors.[76]

Final Part I provides various definitions required for the interpretation of the document.[77] Of particular importance is the definition of a TNC, which is quite broad and refers to an "economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form,

[72] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at B–G These rules are explained and explicated in great detail important in the *Commentary* attached to the *Norms*.UN Doc. E/CN.4/Sub.2/2003/38 (2003) UN ESCOR
[73] Deva at 507; Vazquez at 945; see also Ratner at 499–500
[74] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at H
[75] Deva at 514–518
[76] Backer at 334
[77] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at I

whether in their home country or country of activity, and whether taken individually or collectively." The combination of this definition with the definition for "other business entities", which was drawn up to "ensure that transnational corporations could not change their identity... and therefore avoid the draft Norms", potentially includes nearly all business entities existent.[78] The terms 'human rights' and 'international human rights' are also defined widely for the purposes of this document. The terms include:

> "civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system."[79]

This definition allows the inclusion of human rights norms and standards from different levels and generations. While some of the norms listed in the document have universal legal effect, others are norms of positive character existent only between parties to certain agreements and some are even norms with no general legal effect and as such of nonbinding 'soft law' effect.[80]

It seems that there exists a discrepancy between the major issues discussed while drafting the *Norms* and the issues which were the basis for the criticism of the *Norms*. There were five main issues that were widely discussed during the drafting process. The first issue was the scope of application of the *Norms* and the definition of the term TNCs. The decision of the drafters was to include all types of business entities, and not to limit the scope of the document just to TNCs. Weissbrodt emphasised that while most media attention focused on the misdeeds of major corporations, applying human rights standards only to large TNCs could be considered discriminatory. Moreover, the drafters considered it difficult to define appropriately the term TNC, so as not to allow corporate lawyers to restructure the framework of the corporation in a way that will prevent these standards to be applied

[78] *Id.* at 20–21; Backer at 337
[79] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at 23
[80] Backer at 340

on this corporation.[81] Secondly, and largely derived from the previous issue, the drafters of the *Norms* believed that the principles should be respected by all businesses, and in order to avoid distinctions between the standards applied to domestic and transnational corporations, applied the *Norms* to all corporations, while minimizing the implementation of rules for small "mom and pop" shops.[82] Thirdly, the drafters of the *Norms* decided on an approach, according to which, the power and the influence of a corporation should be matched by the appropriate level of responsibility.[83] Fourth, the *Norms* were designed to be the most comprehensive and human rights focused document applying transnational rules to businesses up to that time.[84] Finally, a special non-voluntary character was designed for the *Norms*. While this did not amount to an "international treaty", according to its drafters, they described the legal authority of the *Norms* as a "soft-law" restatement of the principles applicable to corporations, derived from their sources in international treaties and customary international law.[85] Another novelty of the *Norms* was their use of a binding "shall" language, instead of the previously accepted "should" terms.[86]

Out of the issues mentioned above, only the latter two were mentioned by the opponents of the *Norms*. The criticism of the *Norms* was focused more on the transition of responsibility from States to TNCs, through that altering the traditional framework of international law; the application of responsibility over the actions of other actors to TNCs; and the somewhat contradictory claims of over-legalism and vagueness of the document.

The *Norms* relate to TNCs as entities with distinct social, cultural, civil and political rights and duties, rather than just legal entities whose function is limited to

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[81] Weissbrodt at 65–66; See also Baxi at 6–9

[82] Deva at 500–501; Weissbrodt & Kruger at 907–912

[83] This approach is in line with the theory of legal responsibility of corporations suggested by Ratner. Ratner

[84] Furthermore, one of the much disputed additions to the *Norms* was their incorporation and encouragement of any further evolution of the existing and similar human rights standards. Weissbrodt at 66–67

