
RESEARCH ARTICLE

Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights

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The growth of transnational corporations over the past few decades has been paralleled by concerns to find ways of regulating the deleterious impacts on human rights by the ever-increasing number of companies whose corporate tentacles stretch across national boundaries and beyond the reach of traditional corporate control mechanisms. The steady evolution of a global social expectation that companies should respect international human rights standards, combined with the occasional foray by states in adopting an expansive approach to protecting rights, is changing the nature and possibility of developing a firmer basis for corporate accountability for human rights. What we are witnessing is a process of re-regulation whereby state and non-state actors are utilizing a combination of public and private regulation to improve the framework for corporate rights compliance. The regulation of corporate activity with respect to human rights requires a multiplicity of stakeholders and a very nuanced mix of public and private regulation that may be difficult to replicate easily across different sectors, states and cultural boundaries.

Keywords: corporate responsibility; human rights; regulation; Guiding Principles

I. Introduction

There is one and only one social responsibility of business -- to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.¹

Milton Friedman's well known and oft quoted statement regarding corporate social responsibility is commonly interpreted as implying that companies do not possess any social responsibilities but rather should simply focus on increasing profits. However, an important element of Friedman's mantra is the pivotal phrase 'as long as it stays within the rules of the game'. Friedman, writing in 1970, narrowly defined that phrase in legal terms but significant developments since then, mean that the 'rules of the game' in terms of defining the social expectations of a company, have changed. The rules (such as they exist) are not simply confined to codified law but flow from sources as diverse as privately drafted codes of conduct to internationally formulated guiding principles, all so-called soft law standards that help guide corporate respect for human rights. The 'rules of the game' have become more amorphous and the responsibility for implementing them more diffuse since Friedman's initial foray into this field.

Responsibility for protecting and advancing respect for human rights has long been assumed to be the duty of the state and the rules for doing so, stemming predominantly from international treaties that might then be translated into national laws, such as labour and anti-discrimination laws. It is only quite recently that discussion has shifted to focus on the human rights responsibilities of corporations and what that might entail both in terms of formulating precisely what standards should be met by companies, who should set such standards and how to manage compliance with those standards. The adoption by the United Nations (UN) Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights,² assisted in

¹ M Friedman, 'The Social Responsibility of Business is to Increase its Profits' *New York Times Magazine* (New York, 13 September 1970) <<http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>>.

² UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect

entrenching the notion of the existence of a corporate responsibility to respect human rights,³ but interpreting and implementing that responsibility on the ground is a longer term task that requires re-interpreting and refining the 'rules of the game'. The Guiding Principles, developed by the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie ('the Special Representative'), set out a three-pronged framework for delineating between the roles of the state and business with respect to human rights. First, states have a duty to protect people from human rights violations by corporations. Second, corporations have a responsibility to respect, uphold and not interfere with human rights. And, third, both states and corporations have a responsibility to ensure that people who are victims of corporate violations have access to an effective remedy. This demarcation between a state's duty and a corporation's responsibility explicitly acknowledges the traditional (and theoretically at least), primary role of states in protecting human rights but also recognises the urgent need for the private sector to take a prominent role in advancing respect for rights.

While the Guiding Principles provide a useful foundation for future action and reaffirm the responsibility (if not legal obligation) of companies to improve working conditions, well before their adoption in 2011 many global companies were already involved in establishing or working within private compliance programs, that were sometimes complementary to existing national laws and at other times, superseded state efforts to protect workplace rights. In some sectors and in some countries, the willingness of companies to either proactively (or more often) reactively improve working conditions in their supplier factories has outstripped the willingness of some national governments to confront and more clearly articulate their own understanding of what such corporate responsibility might entail. The reliance on private regulation to fill this lacuna is in part an acknowledgement of the sluggish pace at which international (and often national) law develops and the political reality that there is little appetite at present among states for the development of a new treaty focused specifically on business and human rights concerns.⁴

As the global business and human rights agenda has evolved in the last three to four decades, we have witnessed the rise of, and reliance on, private regulation,⁵ as a means of driving consensus on how corporations should or could advance respect for (and sometimes, protect) human rights. International human rights law and its state centric framework for protecting rights is proving inadequate to stem (or redress) corporate rights violations and is proving to be more the backdrop for the development of mechanisms to prevent and protect individuals from corporate rights violations, rather than the prism through which corporate accountability might be filtered. The unwillingness and/or inability of many governments to fulfil their human rights obligations has led to protection gaps. All around the global marketplace, non-state actors such as non-government organizations ('NGOs'), unions, companies, multi-stakeholder⁶ groups and industry bodies, have stepped in to fill this gap. This transfer, or sharing of regulatory authority from states to non-state actors is not so much 'deregulation' but rather what some commentators refer to as re-regulation⁷ or

and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (21 March 2011) A/HRC/17/31. The Guiding Principles operationalise the 2008 'Protect, Respect and Remedy Framework for Business and Human Rights' also developed by the Special Representative: UN Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (7 April 2008) A/HRC/8/5.

³ The Special Representative commented in 2010 that the corporate responsibility to respect rights is a notion that has been gradually emerging and is 'acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself'. J Ruggie, *The UN 'Protect, Respect and Remedy' Framework for Business and Human Rights* (September 2010) <<http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>> accessed 24 June 2013. This stands in contrast to earlier views by economist Milton Friedman who argued that it was a 'fundamental misconception of the character and nature of the free economy' for a corporation to have any concern other than maximisation of profit (see M Friedman, *Capitalism and Freedom* (University of Chicago Press 1962) 133 and more recently D Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (Institute of Public Affairs Great Britain 2001) 147).

⁴ J Ruggie, 'Treaty road not travelled' (May 2008) <www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf>.

⁵ Regulation as referred to in this paper incorporates both formal and informal, legal and non-legal mechanisms or techniques designed to influence or at times coerce corporations to better respect and/or protect human rights.

