

# **CORPORATE HUMAN RIGHTS ACCOUNTABILITY AND THE HUMAN RIGHT TO DEVELOPMENT: THE RELEVANCE AND ROLE OF CORPORATE SOCIAL RESPONSIBILITY**

*Dr. Clarence J. Dias\**

*By employing a human rights perspective, this paper focuses on Corporate Social Responsibility ('CSR') and its impact and relevance in the globalized, commercialized world. The discussion around CSR takes into consideration three important developments: enormous growth of corporate power (without commensurate accountability), a paradigm shift in the nature of development and emerging claims from victims of corporate activities. The paper responds to these considerations by concluding that CSR has been the preferred model for achieving corporate accountability. The right to development against corporations has also impacted the functioning of corporations and the evolving nature of CSR. The paper also discusses recent examples of measures aimed at protecting victims from corporate activities.\*\**

## **I. FOCUS AND BACKGROUND**

This paper focuses on CSR through the prism of the paradigm and practice of universal human rights as the latter have evolved internationally under the auspices of the United Nations ('UN') over the past 60 years. It does so in response to three major global developments and trends over the past two decades. *First*, there has been an increasing, and now enormous growth of corporate power without a commensurate, accompanying growth of corporate accountability. *Second*, there has been a so-called paradigm shift from development through aid to development through trade and investment- a shift that calls upon corporations to become the key (some would say prime) vehicles of development. *Third*, there has been a growing clamour from the "victims" of corporate activities who have had to bear the brunt of the adverse impacts of corporate activity, economic, social, cultural, civil and political.

This paper also presents an initial examination and assessment of three of the major responses to the above-mentioned three trends and developments- (1) the emergence and present boom in corporate and industry voluntary

\* President, International Center for Law in Development.

\*\* Abstract supplied by the Editors.

initiatives exemplified by CSR as their preferred approach to the issue of corporate accountability; (2) the now 25 year old experience, internationally and nationally, at recognizing, elaborating and implementing the human right to development; especially in relation to corporations as a vehicle for development; and (3) recent attempts at establishing a right to protection for the victims of gross human rights abuses and violations with related duties to protect and related mechanisms to prevent, address and redress such gross human rights abuses and violations.

Finally, the paper poses the basic (hopefully not rhetorical) question, “What is the relevance and role of CSR in respect of the above?”

## II. THREE TRENDS AND DEVELOPMENTS

### A. *THE PHENOMENAL GROWTH OF CORPORATE POWER*

Public interest about corporate, environmental and social responsibility and its role in creating a sustainable economy has developed over the past 25 years. In 1970, there were only 7,000 transnational corporations (TNCs). By 1994 there were 37,000 TNCs with over 200,000 globally spread affiliates.<sup>1</sup> Furthermore, there exist hundreds of thousands of non-equity links such as subcontracts, licensing agreements and strategic alliances between parent companies and foreign entities.<sup>2</sup>

TNCs have been expanding numerically, geographically and financially. Between 1980 and 1992, TNC sales skyrocketed from \$ 2.4 trillion to \$ 5.5 trillion.<sup>3</sup> Currently one-third of all global trade is composed merely of financial transactions within the same TNC.<sup>4</sup> TNCs affect 86 percent of the world's land that is cultivated for export crops, control over 60 percent of aluminium mining and sell 90 percent of the world's agrochemical products.<sup>5</sup> Some TNCs are more financially powerful than national economies. For example, the annual sales of the Royal Dutch/Shell Group Oil Company are twice New Zealand's gross domestic product ('GDP'); annual sales of the British tobacco company, BAT Industries, are equivalent to the GDP of Hungary; the German electronics firm, Siemens AG, has annual sales that exceed the combined GDP

<sup>1</sup> ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 2 (Karl P. Sauvant, Kumiko Matsuura & Joachim W. Muller eds., 1994).

<sup>2</sup> United Nations Centre on Transnational Corporations, *The Universe of Transnational Corporations*, 4 (E/C.10/1993/11, 1993c).

<sup>3</sup> United Nations Centre on Transnational Corporations, *Growth in Foreign Direct Investments in the 1980s: Trend or Bulge?*, 24 (E/C.10/1993/3, 1993a).

<sup>4</sup> United Nations Centre on Transnational Corporations, *Trends in Foreign Direct Investment*, 8 (E/C.10/1993/2, 1993b).

<sup>5</sup> United Nations Centre on Transnational Corporations, *Transnational Corporations and Issues Relating to the Environment*, 4 (E/C.10/1991/3, 1991).

of Chile, Costa Rica and Ecuador; and the annual sales of both General Motors and Mitsubishi are more than double the GDP of Hong Kong or Israel.<sup>6</sup>

The fall of the Soviet empire, the decline of social welfare programs in several countries, the predominance of a free market ideology, the increasing mobility of capital as well as the growth of international and bilateral trade agreements have expanded the powers and privileges of TNCs, while minimizing their social responsibilities. This changing environment is particularly notable in many developing countries where governments, once extremely suspicious of foreign corporations, are now exerting every effort to attract TNCs. Proponents of TNCs argue that these entities advance social goals by providing jobs, paying taxes used for social programs, building an industrial base, earning foreign exchange, transferring technology, raising living standards and contributing to charitable causes. On the other hand, advocates of enhanced corporate responsibility note that TNCs have been linked to interference in sovereign affairs, continued disparities in wealth, poor workplace conditions, corruption, transfer pricing policies, and a descent to “the lowest common denominator” of human rights, labour, consumer and environmental standards.

As a result of a couple of decades of economic globalization, TNCs are currently witnessing an unprecedented expansion in their privileges and rights. Such an expansion has occurred both on the international level, through multilateral trade agreements and bilateral investment treaties, and on the national level, through privatization efforts and weakened government regulation.

## *B. THE PARADIGM SHIFT IN DEVELOPMENT*

The World Summit on Social Development at Copenhagen (1995) marked a paradigm shift from development through aid, to development through trade and investment. This paradigm shift heralded a key role for corporations (national and transnational) as “vehicles for social development”. Critics of this shift caution that it would be both extremely fortuitous and rare that a perfect, or indeed even workable fit could be found between the national development priorities of a country and its peoples on the one hand and the priorities of a corporation, especially the global priorities of a TNC, on the other hand.

Endeavouring to strike a balance, the Copenhagen Declaration and Programme of Action of the World Summit on Social Development added three core elements to what it termed as “the global consensus on development”:

---

<sup>6</sup> GLOBAL COMPANY HANDBOOK, Vol. 1 (1993); United Nations Development Programme (UNDP), *Human Development Report* (1994).