[85] Weissbrodt & Kruger at 907–915; Deva at 513; Weissbrodt at 67

[86] Deva at 499–500; Deal; IN THE MATTER OF THE DRAFT "NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS". OPINION OF PROFESSOR EMERITUS MAURICE MENDELSON Q.C. 5, http://www2.ohchr.org/english/issues/globalization/business/docs/confederationbritish2.doc (last visited Jul 22, 2011) This fact is contradictory to the general normative language of the document. Rule links this with the previous failures to obtain UN enforced human rights laws, and a desire to stimulate or accelerate desired changes in societal norms in order to accelerate accordingly the pace of corresponding changes in the law. Rule at 332

the economic sphere only and whose activities must be regulated in order to remain active only in this sphere. Backer asserts that *Norms* treat corporations as 'virtual State actors' for the purposes of many normative requirements.[87] They bypass the medium of the State, in order to create a direct link between international law and TNCs, through that, making the TNCs important actors in promoting human rights, mainly in the developing countries, but also in the developed countries that refused to adopt certain human rights norms.[88]

Several aspects of the *Norms* are worthy of a deeper analysis. The *Norms* drew from previous instruments of human rights the obligations relevant to TNCs and other business entities and applied them directly upon the corporations, while reemphasizing the primary and the overarching responsibility of the States.[89] Kinley and Chambers identify four points where the *Norms* diverge from traditional human rights documents. Firstly, unlike other instruments of human rights law, the *Norms* revolved around the duty-bearers, upon which the different rules apply, rather than focusing on a single set of rights (civil, political, economic) or rights holders (women, children, racial groups).[90] The focus of the *Norms* on duty-bearers, rather than on a specific set of rights, also causes them to be indeterminable about the exact scope of the specific rights, applicable to the TNCs.[91]

Secondly, the notion of a "sphere of influence" and thus responsibility, derive from the corporate social responsibility (CSR) movement. This aspect has also been criticised for not being clear enough and being ambiguous about the question of whether the entire supply chain of the corporation lies within its "sphere of activity and influence".[92]

Thirdly, the *Norms* seek to establish new enforcement mechanisms, applicable to non-State actors, and to make non-State actors the promoters of these norms and mechanisms when entering into contractual relationships with their business

[87] Backer at 371 Moreover, through this they cause an embedded contradiction with the obligation to respect national sovereignty as defined in article 10 of the *Norms*.
[88] One example can be that of the United States, which continuously refused to ratify the International Covenant on Economic, Social and Cultural Rights, but through the *Norms*, the TNCs therein would become bound by that instrument. *Id.* at 353, 371–372
[89] Rule at 333
[90] Kinley & Chambers at 452
[91] The Norms are, therefore, ambiguous on whether the same scope of positive obligations applies to TNCs as it does to States. See Deva at 510–511
[92] Kinley & Chambers at 452; Deva at 502–503; Baxi at 11–14

partners.[93] The subject of enforcement as such is a key issue of the *Norms*.[94] TNCs were due to be subject to "periodic monitoring and verification by United Nations and other international and national mechanisms already in existence or yet to be created regarding the application of the Norms."[95] Vázquez further asserts that States would be reluctant to create and maintain institutions, established under the Norms, as this would limit their own sovereign powers.[96] Furthermore, he suggests that legal norms are less likely to be observed by non-State actors in the absence of effective enforcement mechanisms carrying sanctions.[97] Another downfall of this mechanism is its unintended anti-democratic character, which is due to the influence of NGOs on the drafting process.[98] Yet another shortfall of this mechanism is its supposed lack of sanctions to be implemented in case of violations.[99] However, this shortfall is only alleged, as in fact, there is a rigid sanctioning mechanism which obligates the TNCs to be in business only with TNCs that adhere to the *Norms* which provides in fact the necessary sanction. Another element of implementation is the duty of the TNCs to provide "prompt, effective and adequate reparations to those persons, entities and communities" that have been adversely affected by failure to comply with the *Norms*.[100]

Fourthly, the *Norms* added to the traditional scope of human rights other rights associated with consumer protection, environmental rights and issues of corruption alongside traditional human rights and fundamental freedoms.[101] Kinley and Chambers observe that this development is sensible as violations of these norms may bring violations of other, more basic human rights, such as the right to life,[102] denying

