

# “PROTECT, RESPECT AND REMEDY” – THE HUMAN RIGHTS PERSPECTIVE OF CORPORATE SOCIAL RESPONSIBILITY

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**Abstract :** India’s mandatory model of corporate social responsibility (CSR) makes it one the most distinct CSR models around the world. The present paper is an effort to understand how Corporate Responsibility in respect of human rights is treated under international law. It seeks to map out the current developments in international law to respond to the effect of Transnational Corporations (TNCs) on the human rights of host states. Part I of the paper deals with the concept of CSR from the perspective of amendment in The Companies Act. Part II outlines of the relationship of TNCs with international law. Part III deals with the current developments in international law against growing apprehension of human rights abuse by TNCs. Part IV concludes the essay with some observation of the author.

**Index terms:** Corporation, Human Rights, Corporate Social Responsibility, International Law, Model

## I. INTRODUCTION

India’s mandatory model of corporate social responsibility (CSR) makes it one the most distinct CSR models around the world.[1] While there are countries that insists on an obligatory “only CSR reporting” model, India’s model is based on an obligatory requirement for Companies to spend 2% of their total profits on social welfare programs.[2] Unique as it is, this model also marks a paradigm shift from the emerging and existing pattern of CSR practices under international law. Indeed, coming as it does from India’s own constitutional commitment towards a welfare state, India’s CSR model marks a converging point for the public and the private sectors to work together towards the common goal of social and economic welfare. In charting out the areas requiring corporate attention, special emphasis has been paid to those issues that are veritable constituents of human rights protection.[3]

India’s CSR initiative marks a significant shift from the traditional understanding human rights protection as states alone. Since the law is in its formative stages it remains to be seen how the law impacts the corporate universe in the coming years. But all things considered, India’s CSR initiative marks a welcome digression from the philanthropic tradition in which CSR had been tied (still tied) until now. Since the passage of the Universal Declaration of Human Rights in 1948, human rights have assumed a reckoning force in all international and national decisions. Issues ranging from climate change to nuclear disarmaments, from global food security to collective security, from refugee crisis to extradition agreements have been significantly influenced by human rights considerations. Today when most of our High tea gossips include copious deliberation on globalization and liberalization, it does not come as a surprise that issues concerning human rights protection also feature on every international deliberation on the impact of globalization. Globalization as understood today serves as a virtual playground for both state and non-state actors to vie for the most lucrative deal in terms of investment for nation states, and lax regulatory mechanisms for corporate entities. The stakes are high and the stakeholders many. At the end when a lucrative deal has been arranged there remains to be asked only one question – so where does human rights feature in all of this?

The present paper is an effort to understand how Corporate Responsibility in respect of human rights is treated under international law. It seeks to map out the current developments in international law to respond to the effect of Transnational Corporations (TNCs) on the human rights of host states. Part I of the paper deals with the concept of CSR from the perspective of amendment in The Companies Act. Part II outlines of the relationship of TNCs with international law. Part III deals with the current developments in international law against growing apprehension of human rights abuse by TNCs. Part IV concludes the essay with some observation of the author.

## II. CORPORATE SOCIAL RESPONSIBILITY V CORPORATE SOCIAL ACCOUNTABILITY

Responsibility as understood under the CSR milieu partakes two conceptual positions. One involves the need to placate social costs that are incidental to the profit making venture of corporate entities. Looked in this way, it simply means asking the corporation to pay back what it has taken from the society. Unfortunately, a lot of what is considered CSR today has a philanthropic dimension to it, more suitably propelled by business morality rather than an obligatory legal framework. The autonomous nature of business entities and the ubiquitous presence of shareholder's claim, provides more than a theoretical impediment to the Company's profits from being obligatorily spent on social causes. In such a situation the least that is expected of corporate entities is to contribute to social causes and to report back the same to the concerned authorities without making it any more obligatory for them to do so. The second conceptual position delineates corporate responsibility in terms of those values that are core to societal well-being. These values constitute recurrent themes on our every-day discourse on human rights, ecological degradation, workplace discrimination, sexual harassment, occupational health and safety, labour standards etc. Responsibility in this sense conveys the ethical idea that core societal norms should be respected and any infraction of such values should be adequately remedied. Understood in this sense responsibility is often understood to mean accountability. Since an effective legal system is conditional for the existence of a tangible accountability regime, most of the present controversy on CSR boils down to the proper extent within which law can interfere with the autonomy of a corporate regime.[4] This is more often the case when off-shore corporate activities in developing countries gives rise to corporate abuse of human rights, environmental rights and flagrant violation of labour standards, workplace conditions and others.[5] A common trend amongst most of the major corporate giants in the world today is to invest in developing economies where besides the low margin of labour wages, the legal apparatus - in terms of adequate laws or proper enforcement - is virtually ineffective.[6] Inevitably, there has been a felt need for evolving a universal consensus to impose obligations on states to ensure that corporations within their jurisdiction (including extra-territorial) abide by certain minimum human rights standards.