1. The role of the State in development must be one of providing an enabling environment for sustainable social development. This was elaborated in detail in Commitment I of the Copenhagen Declaration and Programme of Action.
2. The role of the corporation and the private sector as a key vehicle for social development is clearly recognized.
3. The role of Non Governmental Organizations ('NGOs') and civil society as key participants and protagonists in social development is similarly recognized.

The Copenhagen formula thus envisaged a balanced tripartite relationship between corporations; communities; NGOs and civil society; and the State. Two decades of untrammelled economic globalization, however, have created significant imbalances in this tripartite relationship and this paper explores ways of restoring the balance.

### *C. THE "VICTIMS" OF CORPORATE SOCIAL DEVELOPMENT*

The United Nations Development Program ('UNDP') has developed a Human Development Index ('HDI') which has been duly gender-sensitized as well with a Gender Development Index ('GDI') which they apply in each of their annual Human Development Reports. The HDI has enumerated various indicators of social development, including infant mortality rates, access to safe water, educational attainment, longevity rates, standards of living and purchasing power.

TNCs have had, at best, only moderate positive effects on many of UNDP's indicators. The negative impacts of TNCs on social development have, however, been quite dramatic, as becomes evident when one examines, below, the relationship between TNCs and social development with respect to their effects on employment (direct and indirect); on the environment (local, national and global); on safety and health (of workers, host communities and consumers), on transfer of technology, and economic growth (with equitable distribution).

#### 1. TNCs and Employment: Direct and Indirect Relationship

Although TNCs employ only a small fraction of the world's workforce, (approximately 2-3 percent) they are particularly important employers in some sectors and some nations. For example, TNCs account for one-fifth of all paid employment in non-agricultural sectors and are particularly important

in manufacturing industries in which technology is important.<sup>7</sup> Such figures, however, do not accurately portray the actual impact of TNCs on employment levels. Direct employment by TNCs will sometimes displace jobs from national firms, although the extent of the effect of such a displacement will vary across industries and countries. Furthermore, many TNCs have been reducing their aggregate totals of employees as they become increasingly capital intensive and release workers to minimize costs.

On the other hand, TNCs not only employ individuals directly, but can also indirectly generate jobs by establishing backward and forward linkages within a domestic economy. In this demand and supply chain, TNCs indirectly produce employment by purchasing goods and services from local suppliers and subcontractors as well as by widening access to markets and providing resources that can be used in further production within a host economy. It is estimated that the indirect employment that TNCs generate is at least equivalent to figures for direct employment.<sup>8</sup> Nevertheless, TNCs are responsible for the employment of a very small proportion of the world's workforce, and such employment pales into insignificance when compared to the assets that such enterprises control. While TNC activity might account for 5 percent of world employment, TNCs control over 33 percent of the globe's productive assets.<sup>9</sup>

TNC employment practices in developing countries have been the subject of strong criticism. Advocates of TNCs, maintain that TNCs provide jobs to individuals who otherwise would have none; in both industrialized and developing countries TNCs almost always provide higher wages, safer work conditions and better benefit packages than local firms. But they do not usually do so for altruistic reasons. In developing countries, there exist significant disparities between TNCs and local firms with respect to technology, economies of scale and management techniques. Moreover, TNCs often seek to deflect nationalist sentiment against foreign economic entities by offering a minimal factual basis for making the above claims. Officials in TNCs respond that they are obligated only to pay the prevailing wage for a particular skill category but that is a thinly veiled justification for using TNC mobility to establish global sweat shops. In Indonesia, women sewing sneakers for Reebok work over 60 hours per week while earning only \$ 80 a month (approximately the price of one pair of shoes).

While Reebok officials might note that they are at least paying the legal minimum wage, a more accurate assessment of their wage scales

---

<sup>7</sup> Eric Koldner, *Transnational Corporations: Impediments or Catalysts of Social Development*, 4 (World Summit for Social Development Occasional Paper No. 5, UNRISD, 1994).

<sup>8</sup> United Nations Transnational Corporations and Management Division, *Transnational Corporations and Economic Growth through Technology*, 186 (E/C.10/1992/4, 1992).

<sup>9</sup> Transnational Corporations, *supra* note 2, 22.

requires a comparison between Reebok's wages and those of other similarly situated TNCs. In fact, while operating in the same Indonesian environment, the Gillette Company pays its workers 3-4 times the legal minimum wage and provides its employees with American style retirement and health benefits.<sup>10</sup>

Although TNCs generally treat their workers better than do local firms, their actions are hardly beyond reproach. In 1994, a fire at a Thailand toy factory killed 188 employees because the management did not maintain the sprinkler system and had locked the workers inside the plant.<sup>11</sup> Moreover, TNC labour policies in developing countries with respect to subcontractors and export processing zones are often inexcusable. TNC employees in developing countries often work very long hours under hazardous conditions and receive little pay and no compensation for overtime. They possess low unionization rates, limited job security and few opportunities for training or advancement. In Bangladesh and China for example, clothing companies such as Calvin Klein and Liz Claiborne use subcontractors offering no worker rights, sometimes employing bonded labour.<sup>12</sup> TNCs attempt to evade responsibility for their treatment of employees overseas by asserting that only their subcontractors establish and supervise working conditions. TNCs, however, remain at the top of these subcontracting pyramids, provide the majority of work orders such factories receive and, therefore, possess significant influence over their operations. While TNCs might not directly employ their subcontractors' workers, they do benefit from exploitation of such workers, and their hands are hardly clean.

Recent transformations in the global economy, the structure of corporate activity, geopolitical relations and prevailing economic ideologies have radically restructured the relationship between TNCs, labour and host governments. As union membership declines throughout the world and as host governments prove increasingly incapable of effectively regulating corporate activity, TNCs reign supreme.

## 2. TNCs and the Environment

TNCs adversely affect social development in two ways. *First*, through their over-consumption of non-renewable natural resources such as minerals (which are therefore subject to depletion) as well as of renewable resources such as water (which through pollution and over-mining of ground water are rendered scarce and non-renewable). TNCs also negatively impact social development through their degradation of environmental resources. TNCs have been responsible for many tragic environmental disasters over the past 20 years- Union Carbide in Bhopal, India; Exxon's Valdez oil-spills off Alaska;

<sup>10</sup> Mitchell Zuckoff, *7 Days in June*, BOSTON GLOBE, July 10, 1994, D1 & R1-V.

<sup>11</sup> Mitchell Zuckoff, *Trapped by Poverty, Killed by Neglect*, BOSTON GLOBE July 10, 1994, 19.

<sup>12</sup> Mitchell Zuckoff, *Using US Exports Can be Risky*, BOSTON GLOBE July 10, 1994, 6.

Texaco in Ecuador; Omei Gold Mining in Guiana; Shell in Ogoniland, Nigeria; Rio Tinto Zinc in Bougainville, Papua New Guinea; and more recently British Petroleum in the Gulf of Mexico and the numerous coal mining disasters, worldwide, over the past year and a half.