⁶ As defined by Utting, 'the term "multistakeholder initiatives" is often used to refer to voluntary CSR initiatives where two or more stakeholders, actors of interest groups cooperate in the design and application of standards. Such stakeholders often include companies, industry associations, NGOs, trade unions, government agencies and international organizations. Multistakeholder institutions are sometimes legally constituted as not-for-profit organizations, with different interests and actors in their governance structures', in P Utting, 'Rethinking Business Regulation: From Self-Control to Social Control' (Business and Society Programme Paper Number 15, September 2005) <[http://www.unrisd.org/unrisd/website/document.nsf/462fc27bd1fce00880256b4a0060d2af/f02ac3db0ed406e0c12570a10029bec8/\\$FILE/utting.pdf](http://www.unrisd.org/unrisd/website/document.nsf/462fc27bd1fce00880256b4a0060d2af/f02ac3db0ed406e0c12570a10029bec8/$FILE/utting.pdf)>.

⁷ *ibid* 14.

even a regulatory renaissance.⁸ Private regulatory mechanisms utilize a combination of hard and soft laws to establish relevant standards that companies strive to achieve. The source of such hard law tends to be readily accessible international and national legislation focused on defining consistent standards for health and safety, wage, hours and conditions of work; the soft law standards are more nebulous. While there is no entrenched definition of what constitutes soft law, in this context it might commonly include instruments as diverse as those internationally formulated (other than a treaty) that contain 'principles, norms, standards or other statements of expected behaviour'⁹ but also widely accepted codes of conduct that have been developed by a group of stakeholders as a mechanism to prevent corporate rights abuses. The Guiding Principles thus appear to be the latest in a long line of soft regulatory techniques that rely in a large part on private regulation that encourages, but does not necessarily require, a corporation to comply with human rights.¹⁰

This paper examines this process of 're-regulation' in the business and human rights context (principally focused on working conditions and labour standards). Section II examines the reliance on non-state actors to regulate corporate activity with respect to human rights and Section III considers the pivotal role played by soft law in regulating corporate compliance with human rights and the promise and pitfalls of doing so. Section IV considers the role of the state and the possibilities for it to both complement and supplement private regulation so as to better protect human rights. Ultimately, this paper proposes that the regulation of corporate activity with respect to human rights requires a multiplicity of stakeholders and a very nuanced mix of public and private regulation that may be difficult to replicate easily across different sectors, states and cultural boundaries. While, in this field, the state may no longer play the primary protection role ascribed to it in either international human rights law or the Guiding Principles, it remains an essential piece of the human rights enforcement puzzle and greater attention needs to be paid to analysing what mix of international/domestic, state/non-state and hard/soft regulatory mechanisms will be most effective in protecting human rights in the workplace.

II. The Rise of, and Reliance on Private Regulation

For the last several decades, globalization has posed both challenges and opportunities for advancing the protection of human rights in the global marketplace. Significant developments have been taking place in factories, fields and offices all over the world where a variety of stakeholders have been pushing and prodding corporations to adopt operational changes that will lead to sustained compliance with international human rights standards. Sometimes business has been proactive in seeking such changes, at other times reluctant or simply absent. In today's global economy, large companies in most industries have come to rely on a series of contractors and suppliers in a range of countries to produce their products. Today's global supply chains link individual workers with large and small companies across national, political and cultural boundaries and 'in a world of 80,000 transnational corporations, ten times as many subsidiaries and countless national firms, many of which are small and medium-sized enterprises', any attempt to regulate corporate behaviour will always be a challenge.¹¹ What is becoming increasingly apparent is that for sustained improvements to occur, a multiplicity of stakeholders must be involved, including but not necessarily relying only on the state. Some of the most powerful global actors today are companies, not governments.¹² Logically recourse to local laws and a system of enforcement and judicial relief in the host countries where global corporations operate should be the first option for ensuring greater respect for human rights. However the reality is that

⁸ *ibid* 1; R M Locke, *The Promise and Limits of Private Power* (Cambridge 2013) 169.

⁹ D Shelton, 'Normative hierarchy in international law' (2006) 100 AJIL 291, 319. Also see, J Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 LJIL 313, 334. Also see D Vogel, 'Private Global Business Regulation' (2008) 11 ARPS 261, 262, who refers to civil regulation as soft law and defines it as 'socially focused voluntary global business regulations'.

¹⁰ For an overview of the challenges of utilizing private regulation and soft law in this field see R M Locke, *The Promise and Limits of Private Power* (Cambridge 2013); A Sobczak, 'Are Codes of Conduct in Global Supply Chains Really Voluntary: From Soft Law Regulation of Labour Relations to Consumer Law' (2006) 16 BEQ 167, 184; E Pariotti, 'International Soft Law, Human Rights and Non-state Actors: Towards the Accountability of Transnational Corporations?' (2009) 10 HRR 139; L Baccaro and V Mele, 'For Lack of Anything Better? International Organizations and Global Corporate Codes' (2011) 89 PA 451; S Deva, *Regulating Corporate Human Rights Violations* (Routledge 2012) 64-118; W Cragg 'Business and Human rights: a principle and value-based analysis' in W Cragg (ed), *Business and Human Rights* (Edward Elgar 2012) 3-46.

¹¹ UN Human Rights Council, 'Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework; Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (9 April 2010) UN Doc A/HRC/14/27.

¹² For example, in its 2013 World Report Human Rights Watch noted that 'In 2011 alone, oil and gas behemoth ExxonMobil generated revenues of US\$467 billion—the size of Norway's entire economy. Walmart, the world's third-largest employer with more than 2 million workers, has a workforce that trails only the militaries of the United States and China in size.' Human Rights Watch, *World Report 2013* (USA 2013) 29.

in many countries this simply is not happening. In developing countries (but not exclusively so), laws are sometimes weak, but enforcement weaker still and corruption can be endemic - reflecting chronic failures in developing a governmental order based on the rule of law. Thus, reliance on the state to ensure human rights are protected remains a long term proposition.