## III. WHY DO WE NEED INTERNATIONAL LAW TO REGULATE TNC'S OFF-SHORE ACTIVITIES?

An often repeated allegation against TNCs is that they possess huge economic power and more often than not are known to wield it for political gains or in shaping the course of national and international regulatory framework to protect their own interests.[7] Developing countries try to attract Foreign Direct Investment (FDI) through different policy measures like building of Export Processing Zones, which provide special incentives in the form of flexible labour and environmental standards.[8] While the TNCs benefit from little or no environmental regulations, the rights of people to access to a clean and wholesome environment are denied due to the polluting activities of the corporations. This is not to deny that TNC's have brought enormous benefits. Today, countries around the world compete to attract multinationals; they boast of having a business-friendly environment. Furthermore, foreign capital has poured into developing countries, increasing six fold between 1990 and 1997, before its slowed (and reversed) as a result of the East Asian and global financial crisis.[9] And yet for all the gains that they have brought, TNCs have suffered frequent backlashes for the way in which they have abused human rights and caused environmental degradation in the host territories. The Bhopal disaster is too recent in our memory to ignore the concerns that TNCs brings with

them. In the absence of an effective regulatory mechanism, which is often the case with domestic laws, national regulatory mechanism has proven too weak to counter the tirades of TNCs. This was clearly evident in the Bhopal Gas leak disaster.[10]

These facts together with the inability of the local government to devise regulatory mechanism have put corporations doing business, particularly in the third world countries, in a questionable position. As a direct consequence of the effort to manage the problems generated by the transnational challenges of corporate groups, human rights issue have assumed great significance in the corporate affairs. Under pressure to be more accountable, many corporations have taken up the banner of Corporate Social Responsibility (CSR), adopting various voluntary initiatives. However, there has been little or no call from the international community to devise an international mechanism presenting binding norms for the conduct of corporations nor has much attention been devoted to remedying the presumed shortcomings in the regulatory systems of host countries that thwart effective remedies for these social harms. Instead the international opinion has focused on giving piecemeal remedy by calling for non-binding code of conduct for the corporations.

While it is generally accepted that corporations have a duty to respect human rights in their overall pursuit of making profits, there is no clear consensus on how the content of the duties ought to be framed. Respect in terms of negative human rights, like right to equality, right to liberty, freedom of speech are well documented and would simply involve a duty of non-interference.[11] Looked from this perspective there is nothing appalling in asking TNCs to abide by the duty of non-interference. Moreover, most TNCs would find nothing problematic in abiding by such duties so long their investment goals are fulfilled. But there are other variation of human rights that requires consistent interference from the state machinery in order such rights are atleast the reason for having such rights are realized. Some of these rights go into the roots investment policies and stands in diametrical opposition to investment goals. For example a stringent policy to fair minimum wage is a universally documented human rights, which could work against the investment policy of a TNC, if reluctance to pay fair wages was one of the reasons if had opted for the concerned host state. Most CSR activities contain a plethora of schemes to augment the realization of various human rights. It only remains to be asked as to what extent TNCs can be obligated to augment such realizations.

### III. TRANSNATIONAL CORPORATIONS AS INTERNATIONAL ACTORS

For more than two decades, civil society advocates have been grappling with the formidable challenges created by economic globalization for human rights protection, particularly for marginalized communities and the environment. Increasingly powerful economic actors — such as transnational corporations and development finance institutions — are not held accountable for harms they may directly cause or for abuses linked to their operations. As a result, the violations caused by economic actors have exposed critical gaps in accountability, where protections provided by the international human rights system have not kept pace with the scope and impact of the global economy.[12] A recurring problem in carving out an effective international accountability regime against TNCs boils down to the status of TNCs in international law. The existing human rights regime under international law is state-centric, which means the primary duty of protecting human rights falls upon the state. Thus any incident of human rights violations have to be taken care of by the state machinery, beyond which, atleast theoretically, there is no other remedy. It thus follows that the main channel for addressing the human rights impacts of non-state actors (which includes corporations and international organizations under international law) is through the state duty to protect. It is a positive obligation requiring governments to take action to prevent third parties from violating or undermining human rights. In theory, it calls for government regulation to ensure that business does not violate human rights standards in operations. But as has been the case this often falls short in practice.