[93] Kinley & Chambers at 452–453; Baxi at 18
[94] Weissbrodt at 67; Backer at 384
[95] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR Art. 16; Campagna at 1247
[96] His claim in fact matched the views of various States. See *f.e.* the Australian and Norwegian responses to the *Norms* that argues exactly that. Australian Permanent Mission to the UN; DECISION 2004/116 - RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, http://www2.ohchr.org/english/issues/globalization/business/docs/norway.pdf (last visited Jul 12, 2011)
[97] Vazquez at 954–955
[98] Backer also notes that the result of the enforcement mechanism of the Norms would be the increased power of other non-State actors (the NGOs), while trying to regulate and limit the power of TNCs. Backer at 384–388
[99] Campagna at 1247; Deva at 518–519
[100] See U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR Art. 15-16; Deva at 500
[101] Kinley & Chambers at 453–455; Vazquez at 944–947; Baxi at 16–17; Deal
[102] Which may be the result of serious violations of consumer protection.

populations of economic, social and cultural rights[103] and other basic widely accepted values such as the right to health and the right to development.[104]

One of the advantages of the *Norms* was its possible impact, through the non-voluntary instrument of regulation, to overcome a so called "free-rider" dilemma of many TNCs, whereas the adoption of voluntary programmes for the protection of human rights, would disadvantage them economically against their competitors in the market, who do not take similar actions.[105] Backer also argues that one of the important aspects of the *Norms* was that it constituted "*in fact* of a mechanics of interplay between the national, international, public and private law in allocating and competing for regulatory power." [italics in origin][106]

5 The *Norms* – an appraisal

Backer analyses two main types of responses to the *Norms*. The 'public sector oriented' participants, which mainly refers to academics and NGOs, supported the document for being an advance over existing voluntary standards by providing a single comprehensive regime which draws an appropriate balance between the obligations of the States and of companies with respect to human rights. They claimed that the *Norms* provided a template for State behaviour along with a system of remedies for individuals supervised by a supra-national organisation. The second group, 'private sector' or 'market oriented' participants, emphasised the extreme radicalism of the *Norms* – the mandatory approach; the presumption that private economic entities are more, rather than less likely to promote human rights and development; and the lack of basis for obligating TNCs under international law, particularly in light of the vagueness and questionable legal effect of some of the norms mentioned in the document.[107] The second group was the more influential one, and it was the one that eventually determined the future of the *Norms*. This section analyses the responses to the *Norms* through examining the validity and reasons for these responses.

[103] Which may be the result of squandering national resources for the benefit of privileged few in the absence of proper anti-corruption norms.
[104] Kinley & Chambers at 472–474
[105] Campagna at 1223; but see Vázquez claiming that the Norms emphasise the problem of "free riding" for non-State actors, and may therefore, through the constant violations of these norms bring their demise Vazquez at 955–957
[106] Backer at 288
[107] *Id.* at 356–357; The Norwegian Ministry of Foreign Affairs

We shall first turn to examining the responses by the business sector. Despite the fact that the majority of the business community rejected the *Norms*, mainly through the business chambers and industry organisations; some favoured the application of the *Norms* and even volunteered as pilot participants for the *Norms*. Parts of the business community, have claimed that compliance with human rights law should be by choice and only applicable to the extent desired by the business community. They also argued that nation States, rather than the UN, should enforce human rights.[108] The International Chamber of Commerce and the International Organisation of Employers issued a joint statement opposing the *Norms* and their "legalistic approach". At the same time the US Council for International Business opposed the *Norms* through criticising their vagueness. Senior Vice President, Deal, claimed that the *Norms* create a "legal no man's land".[109] He argued that because the document does not distinguish between binding and non-binding human rights obligations, as some of its principles are drawn from non-binding instruments of human rights, it blurs the line between voluntary and legal actions, thus making "corporate compliance virtually impossible".[110] Kinley and Chambers argue, however, that a certain level of vagueness is not only expected from an international document (as opposed to domestic legislation), but is required in order to create consensus on the international level.[111]

The duties of the TNCs were to increase not just directly, but indirectly as well. Not only might have the *Norms* placed a legal liability upon a corporation that colludes with a State which is a perpetrator of human rights violations, but they also stipulated as a duty for a TNC to 'impose' human rights obligations upon States, even if these States refused to ratify the human rights instruments involved.[112] Backer claims that this reflects the use of mechanisms of 'low level' international governance, meaning international governance that arises "at the level of private law in the municipal systems of sovereign states", which has been a contested issue in the