TNCs have been responsible for a host of global environmental problems. They generate approximately 50 percent of greenhouse emissions, which are responsible for global warming. They are also the primary producers and users of ozone-depleting chlorofluorocarbons ('CFCs'). They are significant polluters of air, land, ground water, wetlands and the ocean. Their commercial logging and mining activities contribute significantly to deforestation and loss of biodiversity and have negative externalities such as rapid run-off of rain water leading to flooding and loss of topsoil. TNCs usually do not internalize these social costs and farmers are too poor to buy the land from the forest owners to prevent the occurrence of such negative externalities.<sup>13</sup>

Given that TNCs possess greater resources and better access to research and development, they bear an enhanced responsibility to promote environmentally sustainable and responsible practices such as maintaining regular periodic meetings between environmentalists and senior managers; setting emission reduction targets and timeframes; pegging managers' salaries to environmental goals; and rewarding employees for technical innovations that help comply with environmental standards.

### 3. TNCs and Issues of Safety and Health

Aside from the sweat labour incentive, TNCs often take advantage of host country labour laws which regard workplace health and safety as secondary to attracting foreign firms and their capital, technology and know-how. TNC involvement in pharmaceuticals, insurance, information technology, healthcare services, pesticides and agribusiness can, and does affect consumer health. Furthermore, through sophisticated marketing techniques, TNCs significantly influence consumer preferences and often promote products and lifestyles incompatible with ecological sustainability and poverty reduction.

Products that could potentially improve health and nutrition levels, such as pharmaceuticals, are often priced out of reach, especially in developing countries. Moreover, sometimes when consumers in developing countries can afford the pharmaceuticals that TNCs manufacture, such drugs can be harmful to their health. TNCs often market and sell to developing nations pharmaceuticals that have been banned in their home countries, although they are aware that studies have demonstrated the adverse health effects of

<sup>13</sup> There is an inevitable tension for a TNC between maintaining its international competitive edge and its environmental integrity. *See generally*, RICHARD DE GEORGE, *COMPETING WITH INTEGRITY IN INTERNATIONAL BUSINESS* (1993).

their products. Problems also arise when TNCs sell outdated, poorly-labelled or mislabelled pharmaceuticals to developing countries. An important study has found that two-thirds of 241 pharmaceuticals manufactured by US based TNCs and sold to developing countries had serious labelling deficiencies that failed to provide doctors with the information necessary to prescribe the drug safely and effectively.<sup>14</sup>

TNCs adversely affect consumer health and nutrition levels by selling to developing countries pesticides that have been banned in their home nations. One-quarter of all pesticides exported by TNCs from the US in the late 1980s, for example, were chemicals banned, regulated or withdrawn in the US, which, ironically but fittingly, through a “circle of poison”, found their way back to the US in imported produce!<sup>15</sup>

TNCs sometimes worsen health conditions in developing countries by marketing and selling infant formula as a substitute for breast milk and by marketing and selling tobacco products. TNCs assert that concern over the adverse effects of their consumer products is misplaced. They argue that individuals who buy their goods are merely exercising freedom of choice and individual autonomy. They assert that attempts to prevent TNCs from selling to developing countries pesticides and pharmaceuticals banned in their home countries constitute an imperialistic infringement on the sovereignty of these nations. But the stark truth is that such TNC invective against regulation stems not from concern for individual autonomy or national sovereignty, but rather from an avaricious desire to maximise profits.

TNC involvement with the production and use of asbestos, volatile organic compounds and radioactive waste materials can also generate health problems. So too does TNC use of toxic chemicals in their production processes. TNCs manufacture most of the world’s chlorine, which is used as a base for potentially harmful chemicals such as PCBs, DDT and dioxins. These chemicals can lead to birth defects, reproductive, neurological and developmental damage. The grimmest reminder of the stakes involved comes from the world’s worst industrial disaster. The use by Union Carbide of methyl isocyanate in its pesticide production process at the plant in Bhopal, India resulted in the death of more than 5000 people and the permanent disability of half a million people.<sup>16</sup>

---

<sup>14</sup> Mitchell Zuckoff, *Using US Exports Can be Risk*, BOSTON GLOBE July 11, 1994, 6.

<sup>15</sup> THE GREENPEACE BOOK OF GREENWASH 9 (1993).

<sup>16</sup> DEMBO, DIAS *et al.*, NOTHING TO LOSE BUT OUR LIVES: EMPOWERMENT TO OPPOSE INDUSTRIAL HAZARDS IN A TRANSNATIONAL WORLD (1989).

#### 4. TNCs, Technology Transfer, Tax Revenues, Economic Growth and Equity

TNCs can contribute to social development through the transfer of technology in many forms including hardware, software, process and product design, and training in management, marketing and quality control skills; and through a variety of methods including joint ventures, foreign direct investment, licensing agreements, turnkey plants, technical assistance, subcontracting arrangements and non-equity investments.<sup>17</sup>

TNC technology transfer can potentially provide host countries with a number of benefits, including enhanced economic growth, helping develop a host country industry, and advancing human resource development. In practice, however, the record of TNCs in this field leaves much to be desired. Historically, they have not employed enough nationals in management positions and transferred only minimal management skills. While large TNCs do spend billions of dollars on research and development ('R&D') annually, they conduct only a small fraction of such R&D outside industrialized countries. When they do conduct R&D in developing countries, they often merely adapt existing technology to local conditions- a process that generates little impact on local research and innovation capabilities. Even worse, there are instances where indigenous knowledge systems have been plundered and their creations patented in the home country of the TNC. Finally, there is evidence that the technology TNCs transfer is too costly for developing countries, does not create local linkages, is protected through patents, is often capital intensive and inappropriate for labour intensive developing countries, and produces goods for affluent classes while failing to meet local needs.

TNCs can indirectly foster social development through their provision of taxes to the State because governments can use these revenues to finance social welfare programs. But, while TNCs pay substantial taxes under some circumstances, they also engage in a variety of practices (notably transfer pricing) that intentionally deprive governments of tax revenues that are due to them. Countries have attempted to combat transfer pricing tactics through unitary taxation policies under which a government calculates a company's taxes on the basis of its global profits instead of on the basis of profits it declares within the country's borders. Companies have, however, successfully lobbied against unitary taxation policies in most jurisdictions.

While in theory TNCs can promote social development by fostering economic growth, in practice this relationship rarely exists. TNCs have at times, actually hampered indigenous economic growth by driving local entrepreneurs out of business, importing key goods and services, remitting a

---

<sup>17</sup> KOLDNER, *supra* note 7, 18.

majority of the profits to their home countries, and transferring fees and royalties to parent companies located outside the host country. Moreover, even if TNCs do improve a host country's economy, the relationship between economic growth and social development is tenuous. Although the global economy continues to grow annually, such growth is hardly curing problems of poverty, unemployment, disparities in wealth, or other issues of social malaise.