As argued elsewhere there exists a huge disincentive for host-states (especially the developing and underdeveloped countries) on insisting on a rigid human rights regime including strict environmental regulations.[13] To do so would mean to lose potential investment opportunities from TNCs. Another disincentive arises when the interests of local elites — who control or influence the host state government — align with those of powerful economic actors rather than the public.[14] At the same time, home states — or countries where the multinational corporation is headquartered — often hesitate to enforce regulations for corporations operating across borders or “extra-territorially” because these types of legal obligations are not clearly defined. If the political environment is hostile to regulation, host state governments may hesitate to enforce. They also may face a disincentive out of concern for prompting corporations to consider moving to a location with a more lax regulatory environment, suffering a loss of jobs and investment. Undoubtedly, it has led to a huge enforcement gap between international human rights law and its enforcement against TNCs, at least at the national level.[15]

On an international scale most of the dispute on human rights protection by TNCs have bordered on the status of TNCs in international law. If nation-states have a positive duty of protecting human rights, it stems out of the fact that states are considered to be a subject of international law. And as far as the definition of legal personalities goes there is no doubt that TNCs are legal personalities. But beyond that there exists an area of uncertainty whether they could actually be classified as subject of international law. J.L. Brierly’s 1963 definition of international law as “the body of rules and principles of actions which are binding upon civilized States in their relations with one another”[16] was representative of the common position at the time he wrote. The overwhelming focus on states has led many scholars and commentators to conclude that international law is law pertaining to states only and that only states are the subjects of international law.[17] This view is quite entrenched and under its extreme version, individuals, MNCs, intergovernmental and non-governmental organizations all interact with the international system, but are objects rather than subjects.[18]

A few international legal scholars, on the other hand, have recognized MNCs as subjects of international law. Some have adopted a *de facto* approach based on their significant participation at the level of international law[19] and on the growing privatization of international law as evidenced by investment law and arbitration.[20] Nowrot has gone further by completely breaking with the positivist view and asserting that a rebuttable presumption exists according to which MNCs are subjects of international law unless states and international organizations express the contrary in a legally binding form.[21] Others have left the question open,[22] sometimes adding that there is no legal impediment to their ascension in the canon of the subjects of international law.[23]

There are other scholars who have sought to break the impasse by suggesting alternative approaches that goes beyond the unceasing rigmarole of the “subject – object” debate. Higgins for example suggests that international law is a dynamic decision-making process in which no subjects and objects exist, but only a variety of participants, including TNCs.[24] In a similar vein other scholars Klabbers has ascribed a merely descriptive and normatively empty value to the concept of international legal subjectivity.[25] He concludes that ‘personality is by no means a threshold which must be crossed before an entity can participate in international legal relations; instead, once an entity does participate, it may be usefully described as having a degree of international legal personality’.[26]

#### IV. ACCOUNTABILITY OF TNCs UNDER INTERNATIONAL LAW

The state-centric nature of international law proceeds under the assumption that since it is the duty of nation-states to protect human rights, therefore any accountability of TNCs in terms of human rights abuses should follow from the municipal courts under domestic legislations. Ofcourse, this dictum made sense so long human rights protection was the sole prerogative of nation-

sates. The rapid strides which globalization has made today and the corresponding enthusiasm by which it has been embraced by nation-states have forced the need for a more collateral initiative from TNCs as far as human rights protection is concerned. This is the case as seen from the present socio-economic perspective of India's constitution. The role of the State as contemplated under the Constitution involved much of what has been traditionally referred to as welfare functions. Thus beyond the paradigm of traditional state functions like maintaining law and order and national security, the state was constitutionally obligated to provide for health care, free schooling, food security, employment, transportation, communication and the likes within its capacity. To go with it the, socialistic pattern of the Indian economy made it the prerogative of the state to ensure that the constitutional goals as contemplated under the Directive principles were fulfilled. In addition to that there was the added necessity to ensure that in carrying out its functions that the state did not infringe on the fundamental rights of its people. It is no wonder therefore that a part of India's socio-economic structure has taken up in determining the definition of state as provided under Article 12 of the constitution. It is neither feasible nor necessary to delve into that particular portion of India's constitutional history; but suffice to say that the traditional notion of state has secured by the decisions of the Supreme Court has undergone a sea change, more so after India opened its market for foreign investments.[27] Today all those functions that were considered to be the traditional functions of the state are performed by corporations, both domestic and international, and there is a growing demand to ensure that in vesting its traditional function to private enterprises the state does not escape from its fundamental role of protecting the fundamental rights.[28] Thus, a major portion of constitutional debate in India focuses on the question whether non-state actors – which seemingly perform the same function as the state – can be defined as state under the Indian Constitution.

Most of the human rights regimen in international law focuses on the “no interference” paradigm of human rights protection. Ofcourse any interference amounting to abuse under international standard would immediately entail liability. The only problem is that rather than being enforced by an institutional mechanism under international law, the burden lies on the concerned state to enforce liability. In the absence of any binding international obligations, the accountability facet of CSR falls flat on its face. As discussed earlier there are certain categories of human rights that need a positive interference from the state if those rights have to have any meaning at all. Right to education may mean nothing if the state is unwilling to provide any education at all. It is in this context that international law is found wanting the most. The lack of international understanding, in the form of clear guidelines if not mandatory obligation, is the most confounding. Most CSR schemes constitute all such initiatives aimed at enhancing human rights. But as is the case with international law there is hardly any country in the world which has made CSR spending mandatory on corporate entities.