The development and implementation of private regulatory methods that do not rely on the role of the state as *the* 'human rights protector' include the incremental but now widespread adoption of codes, guidelines and principles – both at the micro and macro level – which are being used as mechanisms to drive corporate compliance with international human rights standards.¹³ Such developments have, and continue to, urge a change in corporate culture that recognises workers, wherever they are located, must be treated with dignity and respect. Slowly but surely a paradigm shift is taking place that affects the way companies and society are increasingly viewing this issue with the state being viewed as (possibly) part of the solution, but not *the* solution. Companies, in particular global transnational companies, are 'required' to play a significant role in developing a solution. 'In the recent past, it was sufficient for vanguard companies to do their best to avoid causing environmental and social damage. Now they are being asked to become a force for good, and discovering they cannot do it alone.'¹⁴ Thirty to forty years ago, very few companies acknowledged any affirmative obligation to address workplace conditions in the factories of their foreign suppliers – factories they generally neither owned nor operated – but this concept is no longer anathema to companies. For many (but not all) companies, the question is no longer 'Do we have an obligation to address workers' rights in suppliers' factories? It is how do we do it, at what cost, and with whom do we collaborate in addressing the problems that exist?'¹⁵

Take for example, the different corporate responses to two workplace disasters nearly thirty years apart. In December 1984, fourteen years after Friedman's acknowledgment of the limited scope of a corporation's social responsibility, a corporate catastrophe occurred in the Indian city of Bhopal. On the night of 2 December 1984, a massive leakage of toxic gases from a storage tank at a chemical plant resulted in the deaths of more than 3,000 people in its immediate aftermath and injured and subsequently killed thousands of others.¹⁶ Some blame was attributed to the central and state Indian governments and their lax enforcement of safety laws and haphazard planning permissions,¹⁷ but public attention also focused on the plant operator, Union Carbide India Limited, and its US based parent company, Union Carbide (UCC). Although UCC exercised extensive control over its Indian subsidiary (evidenced not simply by share ownership or representation on the board of directors but also by involvement in 'key decisions regarding issues such as, technology, plant design, safety...training of employees'¹⁸), UCC started shifting the blame for the accident to its subsidiary. The reaction of the principal companies involved was generally denial, obfuscation and a lack of responsibility for the calamity that ensued and liability was strictly defined in terms of legal accountability for the disaster. Litigation was pursued in both the American and Indian courts with mixed results.¹⁹ The action against the parent company, UCC was ultimately dismissed and the Indian case settled. Bhopal remains one of the modern world's worst industrial accidents and as a legal precedent it is most noteworthy for highlighting the limitations of the law and the lack of justice ultimately delivered to those

¹³ The rise of private voluntary initiatives aimed at regulating corporate adherence to human rights has a rich but relatively brief history, is well documented and includes prominent examples such as the the Sullivan Principles regulating business conduct in South Africa during the apartheid era to more recent initiatives such as the Fair Labor Association or the Forestry Stewardship Council. See for example: D O'Rourke, 'Outsourcing Regulation: Analysing Nongovernmental Systems of Labor Standards and Monitoring' (2003) 31 PSJ 1; E Schrage, *Promoting International Worker Rights through Private Voluntary Initiatives: Public Relations or Public Policy* (University of Iowa 2004); D Vogel, 'Private Global Business Regulation' (2008) 11 ARPS 261.

¹⁴ R Tieman, 'Supply chain: Groups face rising concern on safety' *Financial Times* (New York, June 11 2013) <<http://www.ft.com/intl/cms/s/0/5bd48c1a-b7e2-11e2-9f1a-00144feabdc0.html#axzz2W3By2VWv>>.

¹⁵ M Posner, 'Testimony before the United States Congressional Human Rights Caucus "Human Rights And Brand Accountability: How Multinationals Can Promote Labor Rights" ' (8 February 2006) <<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1012&context=codes>> accessed 24 June 2013.

¹⁶ According to official government figures 3,000 people died in the immediate aftermath, but this figure was later revised upward. See Bhopal Gas Tragedy Relief and Rehabilitation Department, Bhopal, State of Mahhya Pradesh, 'Profile' <www.mp.nic.in/bptrrdmp/profile.htm>. However according to Amnesty International's estimate between 7,000-10,000 people died within the first three days of the gas leak: Amnesty International, '*Clouds of Injustice: Bhopal Disaster 20 Years On*' (UK 2004).

¹⁷ Deva (n 10) 30.

¹⁸ *ibid* 28.

¹⁹ Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984. MDL Docket No. 626, US District Court, Southern District of New York, ordered November 8, 1985. Interlocutory Application No. 19, Filed in Court of District Judge, Bhopal, in Regular Suit No. 1113 of 1986, 4 February 1986; Order 05-04-1989 in Civil Appeal Nos. 3187-89, *Union Carbide Corporation v Union of India*, Supreme Court of India.

worst affected. So, in the nearly thirty years since, as corporate violations of human rights have continued to occur, what, if anything has changed in terms of corporate and public perceptions of a company's responsibility to act and provide redress in the face of such a tragedy?

In April 2013, the Rana Plaza building in Dhaka, Bangladesh collapsed. The building housed five garment factories and over 1,100 workers were killed. Interest from the world's media immediately centred on the global companies outsourcing production to the garment workers in that building. Questions focused on the corporate responsibilities of these global buyers – legal or otherwise – in both preventing and redressing this workplace disaster.²⁰ The ease with which modern technology distributed disturbing images of those killed and maimed in these factories no doubt played a key role in capturing corporate attention. In the aftermath of the tragedy, global press reports continued to focus primarily on the role and involvement of the private sector in remedying this problem rather than on the Bangladeshi government and its clearly inadequate regulatory enforcement of human rights and labour standards. The fact that direct legal liability may be very difficult to prove in linking the global firms with the collapse of the factory was not perceived as a barrier to responsibility.