With the income of the richest one-fifth of the world's population averaging 50 times that of the poorest one-fifth,<sup>18</sup> disparities in wealth characterize most countries. In many nations the gap between the poor and the rich is widening.<sup>19</sup> TNCs are not responsible for the conditions which originally precipitated such inequities. Their activities with respect to foreign direct investment, consumer issues and employment, however, often exacerbate the situation. While TNCs certainly produce benefits for some people of the world, the bulk of the population is left out. Moreover, TNCs can exacerbate existing disparities between the poor and the rich, for example, through their activities affecting consumers. With over four-fifths of the globe's purchasing power concentrated in countries possessing only one-quarter of the world's population,<sup>20</sup> TNCs structure their marketing and distribution systems to provide goods and services only to economically prosperous locations.

Commercial banks often reinforce existing inequities in developing countries. *First*, they usually conduct transactions only with the government and the elite, refusing to extend credit to those citizens who need it most. *Second*, their loans have historically resulted in huge debts which developing countries have financed at the expense of social programs. *Third*, commercial banks have often served as conduits for legal and illegal capital flight. From the above analysis it is clear that the expanding capabilities of TNCs to transfer money, factories, capital and technology throughout the world render more difficult the reconciliation of the long term public interest with short term interests of private business enterprises. Moreover, in this regard, the difference between national corporations and TNCs is only one of scope, scale and degree. Corporate social development, as presently practiced, leaves in its wake a host of "victims" clamouring for justice and change.

---

<sup>18</sup> RUTH LEGER SIVARD, *WORLD MILITARY AND SOCIAL EXPENDITURES* 5 (1991).

<sup>19</sup> RICHARD BARNETT & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* 179 (1994).

<sup>20</sup> *Id.*, 192.

### III. RESPONDING TO THE THREE TRENDS AND DEVELOPMENTS

#### A. CORPORATE AND INDUSTRY VOLUNTARY INITIATIVES – CSR

CSR, also known as corporate responsibility, corporate citizenship, responsible business and corporate social performance is a form of corporate self-regulation integrated into a business model. CSR is a term used to express that an organization is taking responsibility for the impact of its activities upon its employees, customers, community and the environment. It is usually used in the context of voluntary improvement commitments and performance reporting. Essentially, CSR is the deliberate inclusion of public interest into corporate decision-making, and the honouring of a triple bottom line- People, Planet and Profit. CSR involves a commitment to behave ethically and contribute to economic development, while improving the quality of life of the workforce and their families as well as the local community at large.

CSR is a voluntary initiative and begins usually with a corporation declaring its CSR policy and then developing programs, practices, management and implementation structures, and timetables and methods for reporting to the public. Today, corporations are under pressure to be more open and more accountable regarding a wide range of actions and to report publicly on their performance in social and environmental arenas. In response to this pressure, corporations have developed and/or subjected themselves to voluntary codes of conduct as one way of incorporating CSR into their operations.

The relationship between corporate CSR policies and programs and the variety of corporate/industry codes of conduct that have sprung up are of increasing importance. Five core issues can be identified in most businesses codes of conduct, conflicts of interest between the company and its employees, the elimination of corrupt business practices, the rights of customers and suppliers, environmental issues and more recently, accountability and human rights issues.

Corporate codes of conduct can fulfil several functions. They can be a soft substitute for a perceived lack of legal rules or they can help achieve economic success by creating a positive image of the company. Codes can be reactive, sparked by public instances of perceived misconduct by a firm or others in its industry; or proactive, formulated to head off possible public criticism. Although most corporate codes appear to be associated with past or potential public criticism, positive inducements can also play a role. For some corporations, proactive CSR is perceived as good business because individual codes can serve to enhance the corporate image and company profits.

There have been numerous uncoordinated approaches to attempting to define the normative content of CSR and to designing related implementation, monitoring, reporting and evaluating mechanisms.

In the 1970s it was impossible to develop international standards for CSR backed by legal sanctions since the UN intergovernmental forums remained split in a widening North-South divide. Accordingly, some governments initiated discussions aimed at developing voluntary codes of corporate conduct. New “soft law” alternatives similar to a defined social contract were developed whereby governments endorsed and promoted agreed standards as the type of conduct expected of “good corporate citizens”. These soft law standards were a success because they did not require intergovernmental consensus and consisted of broad, and sometimes deliberately ambiguous, language that left room for flexible implementation.

Two main types of soft law codes came into existence. The first set out general standards of behaviour which allowed for an adaptable application by private enterprises depending upon their individual circumstances. Examples of this type of code are the 1976 OECD Guidelines for Multinational Enterprises, the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the UNCTAD Code on Restrictive Business Practices, adopted by the General Assembly in 1980.

The second type of code is aimed at particular types of business activities or conduct and although its content is more specific, it is still open to interpretation. Examples of this type of Code are the WHO International Code on Marketing of Breast Milk Substitutes and the FAO International Code of Conduct on the Distribution and Use of Pesticides, which establishes voluntary standards of conduct for all public and private entities involved in the distribution and use of pesticides.

The advantage of voluntary compliance is that it provides an alternative that envisages public participation, whilst shifting some of the burden of discerning, applying and monitoring voluntary standards onto corporations, in a manner that is acceptable to the society surrounding the corporation. This enables governments and other interest groups to assess corporate performance on a case-by-case basis, giving them latitude to interpret the guidelines and respond to corporate actions as they see fit. In countries where governments lack the will or the means to enforce legal standards this can be very important.

Many codes have been drawn up by single corporations, umbrella organizations of specific industries and general business associations. In particular, three high-profile codes adopted in 2000, have been drafted and endorsed by a combination of corporations, international organizations and

NGOs: the new OECD Guidelines for Multinational Enterprises, the Global Sullivan Principles and the UN Global Compact.

Many individual companies adopt their own codes of conduct that address social responsibility issues, sometimes drawing on an industry code or a set of international business principles. Nevertheless the vast majority of TNCs remain neutral or simply inactive in terms of individual codes of conduct.

As a response to perceived shortcomings in both legislative regulation and corporate codes of conduct, NGOs from different backgrounds have also drafted voluntary codes of conduct. Some groups focus on very specific products, such as tobacco while others concentrate on issues, for example, Greenpeace concentrates on the environment and Amnesty International on human rights. Today most groups focus on issues like labour rights, working conditions, the environment and human rights.