[108] This view was supported by some of the States that opposed the *Norms*, claiming that the States should be the primary obligor under the *Norms*. Backer at 344
[109] The extreme criticism of the *Norms* by these bodies is of particular interest, in light of the fact that they were invited to participate and did participate in fact to some extent, in the drafting process of the *Norms*. Weissbrodt at 70
[110] Campagna at 1205–1208; Vazquez at 929; Deal
[111] Kinley & Chambers at 466–467
[112] Backer at 371–380; Ruggie at 825–826; Kinley & Chambers at 452, 468–472

field of international relations.[113] As Deva alleges, the *Norms* were too centred on the aspiration to stress the basic universality of human rights, while ignoring operational standards and realities of human rights protection and the regional and cultural differences present.[114]

Perhaps, the best characterization of the approach adopted by the *Norms* was reflected in the eleventh paragraph of the Preamble:

> "Noting that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities".[115]

According to Kinley and Chambers, the second part of this paragraph and the extended responsibility of businesses for the activities of others, such as suppliers, partners, joint ventures and even governments, was one of the most problematic aspects of the *Norms*.[116] The business community utilized the first part of the paragraph and their voluntary desire to self-regulate the limited cases where such violations were happening, to criticise the *Norms*. John Cridland, Deputy Director-General of the Confederation of British Industries (CBI) was quoted to have said "[t]hat leaves business having to blow the whistle on something that aims to subject firms to criticism and liability for abusing human rights. It is quite wrong to suggest that firms are generally involved in widespread abuse of human rights - where is the evidence?"[117]

Another major issue of concern for many corporations were the practical implications of the danger of reparations that the companies will be liable to, in

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[113] Backer at 334
[114] Deva at 511–513
[115] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) UN ESCOR at Preamble, Par. 11
[116] Kinley & Chambers at 448–449; Baxi at 8–9
[117] Kinley & Chambers at 448–449; see also the US response to the Norms RE NOTE VERBALE FROM THE OHCHR OF AUGUST 3, 2004 (GVA 2537), http://www2.ohchr.org/english/issues/globalization/business/docs/us.pdf (last visited Jul 12, 2011)

accordance with the *Norms*.[118] This was particularly worrisome, because as mentioned above, they may be liable not only for the direct actions of the corporation itself, but for the ill-deeds their suppliers, joint ventures and other groups, including governments, from whose activities they benefited.[119]

Campagna argues that the main reason for the general opposition of the business community against the *Norms* was not some perceived flaws in the text of the *Norms*, but rather a substantial flaw in the conceptual framework which business leaders apply to international human rights instruments. She alleges that businesses perceived IHRL as a sole management issue, while in her opinion, only the question of whether to comply with IHRL constituted a management issue, with the more essential question of human rights compliance resembled a legal issue which to decide should not be left to the discretion of businesses.[120] The *Norms* therefore represent a major deviation from the more widely accepted approach of self-regulation which is the preferred approach when governing relations between business and human rights.[121]

Backer regards the *Norms* as going even further in altering the foundations of corporate regulation, by actually transforming the authority in regard to regulating TNCs. The drastic change in the definition of stakeholders that is embedded into the *Norms* alters the foundations of corporate governance and regulation. The theory is that human rights under the *Norms* will enter municipal legal systems and