## V. HUMAN RIGHTS INSTRUMENTS VIS A VIS TRANSNATIONAL CORPORATIONS

TNCs can directly impact human rights in the societies they operate in, e.g. by employing children or forced workers, by operating on the territories of indigenous people without their consent, by using discriminatory recruitment policies, or by damaging the environment and thus endangering the life and health of people. They can also indirectly cause harm if they create incentives for state authorities to violate human rights for business purposes or if they support regimes engaged in human rights violations by providing infrastructure, financial means, or international credibility [29]. The Universal Declaration of Human Rights (UDHR) states that ‘every organ of society’ – a term which possibly includes TNCs[30]– ‘shall strive by teaching and education to promote respect for these rights and freedoms’. However, this statement is only contained in the preamble, which has not hardened into customary international law.[31] For the ICCPR, the Human Rights Committee has explicitly stated that it does not have direct horizontal effect,[32] while the Committee on Economic, Social and Cultural Rights observed with regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR) that ‘private enterprises [are] not bound by the Covenant’.[33] Art. 1 of the ECHR binds only the ‘high contracting parties [to] secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention’.

For all its hallowed status as a sacred document of human rights protection, UDHR is non-binding in nature, imposing no positive duty on nation states to abide by its strictures. The Covenants may be binding in nature but it hardly addresses issues relating to business entities let alone their accountability for violation of international human rights. In any case the obligation arising out of the Covenants are binding on nation-states only. It does not come as a surprise therefore, that the lack of binding obligations for TNCs under international law has been a subject matter of considerable criticism.

A different but not completely unrelated issue is the perceived protection gap that comes with entitling states with the sole power of protecting human rights.[34] First, because of the uneven status of recognition of human rights instruments in the various jurisdictions; second, because of their disparate enforcement, which is closely connected to the strength of the domestic legal system and the dependence on foreign investment of the respective states.[35] Another major ground for criticism is the 'governance gap',[36] which results from the discrepancy between the power of MNCs to severely harm human rights and the inability of domestic legislators to take effective measures in this respect. Some legal scholars have also criticized the one sidedness of international human rights law which grants MNCs significant rights and benefits without holding them liable for abuses.[37] There are, however, not only concerns about the effective protection of human rights norms. Commentators have

Many international covenants attach direct or indirect obligations on the states to control activities of private entities, in order to fulfill their duties towards their citizens in upholding their human rights. These obligations are sometimes expressly enunciated like Article 2(e) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), where states are mandated to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; or are inferred indirectly from the general obligatory clauses of International Covenants like Article 2(1) of International Covenant on Civil and Political Rights (ICCPR) which requires States to protect people from human rights abuses by other people. The duty of States to give effect to human rights between private parties has also been confirmed in a number of cases in various international fora. In the cases *Awastingni Community v Nicaragua*,[38] and *Social and Economic Rights Action Center v Nigeria*,<sup>26</sup> violations of human rights were entailed in a state's failure to prevent human rights abuses by corporations. Thus, it can be argued that the international treaty law jurisprudence not only recognizes it to be the prerogative of a State to respect human rights of its people but also its responsibility to prevent human rights abuses by any other private entity.

Various approaches have been proposed to hold companies accountable under international human rights law. It has been argued that MNCs should incur direct liability for human rights abuses.[39] One of the initiatives to this effect was the drafting of the UN Draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. However, fears of diluting the responsibilities of states and undermining their authority as well as the inapplicability of many human rights norms to private actors have effectively hindered the success of this approach. Others have advocated the imposition of aiding and abetting liability on MNCs for their complicity in human rights violations. The ensuing questions of *mens rea* and attribution have not yet been satisfactorily answered.[40] In light of the considerable resistance at the political, legal, and business level to impose binding human rights obligations on MNCs, a host of non-binding 'soft law' instruments has seen the light of day, which seeks to set certain human rights standards for MNCs. They have been lauded as a 'step in the right direction'[41] and are sometimes regarded as a precursor for binding rules. Critics, however, consider them inadequate to effectively protect human rights and ensure legal certainty for the private sector.[42] It has been argued that this 'illusion of regulation' may be 'worse than no regulation at all'.[43]

## VI. INTERNATIONAL REGULATORY REGIME FOR CORPORATIONS

Several international and national bodies, as well as private corporations themselves, have enacted or attempted to enact schemes for regulating the activities of these MNCs. As the report of human rights abuses became frequent, human rights NGOs, International organizations and national governments turned their attention to contain these abuses and hold MNCs accountable for violations. A range of options have been proposed, from developing national laws to establish international and regional treaties or guidelines. In addition, some kind of arrangements in form of voluntary non-binding codes has been suggested such as individual codes of conduct.