In the six months following the Rana Plaza building collapse, three different initiatives formed, all with the stated aim of improving working conditions inside Bangladeshi factories. In May 2013, a group of predominantly European apparel companies developed the Accord on Fire and Building Safety²¹, quickly followed in June by the establishment of the Alliance for Bangladesh Worker Safety, made up of North American retailers including Walmart and Gap.²² These two initiatives, demonstrate 'regulatory renaissance' at work, by both recognizing the limited governmental capacity to provide a short-term remedy to prevent further disasters and accepting that corporate social responsibilities extend beyond those that can be defined in stark legal terms. These multi-stakeholder initiatives adopt a collective workplace safety standard and auditing plan that essentially privatizes aspects of workplace safety in respect of the remediation of safety threats. Together, the plans 'encompass financial commitments of almost \$250 million, plus up to an additional \$100 million in low-cost loans to help pay for building upgrades.'²³ This utilization of non-state actors to protect human rights builds on state efforts in promulgating human rights standards, but also explicitly acknowledges the state's limited enforcement capacity and outsources the implementation of the proposed protection regime to the non-state sector.

Several months later, in October 2013, the International Labour Organization (ILO) announced a three year initiative to improve Bangladesh's garment factories.²⁴ The ILO initiative, co-sponsored by the Bangladesh government, will conduct a fire and building safety assessment on 1,000 to 1,500 factories and run safety and health awareness training. The \$24.1 million project – funded mainly by the British and Dutch governments – also aims to provide skills training to survivors of the Rana Plaza building collapse. This initiative uses government funds to enforce national and international regulations and aims to build the capacity of the Bangladesh government to enforce safety standards across a broad spectrum of local factories. In the interim, the private funds of European and American brands are at work, improving a narrower range of factories that are linked to the companies via their supply chain. While the competing nature of these three initiatives potentially makes implementation all the more challenging it also recognizes that potential solutions must be multi-pronged and may need to co-exist offering workplaces a mix of public and private regulation that has the potential to fill gaps that another program may overlook. A sub-contracting factory that does not have direct relationships with Western brands may not garner the attention of either the Accord or the Alliance, but may fall within the parameters of the ILO project. This is the essence of re-regulation, utilizing public and private regulation that sources standards from international and national legislation to create real reform of workplace safety encompassing, in this case, a large proportion of Bangladesh's garment industry. While limited to one country and one sector, one can see the promise of this regulatory renaissance. However it is not without its pitfalls.

²⁰ See JA Manik and S Greenhouse and J Yardley, 'Western Firms Feel Pressure as Toll Rises in Bangladesh' *New York Times* (New York, April 25 2013) <http://www.nytimes.com/2013/04/26/world/asia/bangladeshi-collapse-kills-many-garment-workers.html?pagewanted=all&_r=0>; and D Viederman, 'Supply chains and forced labor after Rana Plaza: lessons learned' *The Guardian* (London, May 30 2013) <<http://www.guardian.co.uk/global-development-professionals-network/2013/may/30/rana-plaza-bangladesh-forced-labour-supply-chains>>.

²¹ See Accord on Fire and Building Safety <<http://www.bangladeshaccord.org/>>.

²² See Alliance for Bangladesh Worker Safety <<http://www.bangladeshworkersafety.org/>>.

²³ S Labowitz, 'The \$250 million commitment to Bangladesh's factories misses the point' *Quartz* (New York, July 19 2013) <<http://qz.com/105852/the-250-million-commitment-to-bangladeshs-factories-misses-the-point/>>.

²⁴ See ILO, 'Improving Working Conditions in the Ready-Made Garment Sector' <http://www.ilo.org/dhaka/Informationresources/PublicInformation/Pressreleases/WCMS_226720/lang-en/index.htm>.

III. From Principles to Practice: Refining the Rules of the Game

In the forty years following Friedman's assertion of the limited scope of a corporation's social responsibilities, a substantial body of soft law has developed that is effectively refining the rules of the game. As exemplified by the non-state sector's response to the Bangladeshi tragedy, the practical protection of human rights is being pursued at ground level, both by civil society and international institutions acting in concert with business. The reasons that the various codes, guidelines and principles have proliferated in the last three to four decades are multifaceted (including an increase in pressure on companies from NGOs and a willingness on the part of some companies to adapt corporate strategies to incorporate such codes) but it is also clear that the development of these initiatives is in part a response to an inadequate legal framework. There remain very few legal obligations dealing with human rights that bind corporations operating transnationally.²⁵ This lack of clear legal liability has been central to the creation of the permissive international 'human rights free' environment²⁶ in which some corporations now operate and the parallel increase in the development of soft law mechanisms to regulate corporate behaviour. In spite of this, or more accurately because of this, a plethora of codes and guidelines have been established that, with varying levels of success, take on the role of the state in encouraging adherence to human rights standards.²⁷

For example in 2011, after persistent criticism about the working conditions at Foxconn, (one of Apple's principal suppliers),²⁸ Apple agreed to allow the non-profit Fair Labor Association (FLA) access to some Foxconn factories to assess compliance with Chinese legal requirements and the FLA's Workplace Code.²⁹ Multi-stakeholder initiatives such as the FLA, which is a collaborative effort of companies, universities, colleges and civil society organisations, epitomize the private regulatory mechanisms that have developed with the lofty goal of establishing a practical framework for human rights protection. FLA's subsequent audits of Foxconn revealed multiple labour and human rights violations incompatible with both Chinese laws and FLA code standards. These included infractions relating to hours of work, health and safety, compensation and industrial relations.³⁰ The FLA, along with the principal companies involved, then started to develop a plan to remedy these violations. The FLA is only one of a series of multi-stakeholder initiatives that emerged in the 1990s focused on the apparel sector,³¹ in which companies work in partnership with civil society to attempt to regulate unregulated jurisdictions. In this form of re-regulation, private actors are delivering public goods such as labour inspections; traditionally a state function but the assessable standards are a mix of public and private regulations. This acceptance (albeit often reluctantly) by (some) businesses of their human rights responsibilities is indicative of the transformation of the rules of the game and an acknowledgement that the rules can no longer be framed in narrow and legalistic terms.

The Guiding Principles on Business and Human Rights, the latest and most authoritative to date, of a long line of soft law standards designed to curb corporate rights violations unabashedly asserts a corporation's responsibility to respect human rights.³² This corporate responsibility, the UN Special Representative reasoned, emerged not from law but from the basic expectation society has of business: an expectation that companies will do no harm.³³ The Guiding Principles stipulate that the corporate responsibility to respect human rights 'means that they [companies] should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.³⁴ The explanatory Commentary

²⁵ D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003–04) 44 *VJIL* 931, 944–47.