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[118] The problem of acquiring reparations for human rights abuses by individuals from corporations, is particularly problematic when there is no effective possibility of remedies within the territorial State of the individual and the crime. The possibilities of remedies on an international level are scarce and most point to the American Alien Torts Claims Act. On the ATCA see generally Sascha-Dominik Bachmann, *Human rights litigation against corporations*, 2 JOURNAL OF SOUTH AFRICAN LAW 292-308 (2007); SASCHA-DOMINIK BACHMANN, CIVIL RESPONSIBILITY FOR GROSS HUMAN RIGHTS VIOLATIONS: THE NEED FOR A GLOBAL INSTRUMENT (PULP) (2007); David P Kunstle, *Kadic v. Karadzic: Do Private Individuals have Enforceable Rights and Obligations under the Alien Tort Claims Act*, 6 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 319-346 (1995); Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles Heels in Alien Tort Claims Act Litigation*, SANTA CLARA JOURNAL OF INTERNATIONAL LAW (2010); *Filartiga v. Pena-Irala*, 630 F. 2d, 726 F. 2d, 70 F. 3d, 226 F. 3d, 244 F. Supp. 2d, 542 US But see the *Kiobel v. Royal Dutch Petroleum* decision that claims that corporations as legal entities cannot be subject to ATCA. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d For European attempts to use remedies as a tool in protection of human rights, see Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NORTHWESTERN UNIVERSITY JOURNAL OF INTERNATIONAL HUMAN RIGHTS 327-353, 327 (2008)

[119] Hillemanns at 1078; Kinley & Chambers at 448–449

[120] Campagna at 1229

[121] Rule at 330; Deal; THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS 3, http://www2.ohchr.org/english/issues/globalization/business/docs/uk.doc (last visited Jul 12, 2011)

international law not from above as part of prescribed international treaty law, but rather from below by way of business relations, through private law which will then establish binding rules which in turn will become new customary international law.[122]

The far-reaching character of the *Norms* drew significant opposition from various States as well. Most States expressed strong reservations emphasising the undesired departure from the traditional framework of international law, and stressing the central role of the State as an actor under international law.[123] Backer further points out that many States indicated that they would be unwilling to accept any law regime which had the potential to threaten their monopoly of power to adopt and implement international norms within their territory.

Developing States were concerned that the *Norms* favoured corporate authority over State control when implementing human rights standards in their respective state territory.[124] Another concern was that the *Norms* could reduce incentives for some TNCs to expand their operations in some developing States, thus potentially harming the economic development of these States.[125] In general, unlike Western States, which replied to OHCHR's '*Note Verbale'* regarding the Commission's decision 2004/116 on the *Norms*,[126] by emphasising their general disapproval of the document; the replies of developing States were much more scarce and apart from Cuba, did not relay to the issue of the *Norms* directly.[127] Cuba as an exception supported the *Norms* as a 'welcomed progressive development of international law'.[128]

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[122] Backer at 357–358

[123] But see Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the Other International Organizations in Geneva

[124] Backer at 374–380

[125] Rule at 331; Deal

[126] 2004/116. RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, http://www.i-csr.it/home/index.php?option=com_docman&task=doc_download&gid=12&Itemid=&lang=en (last visited Jul 20, 2011)

[127] NO. 133/04, http://www2.ohchr.org/english/issues/globalization/business/docs/croatia.pdf (last visited Jul 20, 2011); PHILIPPINE INITIATIVES AND STANDARDS RELATING TO THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, http://www2.ohchr.org/english/issues/globalization/business/docs/philippines.pdf (last visited Jul 20, 2011); NO. 346/2004 MMG/HR/3/6, http://www2.ohchr.org/english/issues/globalization/business/docs/mauritius.pdf (last visited Jul 20, 2011); NO.: 20/2004, http://www2.ohchr.org/english/issues/globalization/business/docs/syria.doc (last visited Jul 20, 2011); but see Republica de Cuba - Mision Permanente ante la Oficina de las Naciones Unidas y los Organismos Internacionales con sede en Suiza

[128] NOTA NRO. 461, http://www2.ohchr.org/english/issues/globalization/business/docs/cuba.pdf (last visited Jul 20, 2011)