## VII. CORPORATE CODE OF CONDUCT

The “Code of Conduct” is a written policy or kind of statement of principles, intended to serve as the basis for a commitment to particular enterprise conduct. These codes have been developed on the model framework by organizations such as ILO and OECD. It is interesting to note that the code arrangements of both the organization is characterized as voluntarily arrangements and sets out a range of non-binding commitments. MNCs usually enter in to a code varying it with suitable need of national laws and international standards. The content of the code also vary depending upon the sector in which the corporation is engaged. The OECD has identified eight broad areas of conduct to be covered under the code. Among these labour rights, environmental standards, consumer protection, information disclosure are some of the notable entries. These codes have become popular among corporations for several reasons. Firstly, codes provide corporations with a convenient possibility of assuring their stakeholders and the public in general that their business is conducted in an ethical and socially responsible fashion. Moreover, proponents of voluntary codes of conduct argue that there is no need for external corporate regulation by governments, since labor, environmental and other human rights standards can be secured by corporations themselves.[44] They also argue that codes of conduct are a more adaptable and less expensive way of regulation since no monitoring institutions need to be established.

Unfortunately, voluntary codes of conduct suffer from many imperfections. Such codes usually include only vague statements, lack transparency and an effective enforcement mechanism.[45] Companies are not willing to be exposed to independent external monitoring procedures that would ensure their compliance to the codes.[46] Because of their voluntary character, there is no guarantee that the codes will always be followed in practice.[47] Additionally, companies usually implement codes of conduct only under public pressure to make an impression of a socially responsible business.[47] Also, restrictions are imposed only on the corporations that adopt a voluntary code of conduct and put it into practice.[48] Therefore, these corporations might assume that they place themselves at a competitive disadvantage in comparison to other corporations that do not adopt their own corporate codes of conduct.[49] To eliminate the most obvious disadvantages, companies sometimes perform monitoring procedures by third parties like public accounting firms.[50] Unfortunately, the monitoring that is performed by these firms does not prove to be very efficient either, since audit reports usually do not have to be published. Also, there is a possibility that the monitoring firms might not be strict enough because of dealing with corporations that are their permanent clients, and therefore their significant financial source.[51] Thus, the more efficient alternative way is to involve NGOs in monitoring procedures.[52]

## VIII. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

Neither industry based initiatives, such as individual corporate codes, nor multilateral initiatives, such as the Global Compact[53], involve the kind of concrete obligations that human rights, environmental, labour and other advocates believe are necessary to restrain effectively corporate misbehavior. To the dismay of activists and the satisfaction of many TNCs, a proliferation of codes, networks and standards has been helping to improve corporate reputations, while effectively keeping any

discussion of effective international regulatory measures off the agenda. The arrival of the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises (Norms)[54] on the international scene in 2003 provided some ground for believing that this status quo might be challenged. Drafted by a working group under the UN Sub-Commission on the Promotion and Protection of Human Rights and adopted in 2003 in the form of a resolution by the latter, they were rejected by the United Nations Commission on Human Rights (CHR), which stated in unequivocal terms that the draft had ‘not been requested’ and had ‘no legal standing’[55].

The Draft Norms were an innovative initiative insofar as they sought to directly apply human rights rules to MNCs, elevating them to full-fledged duty bearers under international human rights law.[60] Even though the primary responsibility of states was recognised, MNCs were obliged to ‘promote, secure the fulfilment of, respect, ensure respect of and protect’[61] a broad range of human rights. Implementation measures included the adoption, dissemination, and implementation of internal rules of operation, periodic reporting duties as well as monitoring and verification by the UN.[62] However, the Draft Norms have been criticised for simply imposing on MNCs human rights instruments which are addressed to states.[63] Apart from the questionable legal basis for this move and ensuing practical difficulties, it was also feared that such an approach might result in a dilution of state responsibility and a weakening of sovereignty. Extensive criticism led to the abandonment of the project and to the readjustment of international efforts.

After the failure of the Draft Norms, the CHR established the mandate of a Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG), tasked with identifying and clarifying existing standards and practices.[64] The Secretary General appointed John Ruggie, one of the authors of the Global Compact and influential critic of the Draft Norms. In the first phase of his mandate (2005-2007), the SRSG conducted an extensive mapping of international standards and practices which then served as the basis for the formulation of recommendations during the second phase (2007-2008). He developed a three pillar framework, consisting of (1) the state duty to respect, protect and fulfill human rights, (2) the corporate responsibility to respect human rights, and (3) the need for effective remedy for victims of human rights abuses (‘Protect, Respect and Remedy Framework’ or ‘Ruggie Framework’).[65] In the last phase (2008-2011), he elaborated specific recommendations for the implementation of the Framework, resulting in the development of the *Guiding Principles on Business and Human Rights* which were endorsed by the Human Rights Council (HRC) on 16 June 2011.