²⁶ O De Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations' (November 2006) <<http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>>.

²⁷ See Utting (n 6) 14–15.

²⁸ For a summation of some of these criticisms see A Chakraborty, 'The woman who nearly died making your iPad' *The Guardian* (London, Monday 5 August 2013) <<http://www.theguardian.com/commentisfree/2013/aug/05/woman-nearly-died-making-ipad>>; China Labour Watch, 'Beyond Foxconn : Deplorable Working Conditions Characterize Apple's Entire Supply Chain' (June 27 2012) <<http://www.chinalaborwatch.org/pdf/2012627-5.pdf>>.

²⁹ FLA Workplace Code of Conduct <<http://www.fairlabor.org/labor-standards>>.

³⁰ Fair Labor Association, 'Independent Investigation of Apple Supplier, Foxconn, Report Highlights' (March 2012) <http://www.fairlabor.org/sites/default/files/documents/reports/foxconn_investigation_report.pdf> accessed 24 June 2013.

³¹ Other multi-stakeholder initiatives include Social Accountability International, the Ethical Trading Initiative and the Fair Wear Foundation. The Worldwide Responsible Apparel Production (WRAP) is an industry grouping. Such voluntary initiatives set up to regulate supply chains or hold companies accountable vary widely and some have failed to agree on the need for external audits with transparent results. This shortcoming has arguably made them less effective and credible.

³² UN Human Rights Council, '2011 Report' (n 2) Principle 11.

³³ UN Human Rights Council, '2008 Report' (n 2) [9] and [24].

³⁴ UN Human Rights Council, '2011 Report' (n 2) Principle 11.

accompanying the Principles states that ‘the responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate [and that] [i]t exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations.’³⁵

What does this mean in practice and how do such top-down announcements from the UN filter down to impact workers’ rights on the floor of a sub-contracting factory in Bangladesh? To some, the loose language of corporate responsibility rather than obligation implies an acceptance of a ‘world where companies are encouraged, but not obliged, to respect human rights’³⁶ and requires few real changes in the way business operates. ‘The soothing promise of responsibility can deflect public attention from the need for stricter laws and regulations’.³⁷ Responsibility is distinguished from accountability, and corporations interpreting these principles in practice, may choose to take their cue (or not) from a mix of international standards selectively embodied in a soft law format.

Following this line of reasoning, some argue that it is illegitimate for private companies to be conducting labour inspections and that resources should rather be devoted to strengthening public labour administration systems.³⁸ The combination of utilizing soft law standards and enforcement by private actors while filling a governance gap left open by the state, attracts reasonable criticism around the selective nature of the standards monitored and the perennial problems of leaving the ‘fox guarding the hen house’.³⁹ In some cases, the standards monitored by some multi-stakeholder initiatives set a lower bar than that required by local law⁴⁰ and some initiatives lack independent auditing and transparency.⁴¹ Many of the soft law codes and guidelines that have multiplied in this sector in the last three to four decades exhibit these types of problems.

While some credence can be given to the argument that these codes, guidelines and principles have emerged simply because there is a lack of anything better and/or as a tactic for avoiding government regulation, the use of soft law can also be a deliberate strategic choice – made by NGOs and business - because it is attractive to the participation of a broad group of stakeholders (particularly business and sometimes government). The attraction of such soft law (to some participants) can be easily understood if the standards are viewed as containing aspirational goals that aim for the best possible scenario with limited constraints if such goals are not met but soft law is not necessarily commensurate with soft results. Any clear demarcation between hard and soft law is challenging⁴² and while some may argue that ‘the essence of any soft law rule is that it is not binding’⁴³ in this particular field, differentiation between soft and so-called hard (or legally binding) law is not binary but one that should be viewed as developing on a continuum. What is legally sanctioned is distinguishable from activities that are not, but reputational sanctions can be crucial to business.⁴⁴ The reality is that not unlike the global framework for enforcing international human rights law, such initiatives are only as strong as their members choose to make them, and they do not apply to those that do not want to join them. The soft language of the Guiding Principles and the casing in which the corporate responsibility to respect principle is couched (that is, principle not ‘law’) was deliberately adopted in contrast to the legal protection duties it ascribes to states that are grounded in international human rights law. What distinguishes the Guiding Principles from earlier UN efforts to regulate corporations with respect to human

³⁵ *ibid.*

³⁶ A Ganesan, ‘UN Human Rights Council: Weak Stance on Business Standards’ (16 June 2011) <www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>; see also AFLCIO, *Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Worker Rights* (April 23, 2013) <<http://www.aflcio.org/Learn-About-Unions/International-Labor-Movement/Responsibility-Outsourced-Report>>.

³⁷ R B Reich, *Supercapitalism: The Transformation of Business, Democracy and Everyday Life* (Knopf 2007) 170, quoted in Locke, n 10, 157.

³⁸ AFLCIO (n 36) 17.

³⁹ UNCHR ‘Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (22 February 2006) E/CN.4/2006/97 [53].

⁴⁰ For example, in the Apple-Foxconn case, the FLA Workplace Code required a maximum of 60 hours worked per week (regular and overtime), while Chinese law limits work to 40 hours per week and a maximum of 36 hours overtime per month, potentially meaning a maximum of 49 hours per week. FLA’s audit found both standards had been exceeded. The reality is that the Chinese legal limits are not enforced: Fair Labor Association, n 30, 8.

⁴¹ See for example the Worldwide Responsible Apparel Production (WRAP) <<http://www.wrapapparel.org/>>.

⁴² AE Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’ (1999) 48 ICLQ 901-902.

⁴³ A D’Amato ‘Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d’Aspremont’ (2009) 20 EJIL 897, 899.