Western States voiced concern that shifting responsibility for the implementation of human rights standards to corporations would dilute the primary responsibility of States as lawmakers.[129] The United Kingdom argued for a framework containing "a universally accepted collation and clarification of the minimum standards of behaviour expected of companies with regard to human rights".[130] The Australian Government held "the firm view that legal responsibility for the implementation of international human rights standards rests primarily with those States who are party to the standards, not individual businesses. Businesses are obliged to comply with the laws of the countries in which they operate."[131] The Canadian Government recognised that "companies have an important role to play in the promotion and protection of human rights", but emphasised the primary role of the States in this matter. They also expressed several concerns regarding the *Norms*, mainly that they purport to extend existing human rights obligations of States to TNCs; entrust enforcement mechanisms, which may become ineffective, to non-State actors, which in turn can assist States in avoiding their human rights obligations; and change the existing framework of obligations within the framework of international law.[132] The United States went even further by claiming that the *Norms* were not based on existing legal frameworks, that they were "doomed from the outset" and that the international community should rather focus on assisting States to implement their human rights obligations and enforce national law.[133] Moreover, they claimed that the *Norms* represented a significant divergence from the existing frameworks of international law by attempting to establish duties and obligations to non-State actors, while these are applicable solely to States.[134]

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[129] Backer at 376; see f.e. EU REPLY TO THE OHCHR QUESTIONNAIRE ON RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, http://www2.ohchr.org/english/issues/globalization/business/docs/replyfinland.pdf (last visited Jul 12, 2011); The Norwegian Ministry of Foreign Affairs; REPLY OF DENMARK TO THE OHCHR QUESTIONNAIRE ON RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, http://www2.ohchr.org/english/issues/globalization/business/docs/denmark.pdf (last visited Jul 12, 2011)

[130] United Kingdom and Northern Ireland at 4

[131] Australian Permanent Mission to the UN; see also a similar response from Norway The Norwegian Ministry of Foreign Affairs

[132] Permanent Mission of Canada to the Office of the United Nations in Geneva

[133] United States Mission to International Organizations, Geneva, Switzerland

[134] *Id.*; Backer at 377

There was also some anxiety that the *Norms* would make the TNCs both a subject and a source of international law.[135] Of particular interest was the response of the United States, which reiterated their position in the beginning of their response that the *Norms* "have no status – legal or otherwise. Not only was this exercise beyond the mandate of the Sub-Commission – but it was undertaken wholly without consideration for the views of the States." The US also refuted the claim that TNCs are responsible for widespread human rights abuses in countries where they operate, and claimed that this is the result of "action or inaction of States". The US further claimed that international community should focus on promoting and enforcing the rule of law by governments and not on "a drafting exercise geared toward creating 'norms' out of whole cloth."[136]

These adverse views seriously impacted on the views of other UN Member States, when the *Norms* were discussed for adoption by the Commission at its 60th session in 2004: consequently the work on the norms was put on hold. Later, the OHCHR issued a statement thanking the Sub-Commission for drafting of the *Norms* confirming the overall importance of the subject, and at the same time, clarified that the draft proposal had no legal position, and therefore the Sub-Commission should not perform any monitoring functions regarding the *Norms*.[137] Subsequently, the *Norms* were thus effectively abandoned by the Commission on Human Rights in its 61st session in 2005, in line with the approach led by the United States and Australia, whereas the Commission recommended that the UN General Secretary should appoint a Special Representative to review the whole matter of corporations and human rights.[138] Consequently, in July 2005, Harvard Professor John Ruggie was appointed as the Special Representative to the UN Secretary General.[139]

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[135] Backer at 288

[136] United States Mission to International Organizations, Geneva, Switzerland

[137] 2004/116. RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND RELATED BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, http://www.i-csr.it/home/index.php?option=com_docman&task=doc_download&gid=12&Itemid=&lang=en (last visited Jul 20, 2011); David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 HUMAN RIGHTS LAW REVIEW 447-497, 458–459 (2006); Carlos M Vazquez, *Direct vs. Indirect Obligations of Corporations under International Law*, 43 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 927-960, 929 (2005); David Weissbrodt, *Business and Human Rights*, 74 UNIVERSITY OF CINCINNATI LAW REVIEW 55-74, 68–70 (2005); Upendra Baxi, *Market Fundamentalisms: Business Ethics at the Altar of Human Rights*, 5 HUMAN RIGHTS LAW REVIEW 1 -26, 2 (2005)

[138] Backer at 288,331–333; Ruggie at 821; Kinley & Chambers at 449, 459; Martin-Ortega at 281