## **IX. THE RUGGIE PILLARS -PROTECT, RESPECT AND REMEDY**

The first pillar of the Ruggie Framework highlights that states are the primary duty bearers under international human rights law. It is their obligation to respect and fulfill human rights and to protect them against abuses, including those committed by MNCs. This requires states among other to enact, assess, and enforce human rights legislation, to ensure policy coherence, to provide guidance on human rights issues to companies – especially to those operating in conflict zones – and to promote respect for human rights by business partners.

The second pillar focuses on the responsibility of business entities to respect all internationally recognised human rights, which requires them to “avoid causing or contributing to adverse human rights impacts [...] and address such impacts when they occur” and to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships”.[66] The responsibility of companies thereby differs significantly from the obligations of

states. Whereas states have comprehensive duties to respect, protect and fulfil human rights, companies are merely responsible for ensuring that they do not abuse the human rights of others. The Guiding Principles recommend them to adopt “(a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute”.[67] Rejecting previous efforts to compile lists of human rights which are applicable to companies, the SRSB stated that “business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights” and concluded that their “responsibility to respect applies to all such rights”.

The third pillar recognizes the importance of effective access to remedy for the victims of human rights abuses, identifying responsibilities for both states and businesses. States should ensure the effectiveness of judicial grievance mechanisms and provide access to non-judicial and non-state-based grievance mechanisms. Businesses should establish or participate in the latter and ensure that their collaborative voluntary human rights initiatives provide for dispute settlement procedures.

The result has led both to praise and criticism. Supporters have lauded the open consultative process for successfully creating awareness for the problem and appreciated the clear demarcation between state obligations and corporate responsibilities. The business world, which has consistently rallied against the imposition of binding human rights obligations and was starkly opposed to the Draft Norms, welcomed the Guiding Principles. NGOs, on the other hand, have generally been more supportive of the Draft Norms and criticized the ‘regressive’ approach of the Guidelines to attribute merely non-binding responsibilities to companies. Critics also deplored the preference of process over substance, referring to the failure of the Guiding Principles to establish a clear normative framework as a reference point against which the human rights performance of the business entity can be measured.

## X. THE GLOBAL COMPACT

The Global Compact is a ‘soft law’ policy initiative for businesses which voluntarily commit to respect and support ten principles in the areas of human rights, labour, the environment, and anti-corruption, derived from the UDHR, the ILO’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention Against Corruption. The Global Compact was announced by UN Secretary-General Kofi Annan in 1999 and was officially launched in 2000. Today it counts more than 10,000 participants from over 130 countries, making it the largest non-binding corporate responsibility initiative world-wide. Companies have to submit an annual report on the implementation of the ten principles, which, however, is not subject to any review mechanism and has consequently been labeled a mere ‘public relations exercise’. Supporters have lauded its contribution to raising awareness for the underlying issues; however, critics decry the lack of monitoring and audit, both for potential and current candidates.

## XI. CONCLUSION

It is no doubt that most of the focus of CSR in international law has been mostly engaged in shaping the contours of corporate behavior towards environment and human rights. While there still no consensus on any binding principles of corporate behavior, the consequent spillover has given rise to a number of soft law formulations, making its appearance in the form of guidelines and directions. For one, it is the view of the author that the “protect, respect and remedy” pillars as framed under the Ruggie framework adds the required momentum in crystalizing soft law norms on CSR into hard law. The Ruggie framework as it exists at the moment is a comparatively good alternative to a binding legal instrument; thus efforts should be made that the new mechanism acts independent of any pressure or influence of the TNCs, states or any other agency. It should have transparent and

simple procedural requirements, which ought to be publicly available for the participation by all members of the society. Professionalism and fairness should be the other principles based on which the mechanism would be expected to function effectively. The mechanism should not replace the continued application of national and international law by domestic courts.

The other alternative until the binding regime comes into existence is for states to assert for an intense regulatory regime to control corporate behavior. It is often alleged that putting the burden on economic actors to protect human rights will lead to privatization of human rights.[68] But the argument misses the wood for the trees. If by a binding human rights regime corporate entities are mandatorily asked to pay a miniscule percentage of their earnings to human rights protection this would hardly lead to any case of privatization of human rights. In any case, most of the countries have made CSR reporting mandatory, which is an indirect way of asking them to contribute their profits for CSR purposes. A fine example in point would be India's own CSR policy. But even if it is accepted that human rights would be privatized, why should anyone object if such privatization ultimately leads to adequate protection of human rights. The truth is once a state opens itself to globalization the distinction between public and private functions no longer stands. If corporate decisions in such a situation have human right repercussions, it is inevitable. The bottom-line is to ensure that such repercussion, if it amounts to abuse of human rights, can be adequately remedied in the local courts. This is also the rationale that informs the Ruggie Framework of corporate behavior.

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[1] Sec 135 of The Companies Act 2013 (hereinafter the Act)

[2] Ibid 135 (2)

[3] Schedule VII of the Act gives prescriptive channels for undertaking the CSR activities. Among others, it includes activities involved in dealing with issues of eradicating extreme hunger and poverty; promotion of education, gender equality, and women empowerment; reducing child mortality and improving maternal health; efforts geared towards eradication of malaria, HIV, AIDS, and other diseases; projects related to ensuring environmental sustainability, development of vocational skills, and social business projects.