Public pressure is the mechanism that makes CSR work but it has its disadvantages since public opinion is a volatile force which usually depends upon a consumer-driven industry. Many issues, particularly in developing countries, do not attract public pressure that is strong enough to influence corporate conduct. Conversely, public opinion can have the opposite effect. The image of corporations can be reshaped and revamped independent of any change in actual performance. Thus, relying on public pressure to influence corporate conduct backfires when corporations use voluntary codes to revamp their image without actually backing up the code in reality. Particularly in the case of open codes, those critical of business conduct are in danger of being embraced and disarmed and finally reduced to corporate constituencies. The positive image of voluntary self-regulation could also have negative legal repercussions.

Many codes leave key terms undefined and amount to no more than vague pledges. Human Rights Watch has noted that while the UN pledges that corporations which are complicit in human rights violations are not eligible for partnership, the Global Compact does not define complicity. Principle II.1 of the New OECD Guidelines for Multinational Enterprises, state that enterprises should “contribute to economic, social and environmental progress” while Principle II.2 is more specific, demanding respect for human rights “of those affected by their activities”. Again no clear definition of these crucial terms is provided.

The greatest weakness of voluntary codes is that they derive their normative potential from public pressure, not from the legislative process and the public does not have the means to monitor the implementation of or the compliance with the codes. Accordingly, companies are increasingly being asked to establish systematic and independent monitoring and auditing processes to

demonstrate how corporate principles and policies are implemented in daily business practices.

An environmental audit is a systematic, independent, internal review used to assess whether a corporation is complying with environmental laws and codes of conduct. It also focuses on whether the methods being used to improve environmental performance are effective. Documents and reports are studied and key people in the organisation should be interviewed to confirm whether or not environmental targets have been attained. This is a new development in stark contrast to the conventional attitude of corporations which usually only address environmental problems after receiving an order from the Government.

The term “social labelling” has evolved as a means of informing consumers through a physical label about the social conditions surrounding the production of a product. Like codes of conduct, this may concern a single issue or multiple issues. No standard principles relating to social labelling currently exist, as this concept is still being developed.

CSR is gaining increasing attention from both government and business policy-makers, largely due to the stimulus of civil society groups and their activities. Most recent CSR initiatives relate to the environment and human rights issues which are covered by existing United Nations instruments.

In trying to identify common standards for CSR, it has become apparent that the implementation of such standards is fundamental to their success and that there is a need for independent monitoring. Such monitoring, however, is very difficult to establish due to the wide range of codes and practices that exist.

Corporations have begun to realise that civil society can offer valuable perspectives, insights and access to human resources which can assist them in their search for better operational alternatives. Accordingly, dialogue between corporations and social interest groups have increased as a result of CSR efforts. The most noticeable increases in CSR, however, have occurred in particular industries where companies have experienced hostile clashes in the past.

Proponents of CSR argue that there is a strong business case for CSR, in that corporations benefit in multiple ways by operating with a perspective broader and longer than their own immediate short term profits. Critics argue that CSR distracts from the fundamental economic role of businesses; that

it is nothing more than superficial window dressing; and that it is an attempt to pre-empt the role of governments as a watchdog over powerful multinational corporations.

Efforts to secure the more effective implementation of CSR have taken the form of independent, third-party performance monitoring and, if so called for, appropriate action by State regulatory authorities. An interesting new development regarding CSR has been the approach to develop national CSR guidelines on the part of home countries of TNCs and issuing guidance and recommendations to their corporate citizens doing business both home and abroad. The SRSG with assistance from the OHCHR has recently conducted a study of such national CSR policies with 29 member states of the UN responding to a survey sent out by the OHCHR.<sup>21</sup> The results of the survey are informative. Regarding the aims of National CSR Guidelines, the responses (given in parenthesis after each aim) have identified the following:

1. To increase and improve corporate adoption of CSR practices (5).
2. To organize government's response and roles in this domain (5).
3. To encourage corporations to follow international CSR standards (1).
4. To "help businesses reap more benefits from being at the global vanguard of CSR" (1).
5. To ensure that business is associated with responsible growth (1).

Seven "main elements" of national policy that have been identified are- (1) role and responsibilities of State agencies; (2) role and responsibilities of the private sector; (3) challenges and dilemmas for international operations; (4) CSR in a development perspective; (5) international frameworks for CSR; (6) international initiatives and processes for CSR; and (7) evaluation of supporting legal instruments.

Thus, CSR today is no longer a corporate voluntary initiative, especially if the national policy or guidelines are tied to export credits or investment insurance.

## ***B. THE HUMAN RIGHT TO DEVELOPMENT***

Critical to all of the above, is the appreciation, application, monitoring and enforcement of the normative principles that have come to define the

<sup>21</sup> *Survey of State Corporate Social Responsibility Policies– Summary of Key Trends*, June 2010, available at [www.reports-and-materials.org/Ruggie-survey-re-state-csr-policies.pdf](http://www.reports-and-materials.org/Ruggie-survey-re-state-csr-policies.pdf) (Last visited on December 4, 2011).

concept of social development today. These are contained in the UN Declaration on the Right to Development which celebrates its 25<sup>th</sup> anniversary this year.

In 1986 the UN General Assembly Declaration explicitly reaffirmed, the existence of a human right to development.<sup>22</sup> Such a right was implicit in the Universal Declaration of Human Rights and in the Covenant on Economic, Social and Cultural Rights, as well as in Art. 1 of the Covenant on Civil and Political Rights. It was, however, the landmark General Assembly Declaration ('1986 Declaration') that not only reaffirmed the existence of the right to development, but went further and elaborated the content of the rights as well as the specific obligations for States and governments (both individually and collectively) that flow from the right.<sup>23</sup> The 1986 Declaration has made three major contributions to clarifying the relationship between development and human rights.

*First*, it provides a normative redefinition of the very concept and rationale of development. It defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals" "in which all human rights and fundamental freedoms can be fully realized".<sup>24</sup>

*Second*, it affirms that development is an inalienable human right of every human person and all peoples, by virtue of which they are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>25</sup>

*Third*, it prescribes certain normative principles about how development is to be undertaken. The development process is to be one which assures to every person and to all peoples active, free and meaningful participation in development and the right to fair distribution of the benefits from development. The human person is the central subject of the development process and development policy should, therefore, make the human being the main participant and beneficiary of development.<sup>26</sup>

All the aspects of the right to development set forth in the 1986 Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.<sup>27</sup>

<sup>22</sup> The Declaration was adopted by 146 countries casting an affirmative vote. One country, the US, cast a negative vote. Eight countries that abstained were- Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the UK.

<sup>23</sup> G.A. Res. 41/128, U.N. Doc.A/RES/41/128 (December 4, 1986).

<sup>24</sup> *Id.*, Preamble to the 1986 Declaration.

<sup>25</sup> *Id.*, Art. 1.1 to the 1986 Declaration.