[139] Ruggie at 821

In their present form, the *Norms* have no binding force in international law. The Sub-Commission which drafted the *Norms* was not mandated (in a position) to create new international law. At present, there is no international treaty which incorporates the *Norms*, nor is there evidence of any evolving state practice indicating the development of customary international law to that effect. Moreover, as mentioned above, the Commission itself stated that the *Norms* should have no legally binding effect. However, restatements of any principles of customary international law that had been codified in the *Norms* retain their force.[140]

6 Conclusion

This article tried to discuss the question of why the Norms failed to win approval by the UN Commission on Human Rights. The paper suggests that the formal abandoning of the *Norms* was caused by a number of factors, which are the effects of the framework of the *Norms*, rather than their substance. These reasons were well represented in the reservations and criticism of States and the business community of the *Norms*. The main criticisms related to subjecting TNCs to direct obligations under international law without the express consent of the States; overstretching of existing human rights instruments by applying them directly on TNCs; the non-voluntary character of the *Norms*; disempowering the States and enlarging the legal role of corporations on their account; vagueness of the *Norms*; and the allegedly ineffective anti-democratic enforcement mechanisms. Therefore, the reasons for the failure of the norms can be generally divided into three groups. Firstly, the novel character and the large scope of new legal concepts within the framework of the *Norms* broke with traditional roles conferred under international law, thus enabling States and businesses organizations to claim that the *Norms* were contrary to the positivist foundations of international law. Secondly, the scope of the *Norms* went too far in blurring the distinction between public and private law legal frameworks, therefore giving room to the argument that the new concepts countermanded the fundamental role of the State as legislator. Finally, the legal vagueness of the *Norms* and the discussed contradictions within the *Norms* helped to object to their eventual endorsement and

[140] Kinley and Chambers believe that the *Norms* are an example of international 'soft law' that may become 'hard law' if there will be enough evidence of State practice and additional evidence of *opinio juris* or if they will be incorporated through unilateral declarations of commitments. Kinley & Chambers at 482–488; Backer at 380–381

led to their eventual dismissal. Some of these crucial norms faults of the *Norms* should be further emphasised. A central issue was the planned degrading of States as the main subjects of international law, by curtailing their legislative sovereignty and authority. Vázquez observes that the *Norms* created a framework, which promoted a factual disempowerment of the States.[141] TNCs and other non-state actors' motivation to comply with the *Norms* may differ or even contradict to the interests of States: business operations may follow different rules than state interests. He also observes that such violations of international law may have a jurisgenerative effect, and therefore we should leave the norms which should still be developed away from any rigid enforcement mechanism and only use such mechanisms with clear norms that are not to be changed.[142]

As mentioned, the *Norms* blurred the line between public and private law, and moved in the direction of transnational law, by elevating the role of TNCs to subjects of international law. In that they went further than other initiatives dealing with the relations of business and human rights. Backer believes that the *Norms* treated the TNCs as subjects of international law, rather than as objects, a significant change which alters the regulatory power from State to non-State actors.[143] This character of the *Norms* was largely resisted by States. The UK submitted a document to the OHCHR stating that

> "[a]ny ongoing process should not seek to place companies in the same position as States with regard to obligations in international human rights law. To avoid confusion of their legal status, texts relating to the responsibilities of business with regard to human rights should not use legally-binding treaty language."[144]

Perhaps the main reason that the *Norms* were opposed so fiercely by a wide coalition was that they 'touched the heart of the matter'. They questioned the very

[141] Generally, all obligations disempower the States, as they limit their sovereignty and freedom of action. In this case, States also lose power as new institutions may be installed to promote compliance with the *Norms*, apart from leaving the issue of compliance to the will of the States (even though at times collective).
[142] Vazquez at 950–952
[143] Backer at 375–376
[144] United Kingdom and Northern Ireland at 3; see also the Australian view that guidelines for CSR should be voluntary and that "the Norms represent a major shift from voluntary adherence Australian Permanent Mission to the UN