[4] This line of argument was propose put forward by noted economist Milton Freidman in his book capitalism and Freedom, as noted in Corporate Social Responsibility Frank Lopez in Global Economy after September 11: Profits, Freedom and Human Rights, 55 Mercer L. Rev., 739

[5] David Kinley *et al* "The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations", (2007) 25 C&SLJ 30 available at [www.law.usyd.edu.au/scil](http://www.law.usyd.edu.au/scil)

[6] B Hepple, 'The importance of Law, Guidelines and Codes of Conduct in monitoring corporate behaviour' in Corporate Code of Conduct, McLeay, Transnational Corporations and Human Rights, Schutter O, ed; 2006, p. 220

[7] Id

[8] CHU YUN JULIANA NAM, COMPETING FOR FDI THROUGH THE CREATION OF EXPORT PROCESSING ZONES: THE IMPACT ON HUMAN RIGHTS 163 (Olivier De Scutter ed., 2006).

[9] UNCTAD provides data on FDI flows to developing countries. In constant value terms (U.S. \$2,000), net FDI flows to developing countries (inflows less outflows) in 1990 were \$29.2 billion. This rose to \$163.3 billion in 1999, an increase of 5.6 times. Net flows remained below this level until 2005. Since then they have increased to \$176.9 billion, an increase of eight percent from 1999 levels.

[10] The litigation to claim compensation for the victims was not only long but also took place in various forums in India and America. Starting from 1985, when the matter was filed in a US District Court of New York from where it was sent back to India on the grounds of forum non conveniens (inconvenient forum). The matter was transferred to the Bhopal District Court, which allowed a payment of US \$ 270 million to the victims. The decision was appealed to by the defendants in the Bhopal High Court. While the matter was still pending a subsequent intervention of the Supreme Court led to the matter being settled out of court for US \$ 470 million in Feb 1984.

[11] Human rights have been classified under three categories. A) Negative Rights (First Generation Rights) – which basically contains all civil and political rights. By its very nature the responsibility of the state towards such rights is limited to “non-interference. B) Positive Rights (Second Generation Rights) – includes all such rights which are referred to as social and cultural rights. Almost all social and cultural rights involve a positive interference from the state for its enjoyment. C) Collective Rights (Third Generation Rights) – these rights include all those human rights which are exercisable by a group of individuals together. e.g. Right to Environment

[12] See generally, Daria Caliguire, *Advancing Human Rights Accountability for Economic Actors*, The SAGE Fund – Strengthening Accountability in the Global Economy JANUARY 2015

[13] Daria supra note 12 at 13-14

[14] Id

[15] Id. Also see Carolin Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, 4 German Law Journal No. 10 (1 October 2003) – European & International Law

[16] J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 1 (Sir Humphrey Waldock ed., 6th ed. 1963). See also *INTERNATIONAL LAW: TEACHING AND PRACTICE* 516 (Bin Cheng ed. 1982) (stating that “the international legal system is still basically a legal system established and maintained by States to regulate their mutual relationships”).

[17] L. OPPENHEIM, *INTERNATIONAL LAW* (2d ed. 1912). Also see Karsten Nowrot, ‘Reconceptualising International Legal Personality of Influential Non-State Actors: towards a Rebuttable Presumption of Normative Responsibilities’ in John Fleurs (ed), *International Legal Personality* (Ashgate 2010) 369, 372.

[18] See Jessup, *supra* note 1, at 383 (“International law is generally defined or described as law applicable to relations between states. States are said to be the subjects of international law and individuals only its ‘objects.’”).

[19] David Adedayo Jalaye, *The Extension of Corporate Personality in International Law* (Oceana 1978) 244 f;

[20] Nicolás Zambrana Tévar, ‘Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations’ (2012) 4 Cuadernos de Derecho Transnacional 398, 400.

[21] Karsten Nowrot, ‘Reconceptualising International Legal Personality of Influential Non-State Actors: towards a Rebuttable Presumption of Normative Responsibilities’ in John Fleurs (ed), *International Legal Personality* (Ashgate 2010) 369, 372.

[22] Malcolm Shaw, *International Law* (6th edn, CUP 2008) 250;

[23] Id

[24] RoJan Klabbers, *An Introduction to International Institutional Law* (2nd ed, CUP 2009) 52.

[25] Id

[26] The definition of state under Art 12 includes a) the Union Parliament and State Legislature b) Union and State Executive c) Local Authorities and d) Other Authorities. salyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 49

[27] The interpretation of other authorities have been led the Supreme Court to lay down several guidelines over the years. A most favored test is known as the instrumentality test, in which an entity would be state if it performs any such functions which were being performed by the state.