<sup>26</sup> 1986 Declaration, *supra* note 24.

<sup>27</sup> Art. 9.1 to the 1986 Declaration.

The 1986 Declaration is a codification of existing human rights law, contained in other UN human rights treaties as it relates to- (1) the normative definition of development; (2) rights in and to development processes, (3) transparency and accountability of development agencies and actors. As set out in the 1986 Declaration, the right to development comprises several component rights which are already contained in legally-binding instruments. Key among the component rights are- (1) the right to self-determination; (2) the right of non discrimination; (3) the right of participation. Thus, there is no doubt today that the right to development is not a mere pipe dream or ideological slogan. It is a human right guaranteed by international law.

Beginning with the Rio Conference on Environment and Development in 1992, the UN has held a series of global conferences (at the level of Heads of States and Governments) on various aspects of development. Each conference has adopted, by consensus, a declaration and program of action. Each conference has been followed up by a review process at 5 and 10 year intervals respectively. The right to development, as detailed in the 1986 Declaration, has been repeatedly reiterated and further elaborated, by consensus, at each of these Conferences.

Just before the dawning of the new millennium, two events helped put the right to development back on centre stage in the global agenda of co-operation. In 1997, the program of reform launched by the then UN Secretary-General, Kofi Anan designated human rights as cutting across each of the four substantive fields of the Secretariat's work program- peace and security, economic and social affairs, development cooperation, and humanitarian affairs. In 1998, UNDP adopted its policy of "integrating human rights with sustainable human development". In doing so, UNDP was not the first UN development agency to adopt a human rights based approach to development. UNICEF holds the distinction for being the first to do so. Since then, however, almost all bilateral development agencies have joined the UN system in what is valiantly called "mainstreaming human rights in development" or "adopting a human rights based approach to development".<sup>28</sup>

---

<sup>28</sup> In 2003, all UN development agencies adopted *The Human Rights Based Approach to Development Cooperation - Towards a Common Understanding Among UN Agencies*. Popularly known as the Common Understanding, it sets out 3 basic principles of a human rights-based approach to development:

- a. All programs of development co-operation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
- b. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
- c. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.

Adopting a human rights based approach to development provides long overdue recognition of the strong complementarity of human rights and human development. As the Declaration unequivocally posits, the very *raison d'être* of development is promoting the realization of human rights.

The key elements of a human rights based approach to development include:

1. The requirement that the values, principles and standards of human rights permeate the entire process of development programming- from situational analysis and assessment through to program design, implementation and evaluation;
2. A focus in setting development priorities on those most marginalized and excluded in society since their human rights are most widely denied or left unfulfilled;
3. The requirement that those targeted by development are empowered;
4. The identification of duty-bearers and the empowerment of rights-holders;
5. Non-discrimination and participation; and
6. Transparency and accountability.

Thus, a human rights based approach to development embodies all of the normative principles contained in the right to development. The right to development has become a programming tool for development cooperation. Today, the right to development has achieved global recognition and global implementation through development cooperation which is human rights based. This offers unique opportunities for national, regional and international cooperation between governmental and non-governmental entities and actors. After nearly 25 years, there is room for optimism that the right to development is ready to move from rhetoric to realization; and this comes not a moment too soon! Especially in terms of being able to offer a legal resource to the host of “victims” of corporate social development, clamouring for justice and change.

### *C. THE HUMAN RIGHT TO PROTECTION*

Roberta Cohen, in her ‘Statement to the International Journalists Round Table on Human Rights and the United Nations,’<sup>29</sup> reiterated that “sovereignty implies humanitarian and human rights obligations by governments to

---

<sup>29</sup> United Nations, New York, October 14-16, 1991.

the persons residing on their territories.” This articulation of the State’s “duty to protect” was adopted at the 2005 UN World Summit on Social Development. Member States included the right to protection in the outcome document.<sup>30</sup> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.<sup>31</sup> The international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the UN Charter to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>32</sup> In April 2006, the UN Security Council reaffirmed the provisions of paragraphs 138 and 139 in resolution (S/RES/1674), thereby formalizing their support for the norm. The first right to protection resolution adopted by the UN General Assembly (A/RES/63/308) promised to commit the right to protection to further discussion in the General Assembly.<sup>33</sup>

The right to protection, as it is evolving in the UN, in light of the numerous protection rights contained in the UN Convention on the Rights of the Child, now raises the issue of the right to protection against serious human rights abuses perpetrated by transnational and national corporate actors or their agents. While jurisprudence on the subject is being evolved by the UN human rights treaty bodies and special procedures, it is pertinent to take note of the several ongoing UN initiatives in this regard.

In light of the context sketched above, two tasks are vital if the human right to development is not to be relegated to the dustbin of history without commensurate attention to the human right to protection as well:

1. Corporations must be held fully, and expeditiously accountable for all of the adverse human rights impacts that result from their activities and conduct.<sup>34</sup>
2. Communities affected by the activities of corporations must have all of their human rights fully respected, protected, promoted, and fulfilled.

Thus far, there have been 4 UN initiatives responsive to these twin tasks:

---

<sup>30</sup> See ¶¶138 and 189.

<sup>31</sup> See ¶138.

<sup>32</sup> See ¶139.

<sup>33</sup> See generally GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 35-7 (2008).

<sup>34</sup> MICHAEL WRIGHT, *CORPORATIONS AND HUMAN RIGHTS: A SURVEY OF THE SCOPE AND PATTERNS OF ALLEGED CORPORATE-RELATED HUMAN RIGHTS ABUSE*, appended to SRSJ John Ruggie, *Report to the Human Rights Council* (A/HRC/8/5).

## 1. The Code of Conduct Initiative of the UN Centre on Transnational Corporation

This initiative was stillborn and would probably, with the wisdom of hindsight, have been better aborted. The post-NIEO mobilization of the powers of global capitalism ensured that any code of conduct governing TNCs would be stifled at birth. Moreover, such successful stifling also succeeded in emboldening the forces of global capitalism to execute the death penalty on the only UN entity mandated to deal with TNCs. The year 1991 saw the terminal closure of the UN Centre on TNCs, and therewith, the code of conduct approach towards TNCs, which would only survive on a non-binding basis under OECD auspices.

## 2. The UN Global Compact Initiative of the UN Secretary-General

This initiative was born at Davos, raising a presumption of illegitimacy. However, largely because the diplomatic skills of the then-UN Secretary-General Kofi Annan, combined with his commitment, and access to human expertise, the Global Compact has evolved. It has progressed from being yet another corporate exercise in self-promotional public relations<sup>35</sup> to becoming an invaluable precedent in moving from voluntarism (also known as self-promotion) to self-compulsion (also known as ensuring credibility) and external monitoring (of what the corporation has chosen to post, or not post on the Global Compact web-site). Corporate thinking out of the box, is not only conceivable, but is evident in how key corporate sector actors are trying to move, within the confines of the UN Global Compact and possibly beyond, in the belief that in genuine corporate social responsibility lies the alternative to legal liability as the primary means for ensuring corporate accountability.