essence of the State centred doctrine,[145] through promoting direct legal obligations on TNCs and structuring a role for TNCs that bypasses the States and subjects them to supranational regulation monitored through non-State enforcement mechanism. The *Norms* were different from all other frameworks intended to deal with the issue, they weren't just moderate adjustments of the inefficient system of State regulation of TNCs. They tried to use the international legal framework to establish the basis for private law making. This was an attempt to rejoin the public and private legal systems into a single framework of transnational law, similar to the frameworks that existed prior to the Peace of Westphalia. Such a significant alteration of the framework of international law would represent a crucial divergence of the exclusive, State monopolised international legal system to an inclusive transnational system with various legal subjects. This change was well understood by the (mainly Western) States, which was reflected in their extreme criticism of the project.

One can compare the introduction of the *Norms* into the ruling paradigm of voluntary initiatives that are maintaining the State centred order with an alternative, presented at the time, of what Kuhn relates to as "normal science".[146] This brings us to the wider question posed at the beginning of this paper, as to whether there is a possibility of installing 'hard law' in the framework of international law, to regulate the relations between business and human rights. If we adhere to Kuhn's view, then the situation must become a crisis before there will be a destructive-constructive paradigm change. It seems that reality confirms to this assumption. One of the key objections to the *Norms* was due to it being more than the 'soft law' document that its drafters attempted to present at a certain point. Neither the business community, nor most of the States were ready to accept the creation of binding international law regulating corporations, which does not only bypass the States, but attempts to coerce them from below. This, however, may be the result of the joining of various (over-) ambitious intentions of the *Norms*, and may not necessarily predict the failure of all future 'hard law' initiatives. There are indications that the *Norms* went too far, but they may have suggested an alternative to a problem that may otherwise remain

[145] Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NORTHWESTERN UNIVERSITY JOURNAL OF INTERNATIONAL HUMAN RIGHTS 222-261, 233–235 (2008)

[146] 1 and 2 THOMAS S KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 24 (University of Chicago press Second Enlarged) (1970)

unanswered. Perhaps, like Kuhn would predict, there needs to be a new 'crisis' – an extreme situation that clarifies the failure of the current voluntary and self-regulating frameworks, in order to move ahead to the new paradigm.

One cannot avoid reassessing the value and the meaning of the *Norms* in light of the newly endorsed Guiding Principles and the 'Protect, Respect and Remedy' framework in general. While at first it seems that the *Norms* were an important lesson for the UN Secretary General's Special Representative on Business and Human Rights on the necessity of a document that is accepted by all stakeholders and does not propose a rigid binding framework; a deeper analysis of the Guiding Principles may suggest that the difference between the two documents is more nuanced and even this clear 'soft law' document may lead to a future development 'hard law' regulation, but as opposed to the *Norms* an accepted one.[147]

The question of the failure of the *Norms* should therefore be limited to their formal scope. On the normative scope, the *Norms* may be (at least) a partial success. Despite the failure of not having become binding law, the *Norms* did generate a tangible impact on stakeholders at the non-State level. Investment institutions began applying the *Norms* to persuade companies to improve their social responsibility, NGOs began using the *Norms* as a basis for their advocacy of corporate social responsibility, companies have expressed general support for the *Norms*, while others even began "road-testing" the *Norms.*[148] Perhaps after all, the *Norms* are fulfilling the role designed for them, even if they were not adopted officially. Being the less preferred alternative for the corporations, they have certainly turned out to be one of the fundamental building blocks of the new UN 'Protect, Respect and Remedy' framework. Rule suggests that the *Norms* were designed to stimulate societal change, rather than to become a binding legal document and that it should therefore be read as relating to an ideal structure of *de lege ferenda* as regards the connection between business and human rights.[149] Backer argues that the *Norms* were constructed as to have a certain constitutional dimension on a supra-national level.[150] One can conclude with the words of Baxi, whereas the more successful attempts to legislate were often

[147] UN HUMAN RIGHTS COUNCIL (n 2).
[148] Weissbrodt at 72–73
[149] Rule at 332
[150] Backer at 373

the ones were the original ambitions constituted legal utopias '*de lege ferenda'*, which managed to transform existing legal and factual frameworks altogether.[151]

[151] Baxi at 14–15