⁴⁴ C Oka, ‘Accounting for the Gaps in Labour Standard Compliance: The Role of Reputation-conscious Buyers in the Cambodian Garment Industry’ (2010) 22 EJDR 59, 78.

rights⁴⁵ is the deliberate decision to move away from pursuing an explicit legal connection between international human rights law and corporations and rely on a more amorphous, but broader societal expectation that attaches to companies. Such looseness in language can affect both how consistently the Principles are interpreted, who they attach to and how compliance is coerced.

One of the many challenges associated with the Guiding Principles is their practical implementation. While theoretically, emphasis is placed on the primary protective duty of the state to safeguard human rights, it is increasingly obvious from a practical perspective that in many markets this needs to be supplemented by private actors⁴⁶. The Guiding Principles' recognition of the corporate responsibility to respect is acknowledgement of this. The limited capacity of many national governments and institutions like the ILO to stem rights violations, the decline of state backed labour inspections, and the ferocious appetite of the global marketplace has quite simply overwhelmed most national systems of labour market regulation.⁴⁷ Even developed market economies have trouble maintaining adequate levels of inspection.⁴⁸ The need for private actors to take responsibility for labour inspection remains, and will probably grow. Foxconn is China's largest private employer⁴⁹ and in spite of this, or perhaps because of this, state regulated labour inspections were inadequate to address the ongoing rights violations within factories. No socially responsible company wants to be associated with child labour, forced labour or unsafe working conditions in the production of their goods, so the need to perform due diligence to ensure that labour and human rights standards are respected, even in jurisdictions where labour inspectors are active, is often a necessity.

The ideal situation would be one in which non-state actors complement the work of the state by mobilising resources to protect human rights that are comprehensively defined by reference to international standards. The work of the non-state actors is not to relieve states' of their duties, or selectively determine what workplace standards are relevant to their operations, but to assist in building the capacity of governments to assume or resume their obligations to improve working conditions. That synergy has been hard to capture and in many states where violations are rampant their public agencies are either in denial or in bad faith about the lamentable state of labour law enforcement in their jurisdiction.⁵⁰ Reducing corporate violations of workers' rights is a process of progressive realisation. While a diverse range of initiatives aimed at curbing violations of workers' rights have proliferated in recent decades, it is also clear that such initiatives 'have been unable to stem the flow of human rights violations by TNCs [transnational corporations]'.⁵¹ This should not be taken as an indication that such measures are altogether devoid of merit. Initiatives that have relied on the development of soft law via such tools as codes of conduct can play a vital role in internalising human rights norms within corporations and solidifying the notion that corporations have duties with respect to shareholders *and* stakeholders (including workers in their supply chain) alike – a process that in time 'can shape the standards of care that are legally expected of business'.⁵² However, not all codes or initiatives are

⁴⁵ See ie UN Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) E/CN.4/Sub.2/2003/12/Rev.2. More generally on earlier UN efforts see P Utting, 'UN-Business Partnerships: Whose Agenda Counts?' (Paper presented at a seminar on Partnerships for Development or Privatization of the Multilateral System?, Oslo, 8 December 2000) <[www.unrisd.org/unrisd/website/document.nsf/d2a23ad2d50cb2a280256eb300385855/a687857bd5e36114c1256c3600434b5f/\\$FILE/utting.pdf](http://www.unrisd.org/unrisd/website/document.nsf/d2a23ad2d50cb2a280256eb300385855/a687857bd5e36114c1256c3600434b5f/$FILE/utting.pdf)>.

⁴⁶ Locke (n 10) 157.

⁴⁷ One positive example of how the synergy between the public and private sector can work to improve labour conditions is the ILO's Better Work program, which is collaboration between the ILO and the International Finance Corporation (IFC) focused on the application of labour standards in private sector development. The Better Factories Cambodia project launched in 2001, has often been held up as providing a concrete example of how international standards together with strong monitoring and trade incentives can usefully be combined to form a strong and sustainable basis for improving working conditions (see discussion at n 88). For a contrary view see International Human Rights and Conflict Resolution Clinic Stanford Law School & Worker Rights Consortium, *Monitoring in the Dark: An evaluation of the International Labour Organization's Better Factories Cambodia monitoring and reporting program* (2013) <<http://www.workersrights.org/linkedddocs/Monitoring-In-The-Dark-Stanford-WRC.pdf>>.

⁴⁸ AE Compa, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (Cornell University Press 2004); also Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in US Meat and Poultry Plants* (25 January 2005) <<http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear>> accessed 1 May 2012.

⁴⁹ Fair Labor Association (n 30) 1.

⁵⁰ Bangladesh is a prime example of this and the decision by the US government in June 2013 to suspend Bangladesh's trade privileges with the US was an attempt by the US administration to increase the pressure on the Bangladeshi government to act more quickly to improve workers' rights. The involvement of the Bangladesh government in the 2013 ILO factory initiative might be interpreted as a sign that such pressure was effective. See S Greenhouse, 'Obama to Suspend Trade Privileges with Bangladesh' *The New York Times* (New York, June 27 2013) <http://www.nytimes.com/2013/06/28/business/us-to-suspend-trade-privileges-with-bangladesh-officials-say.html?emc=edit_na_20130627&_r=0>.

⁵¹ D Kinley and R Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 3 HRLR 491.

⁵² H Ward, 'Legal Issues in Corporate Citizenship' (February 2003) <<http://pubs.iied.org/pdfs/16000IIED.pdf>> accessed 1 May 2012.

alike and there remains a vast gulf of difference between the motherhood type statement of the Guiding Principles to the specific standards or aspirations of some codes and how they actually engage business in the process of reform highlighting the need for state involvement in this field to supplement and at times, coerce business into operating responsibly and provide guidance and consistency with respect to adhering to internationally recognized standards.⁵³

Relying purely on either the blind faith of market forces or the state to curb corporate violations has its challenges and ultimately, is likely to have limited longevity in bringing about sustained workplace improvements.⁵⁴ To move from the development of these soft law principles to their practical implementation, requires articulated regulation by a multiplicity of stakeholders. In essence, re-regulation relies on a form of 'networked governance'⁵⁵ that places corporate behaviour under the scrutiny of not only states, but also NGOs, unions, industry bodies and international organizations. Private regulatory mechanisms that borrow standards from both hard and soft law instruments may transcend, but also complement, the traditional and formal regulatory role played by states in protecting human rights. This form of regulatory renaissance is not so much 'governance without government'⁵⁶ but rather governance that recognizes the limitations of government and seeks to supplement those regulatory gaps by directly involving other crucial stakeholders.