The UN Global Compact asks companies to embrace, support and enact within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. These values are set out in 10 principles which enjoy universal consensus and are derived from:

- a. The Universal Declaration of Human Rights
- b. The International Labour Organization's Declaration on Fundamental Principles and Rights at Work
- c. The Rio Declaration on Environment and Development

---

<sup>35</sup> See e.g., Surya Deva, *Global Compact: A Critique of the UN's 'Public-Private' Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L. L. & COM. P. 107 (2006).

d. The United Nations Convention Against Corruption

The 2 principles relating to human rights are:

- a. Businesses should support and respect the protection of internationally proclaimed human rights.
- b. Businesses should make sure that they are not complicit in human rights abuses.

Companies participate in the Global Compact on a purely voluntary basis and in its early days, the Global Compact was criticized as being little more than a vehicle for corporate “blue- washing” by using participation in the Global Compact, and by using the Global Compact logo for public relations purposes. Today, the Global Compact seeks to advance universal principles on human rights, labour, environment and anti-corruption through the active engagement of the corporate community, in cooperation with civil society and representatives of organized labour.

The initiative does not monitor or measure participants’ performance. Nevertheless, with the aim of assuring that the integrity of the Global Compact is safeguarded at all times, the Secretary-General has adopted three integrity-measures, dealing respectively with:

- a. Failure to Communicate Progress: The Global Compact’s policy on communicating progress asks participants to communicate annually to all stakeholders their progress in implementing the ten principles of the Global Compact. Participants are also expected to submit a link to or description of their communication on progress to the Global Compact website and/or, Global Compact local network website. If a participant fails to communicate its progress by the deadline, it will be listed as “non-communicating” on the Global Compact website. If a further year passes without the submission of a communication of progress (“COP”), the company will be delisted. The Global Compact reserves the right to publish the names of companies that have been delisted for failure to communicate their progress. Non-communicating companies can become active participants by posting their COP. Companies that have been delisted would need to reapply to join the Global Compact and the application must be accompanied by their COP.
- b. Allegations of Systematic or Egregious Abuses: When a matter is presented in writing to the Global Compact Office, the Office will use its judgment to filter out *prima facie* frivolous allegations. If an allegation of systematic or egregious abuse is found not to be *prima facie* frivolous, the Global Compact Office will forward the matter to the

participating company concerned, requesting written comments, which should be submitted directly to the party raising the matter, with a copy to the Global Compact Office. The Global Compact Office must be kept informed of any actions taken by the participating company to address the situation which is the subject matter of the allegation. If the participating company concerned refuses to engage in dialogue on the matter within two months of first being contacted by the Global Compact Office, it may be regarded as “non-communicating”, and would be identified as such on the Global Compact website, until such time as a dialogue commences. If, as a result of the process outlined above, and based on the review of the nature of the matter submitted and the responses by the participating company, the continued listing of the participating company on the Global Compact website is considered to be detrimental to the reputation and integrity of the Global Compact, the Global Compact Office reserves the right to remove that company from the list of participants and to so indicate on the Global Compact website.

- c. Misuse of Association with the UN and/or Global Compact: The use of the UN name and emblem and any abbreviation thereof is reserved for official purposes of the UN.<sup>36</sup> That resolution expressly prohibits the use of the United Nations name and emblem for commercial purposes or in any other manner without the prior authorization of the Secretary-General, and recommends that Member States take the necessary measures to prevent the unauthorized use thereof.

### 3. The Norms of the UN Sub-Commissions on Human Rights, Business and Human Rights

The Preamble to the Norms states that even though States have the primary responsibility to promote, secure the fulfilment of, ensure respect of and protect human rights, TNCs and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the UDHR. It further states that TNCs and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in UN treaties and other international instruments.<sup>37</sup>

The Norms set out the General Obligation that within their respective spheres of activity and influence, TNCs and other business enterprises have the obligation to promote, secure the fulfilment of, ensure respect of and protect human rights recognized in international as well as national law,

<sup>36</sup> General Assembly Resolution 92(I) of December 7, 1946.

<sup>37</sup> The Preamble lists some 19 treaties including all the human rights treaties and the 4 Geneva Conventions (with their Protocols) as well as several Declarations, including the Declaration on the Right to Development.

including the rights and interests of indigenous peoples and other vulnerable groups. It then goes on to list obligations relating to several human rights notably: the right to equal opportunity and non-discriminatory treatment; the right to security of persons and a detailed set of rights of workers. It also details obligations relating to consumer protection and to protection of the environment.

After these Norms were adopted a study was undertaken by the UN Sub-Commission on human rights<sup>38</sup> regarding monitoring and implementation of the Norms. It was decided that for a trial period companies, on a purely voluntary basis, could agree to be monitored as to their compliance with the Norms, by the Office of the High Commissioner for Human Rights. As such, the Norms represent a very promising initiative. But unfortunately, they have been put on hold, pending the final Report of the Special Representative of the UN Secretary-General ('SRSG') on Business and Human Rights.

#### 4. The SRSG on Business and Human Rights

The SRSG has developed what he terms as the “protect, respect and remedy” framework for better managing business and human rights challenges. In June 2008, the Human Rights Council was unanimous in welcoming the framework, and tasked the SRSG with “operationalising” it by providing “practical recommendations” and “concrete guidance” to States, businesses and other social actors on its implementation. The framework rests on three pillars- (1) the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; (2) the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and (3) greater access for victims to effective remedy, judicial and non-judicial.

The Framework represents an encouraging start but some caveats are called for:

- a. Regarding the first pillar, the State duty to protect: The reality is often one of skewed power relations and some host States may well need protection themselves, against powerful and giant corporate behemoths.
- b. Regarding the second pillar, the corporate responsibility to respect human rights: Voluntary approaches do have their place. But if, in themselves, they are not enough to ensure against corporate disrespect of human rights, then accountability must come into play, including through enforcement of appropriate corporate civil and criminal liability.

---

<sup>38</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Study on Policies for Development in a globalizing world: What can human rights approach contribute?*, (25 UN Doc. E/CN.4/Sub.2/2004/18).

- c. Regarding the third pillar, access for victims to effective remedy, judicial and non-judicial: Such access must be not only effective but timely as well and must be not only reactive, but proactive as well to prevent victimization, multiple victimization and re-victimization.