[28] Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, p. 228 6 Nw. J. Int'l Hum. Rts. 222 (2008), accessible at <http://scholarlycommons.law.northwestern.edu/njihr/vol6/iss2/2>

[29] Peter Muchlinski, 'Corporations in International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2010).

[30] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2007) UN Doc A/HRC/4/35 para 38.

[31] UN Human Rights Committee, General Comment No 31 (n 63) para 8

[32] CESCR, General Comment No 18, 'The Right to Work – Art. 6' (2006) UN Doc E/C.12/GC/18 para 52

[33] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (n 83) para 84.

[34] John Ruggie, 'Prepared Remarks at Clifford Chance' (2007) 4, <[www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf](http://www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-19-Feb-2007.pdf)> accessed 5 December 2013

[35] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2008) UN Doc A/HRC/8/5 para 3.

[36] Anna Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7 Human Rights Law Review 511, 514; Pentikäinen (n 37) 149.

[37] *Awas Tingni Community v Nicaragua* case no 79, Intern-Am CHR (Judgment of the Inter-American Court of Human Rights of 31 August 2001),

[38] See Merja Pentikäinen, 'Changing International "Subjectivity" and Rights and Obligations under International Law – Status of Corporations' (2012) 8 Utrecht Law Review 145, 153.

[39] Jena Martin Amerson, 'What's in a Name? Transnational Corporations as Bystanders under International Law' (2011) 85 St. John's Law Review 1, 36.

[40] Adam Walczak, 'Coming to the Table: Why Corporations Should Advocate for Legal Norms for the Protection of Indigenous Rights' (2010) 42 The George Washington International Law Review 623, 649 ff.

[41] *Id* 643

[42] Simon Chesterman, 'Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones' (2010/2011) 11 Chicago Journal of International Law 321, 327

[43] *Ibid* at 341

[44] S. PRAKASH SETHI, *SETTING GLOBAL STANDARDS, GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS* 58-59 (2003);

[45] *Id*

[46] Ryan P. Toftoy, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?*, 15 ARIZ. J. INT'L & COMP. L. 905, 906 (1998).

[47] See, e.g., *Transnational Corporations: Impediments or Catalysts of Social Development?*, *supra*note 18; James A. Paul & Jason Garred, *Making Corporations Accountable, A Background Paper for the United Nations Financing for Development Process*, Global Policy Forum, Dec. 2000, available at <<http://globalpolicy.igc.org/socecon/ffd/2000papr.htm>>.

[48] *Id*

[49] *Id*

[50] Toftoy, *supra*note 36, at 923;

[51] *Id*

[52] UNCHR Res 116 (2004) UN Doc E/CN.4/2004/L.11/Add.7.

[53] UNCHR Res 116 (2004) UN Doc E/CN.4/2004/L.11/Add.7.

[54] Jena Martin Amerson, 'What's in a Name? Transnational Corporations as Bystanders under International Law' (2011) 85 St. John's Law Review 1, 36.

[55] Id

[56] Draft Norms para 1

[57] Ibid paras 15 and 16.

[58] Chesterman, supra 44 at 327

[59] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2011) UN Doc A/HRC/17/31, para 13.

[60] UNGA Third Committee (65th session) 'Statement by Professor John Ruggie: Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (26 October 2010) 1, <[www.businesshumanrights.org/media/documents/ruggie-statement-to-un-gen-assembly-26-oct-2010.pdf](http://www.businesshumanrights.org/media/documents/ruggie-statement-to-un-gen-assembly-26-oct-2010.pdf)> accessed 5 December 2013.,

[61] UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2011) UN Doc A/HRC/17/31, para 13

[62] Ibid para 15.

[63] Ibi<sup>1</sup>Jan Wouters and Nicolas Hachez, *Business and Human Rights in EU External Relations. Making the EU a Leader at Home and Internationally* (2009) Study for the European Parliament, Directorate-General for External Policies of the Union, Directorate B – Policy Department, EXPO/B/DROI/2009/2, PE407.014, para 29ff, <<http://www.europarl.europa.eu/document/activities/cont/200904/20090430ATT54804/20090430ATT54804EN.pdf>> accessed 5 December 2017.

[64] Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' (2011) <[www.fidh.org/IMG/pdf/Joint\\_CS0\\_Statement\\_on\\_GPs.pdf](http://www.fidh.org/IMG/pdf/Joint_CS0_Statement_on_GPs.pdf)> accessed 5 December 2017.

[65] Rory Sullivan and Nicolas Hachez, 'Human Rights Norms for Business: The Missing Piece of the Ruggie Jigsaw – The Case of Institutional Investors' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Nijhoff 2012) 217, 227 ff.

[66] Overview of the UN Global Compact' (22 April 2013) at [www.unglobalcompact.org/AboutTheGC/index.html](http://www.unglobalcompact.org/AboutTheGC/index.html)

[67] Id para 12

[68] Kinley supra note 5 at 36