IV. Blending Public and Private Regulation: The Changing Role of the State

In its 2013 World Report, Human Rights Watch stridently makes the case for a more prominent - practical not just theoretical - role to be played by states in regulating corporate compliance with human rights: '[w]e have nearly reached the paltry limits of what can be achieved with the current enforcement-free approach to the human rights problems of global companies. It is time for governments to pull their heads out of the sand, look the problem they face in the eye, and accept their responsibility to oversee and regulate company human rights practices.'⁵⁷ Human Rights Watch's argument is fortified by the many examples of corporate irresponsibility it has tabulated over the years⁵⁸ including several where companies have professed to be operating according to a human rights code of conduct. Reasserting the role of the state in improving workplace conditions does not necessarily mean, as one commentator puts it 'a return to traditional command control regulation [as] the limits of that approach are well known.'⁵⁹ What is needed, is some level of involvement by the state to harden the 'societal expectations' foisted on some companies and more readily assumed by others⁶⁰: a blending of public and private regulation or re-regulation.

It is reasonable to argue that compliance by companies with soft law human rights standards is more likely if some aspects of those initiatives encouraging certain behaviours are mandated in the form of a 'hard' law requirement.⁶¹ Such requirements can take various forms and one obvious area where this might be effective in the current climate is government imposed human rights due diligence or specific reporting

⁵³ This is a much broader issue that cannot be fully explored in this paper. It is almost impossible to even compare some of the different multi-stakeholder initiatives as they operate according to individualistic structures peculiar to their particular sector. For example, the Voluntary Principles on Security and Human Rights (<[http:// www.voluntaryprinciples.org/](http://www.voluntaryprinciples.org/)>) has a high level of state and corporate involvement but has been persistently criticised for its lack of implementation and enforcement mechanisms. Meanwhile an initiative like the FLA which operates primarily in the apparel and footwear sector, has no governmental involvement (but was formed partly at the behest of government), is stronger on compliance but has been criticised for its lack of union and broad civil society participation.

⁵⁴ Locke (n 10) 157.

⁵⁵ Baccaro and Mele (n 10) 453.

⁵⁶ Vogel (n 9) 263.

⁵⁷ Human Rights Watch (n 12) 30.

⁵⁸ See Human Rights Watch Reports at <<https://www.hrw.org/topic/business>>.

⁵⁹ Locke (n 10) 2. Command and control regulation might be loosely defined as direct regulation of a company/ industry or activity by legislation that states what is permitted and what is not.

⁶⁰ The fact that states have a duty to protect from third party violations is non-controversial. How far that obligation extends and whether it should be applied extraterritorially is far less settled, see UN Human Rights Council, '2008 Report' (n 2) [18].

⁶¹ For example, a recent briefing paper by an European NGO (SOMO) examined the due diligence efforts of 186 companies that are listed in Europe and make use of the minerals covered by Sec. 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (see discussion at n 77). The results indicated that only a small percentage of EU-listed companies are directly affected by Dodd Frank 1502 and are therefore required to publicly disclose their use of conflict minerals and the large majority of companies that are not required to comply with Dodd Frank 1502 simply do not conduct human rights due diligence on conflict minerals. See T Steinweg and G ten Kate, 'Conflict Due Diligence by European Companies' (November 2013) <http://www.somo.nl/publications-en/Publication_4003?utm_source=SOMO+Alert&utm_campaign=e3922a78cd-SOMO_Alert_Conflict_Minerals10_23_2013&utm_medium=email&utm_term=0_20c962ad76-e3922a78cd-318982993>.

requirements on companies.⁶² These obligations could be mandated via domestic legislation (operating extraterritorially) to 'harden' principles that are currently cast in a soft format.

The Guiding Principles for example, encourage companies to conduct due diligence as a means by which companies might discharge their responsibility to respect rights.⁶³ Such due diligence involves companies conducting a human rights risk assessment as part of their business operations but the parameters of such due diligence are not clearly defined.⁶⁴ There is no legal obligation in the Guiding Principles to either conduct such an assessment or to publish its results. However, the hope or expectation that some companies might willingly adopt such responsibilities stems from experience over the last few decades of some companies who have been involved in multi-stakeholder initiatives that require companies to integrate human rights responsibilities into their *modus operandus*. The Guiding Principles leave a significant amount of 'wiggle room' for companies in setting the parameters of due diligence and note that:

Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships...⁶⁵

The text of this provision is nebulous and open to interpretation. Whether the operations of a sub-contracting factory in Bangladesh can be 'directly linked' to its US based buyer is debatable and with no legal requirement to conduct due diligence, compliance is likely to be patchy and inconsistent. Selective implementation of this principle is also likely to be furthered by the Commentary attached to the Guiding Principles which states that '[w]here business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all.'⁶⁶ States however could supplement and strengthen this process by legislating to require companies they regulate to carry out such due diligence and set the parameters for what it should incorporate.

Articulating the reach of a state to impose such obligations (and therefore defining which companies a state might regulate) opens the proverbial bag of worms. Should (or could) such regulations extend beyond a parent company to its subsidiary operating in India or down its supply chain to its contracted supplier factories? Although in most jurisdictions national law regulates corporate activities that affect human rights including labour rights, anti-discrimination law, environmental protection and criminal law, domestic legislation typically does not apply extraterritorially. However, several UN bodies have, in the last few decades, taken an expansive approach on who and what a state might regulate in the pursuit of protecting human rights. For example, the UN Committee on Economic, Social and Cultural Rights when considering how states might protect the right to health noted that state actions might need to cross national boundaries.