#### *D. NON-GOVERNMENTAL/CITIZEN ORGANIZATION EFFORTS*

While governments can certainly help to promote corporate social responsibility, citizen movements are even more important actors pressuring both governments and TNCs to implement and institutionalize this objective. In fact, there exists a rich history in many countries of such citizen involvement, originating primarily in unions, religious groups, farm groups, environmental organizations, consumer groups and women's organizations.

Citizen organizations have attempted to foster CSR through a variety of methods, including targeting the board of directors, generating negative publicity for the corporation, instituting law suits, pressuring governmental agencies, engaging in dialogue with company officials and mobilizing communities. Three particularly interesting and successful tactics that citizen groups have undertaken are- organizing corporate boycotts, formulating corporate codes of conduct and pursuing alternative investment strategies.

NGOs have also attempted to promote CSR through creative investment strategies. Such tactics have assumed two primary forms. *First*, numerous groups have emerged promoting socially responsible investing practices. Such private organizations screen opportunities for potential investors to ensure that their clients' money contributes only to companies engaging in socially responsible activities. These investment groups attempt to demonstrate that CSR and profit-making are not mutually exclusive endeavours. There exists significant debate, however, as to whether socially responsible investment strategies offer returns as high as traditional investment tactics. *Second*, citizen organizations have also attempted to promote TNC social responsibility by introducing shareholder resolutions. Instead of advocating change from outside the company, citizen groups acquire shares in a corporation so that they can promote change from within the company. During the past few years, the influence of shareholders over the corporate process has been increasing, aided by the concentration of shareholder power in institutional investors. Active investors are increasingly seeking to change corporate policy by using the public process to educate shareholders and to propose alternatives to the policies of the incumbents.

Host communities have entered into "good neighbour agreements" with the corporations they will be hosting. They have also participated

in “hearings” and environmental impact assessments (‘EIAs’) through which they have exercised their environmental right of “free, prior and informed consent”. The success with EIAs has prompted the design of Human Rights Impact Assessments (‘HRIAs’). Adapted to address corporate impacts on human rights in the developing world, the following guiding principles have been identified relating to HRIA processes:<sup>39</sup>

1. **Involve the Public:** Identify all potentially affected and under-represented stakeholders, especially workers and members of the local community. This is especially difficult, but essential, when the state politically marginalizes its minorities or lacks accountable, democratic governance.
2. **Analyze Impact Equity:** Recognise and address the uneven distribution of positive and negative effects. This is consonant with the spirit of non-discrimination underlying all human rights. By minimizing the perception of preferential treatment of particular ethnic groups or economic classes, this also avoids communal strife.
3. **Identify Relevant Definitions, Methods, and Assumptions in Advance (Set Parameters):** Reflect ahead of time on what constitutes significance, reversibility, and mitigation potential, as well as the methods and underlying assumptions. This will concretize and legitimize the impact assessment and promote transparency.
4. **Internalize the HRIA in Decision-Making:** It is understood that an HRIA, and the critical insights derived from it (however unappealing to some), should not be treated as a mere formality but rather as an integral source of feedback informing the central decision-making process. Moreover, the HRIA and its lessons should be institutionalized into corporate practice through internal codes of conduct and explicit policies addressing discrimination, labour, security, and indigenous peoples that include mechanisms for monitoring, non-retaliation, appeals, staff training, and enforcement with contractors.
5. **Use Competent HRIA Practitioners:** HRIA auditors should exhibit independence and familiarity in their dealings with the HRIA process and corporate decision makers. Financial and institutional independence is imperative to avoid actual and perceived conflicts of interest. Familiarity and faithful exception require employing and consulting with qualified and cooperative social scientists and human rights practitioners.

---

<sup>39</sup> Tarek Maassarani, Margo Tatgenhorst Drakos & Joanna Pajkowska, *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT’L L.J. 135 (2007).

6. **Employ Data with Integrity:** For reliable and current information, HRIA auditors should use rigorous fieldwork along with credible sources of data from published social science literature and human rights reports. They should plan for data gaps wisely.
7. **Transparency:** Honestly disclose both the process and results of a project's HRIA, to the extent consistent with the protection of vital trade secrets. This strengthens the legitimacy of corporate decision-making and public participation.

These principles are necessarily intertwined. For example, sound data collection and incorporating predictions of impact equity will rely on active public participation and competent HRIA practitioners. Furthermore, this information will mean little if it is left out of corporate decision-making, shorn of the relevant definitions, methods, and assumptions, or confined to a closed dossier.<sup>40</sup>

The institutions of local governance (such as *panchayati* development in India) also provide mechanisms for community participation in decision-making and so too are UN development processes relating to the Millennium Development Goals and the Poverty Reduction Strategy Process which have now been localized. There has also been work proceeding which develops techniques for monitoring proposed budget of national or state legislative bodies to trace how revenues from taxes paid by TNCs are allocated by host governments.<sup>41</sup>

#### IV. THE CRUCIAL ROLE OF VALUES

The so-called 'free' markets are becoming the new organizing principle for the global order. The idea that governments should protect citizens against the excesses of free enterprise has been replaced with the idea that the government should protect business activities against the excesses of democratic regulation. As a consequence, the ideals of the nation-state have been diluted and distorted.<sup>42</sup>

For instance, the human right to an adequate level of health and education for all has been sacrificed to provide business opportunities for corporations. By the time the world's citizens realize the consequences of this loss, their ability to regain power and reorder priorities democratically will be obstructed by the likes of the World Trade Organisation. The collective corporate

---

<sup>40</sup> *Id.*, 149-150.

<sup>41</sup> CAGATAY, KEKLIK, *et al.*, BUDGETS AS IF PEOPLE MATTERED: DEMOCRATIZING MACROECONOMIC POLICIES (2000).

<sup>42</sup> Sharon Beder, *The Corporate Assault on Democracy*, 4 INTERNATIONAL JOURNAL OF INCLUSIVE DEMOCRACY 1, 15 (January 2008).

ambition to rise above the reach of democratic controls will have attained its ultimate success.

Corporate values emphasize mass conformity, subordination to authority, obedience and loyalty. Ironically, these values, which undermine individuality and freedom of expression, have been encouraged in the name of individuality and freedom. The market values of competition, salesmanship and deception have replaced the ideals of truth and justice.<sup>43</sup>

The conflict between the values enshrined in the paradigm of universal human rights and corporate values is even more evident at the level of self. In the new global culture people are rewarded for their greed, their ruthlessness, their ambition to climb career ladders, their ability to deceive and manipulate others, their willingness to be subservient to “the right people” and keep their personal opinions to themselves. Increasingly, there is little room for the expression of higher human values and qualities such as generosity, compassion, selflessness, willingness to seek out and expose the truth, courage to fight for justice. CSR must include full respect for that most precious of all human rights: *the right to be and remain human*.

---

<sup>43</sup> *Id.*,16.