To comply with their international obligations ... States parties have to respect the enjoyment of the right of health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means...⁶⁷

Postulating two years later in respect to protecting an individual's right to water, the same UN Committee called upon states 'to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries [w]here States parties can take steps to influence other third parties to respect the right, through legal or political means ...'.⁶⁸

⁶² For a discussion of (now) failed legislative attempts in the US, Canada and Australia to impose national human rights standards on companies regardless of where they operate, see A McBeth, 'A Look at Corporate Code of Conduct Legislation' (2004) 33 CLWR 222, 251.

⁶³ UN Human Rights Council, '2011 Report' (n 2) [17] and [18].

⁶⁴ For more on this see J Nolan 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in S Deva and D Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013), 138-61.

⁶⁵ UN Human Rights Council, '2011 Report' (n 2) [17].

⁶⁶ UN Human Rights Council, '2011 Report' (n 2) [17] (Commentary).

⁶⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment 14: The Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4.

⁶⁸ UN CESCR, 'General Comment 15: The right to water' (20 February 2003) UN Doc. E/C.12/2002/11 [31].

Despite this expansive and pragmatic approach taken by the UN Committee on Economic, Social and Cultural Rights that encourages states to protect individuals from corporate harms wherever they occur, the Guiding Principles adopted a more conservative view as to whether a state might regulate corporate activities that extend beyond its borders and jurisdiction. The Guiding Principles note that ‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.’⁶⁹ The Commentary attached to Guiding Principle 2 further elaborates on these territorial and jurisdictional limits by noting the possibilities open to states to broaden and deepen the scope of the duty to protect but does not go so far as to suggest states are obliged to act in this regard.⁷⁰

The Guiding Principles rather limp stance in recognising but not requiring states to regulate companies extraterritorially turns its back on a window of opportunity offered by the UN Committee on Economic, Social and Cultural Rights in recommending an assertive extraterritorial approach to protection. The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights⁷¹ developed by a group of experts in September 2011 takes up the challenge of more solidly integrating international human rights law with the realities of the global economy and the transnational operations of business by declaring that ‘[a]ll States must take necessary measures to ensure that non-State actors which they are in a position to regulate ... such as transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights.’⁷² Maastricht Principle 25 then goes on to clarify that states will be in a position to regulate such corporations if the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned’.⁷³

When looking for examples of how a state might reasonably regulate corporate activities beyond their borders, one model of extraterritorial legislation that has had a widespread impact on the private sector is the US *Foreign Corrupt Practices Act*.⁷⁴ Adopted in 1977, it has influenced the way in which US businesses operate abroad, and has changed the global business environment more generally with respect to

⁶⁹ UN Human Rights Council, ‘2011 Report’ (n 2) Guiding Principle 1.

⁷⁰ The Commentary attached to the Guiding Principles states: ‘At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation.’

⁷¹ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (29 February 2012) <<http://www.lse.ac.uk/humanRights/articlesAndTranscripts/2011/MaastrichtEcoSoc.pdf>>; O De Schutter and others, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ (2012) 34 HRQ 1084, 1135.

⁷² Maastricht Principles (n 71), Principle 24 at 5.

⁷³ *ibid* Principle 25 at 5 and on a related issue with respect to determining the nationality of a TNC for the purpose of determining the judicial fora in which claims against a TNC may be heard, see the *Barcelona Traction Case (Belgium v Spain)* (New Application 1962) [1970] ICJ Rep 3, where the International Court of Justice held that the nationality of a corporation is to be determined by reference to the state in which the TNC is incorporated. This does not, of course, surmount the problems posed by the separation of legal personality recognised throughout the common law world; nor does it dispense of the procedural issues that arise in transnational claims. It does, however, mean that a corporation incorporated, for example, in Australia can in theory be sued in the courts of Australia based on actions committed in another jurisdiction. However the expansive approach taken in the Maastricht Principles stands in contrast to the approach of the US Supreme Court in a 2013 decision examining the extraterritorial liability of corporations for human rights violations. The decision in *Kiobel v Royal Dutch Petroleum Co.* (621 F. 3d 111), while focused exclusively on the jurisdictional limits of peculiar piece of legislation the - Alien Torts Claims Act (ATCA) - complicates the territorial question a little further. In *Kiobel*, a majority of the court further restricted – though did not close the door – to future litigation involving the actions taken by global companies outside the United States, especially for non-US based companies. The justices split five to four in their reasoning with the majority relying on the presumption against extraterritoriality arguing that nothing in the wording, logic or history of the ATCA showed that Congress necessarily meant to sweep into US courts wholly non-US claims involving non-US parties. Justice Breyer, however, in a concurrence joined by three others, rejected that the presumption against extraterritoriality applied to the statute and instead advocated an analysis ‘guided in part by principles and practices of foreign relations law’ (at 1) to determine whether an ATCA plaintiff’s allegations involved ‘sufficient ties’ to the US to trigger jurisdiction. In *Kiobel*, with non-US plaintiffs, defendants and conduct surrounding the claims, it was deemed insufficient to trigger such potential jurisdiction. Recently the United Kingdom (UK) Supreme Court took a more expansive view toward extraterritoriality (albeit not in relation to corporate responsibility) when it considered the extraterritorial application of the ECHR in *Smith (and others) v MOD* [2013] UKSC 41. The Court considered whether the UK government had jurisdiction over British soldiers killed while serving in Iraq. The Supreme Court held unanimously that the UK exercised extraterritorial jurisdiction based on the authority and control over which the UK, through the chain of military command had over the individuals despite the UK no longer exercising ‘public powers’ in the region.

⁷⁴ (1977) 15 US Code § 78dd-1.

corruption. Setting a precedent for how a legislative model can reverberate globally, the US act was followed into operation by the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* and the UN *Convention against Corruption*⁷⁵ which established international standards for combating corruption. Companies have responded to these global anti-corruption laws by developing due diligence programs to proactively identify potential risks. The global implementation of laws to combat corruption is a useful model in assessing how more rigor could be brought to bear in applying international human rights standards to business and the mandated due diligence requirements showcase how the Guiding Principles could be hardened into a national legislative model with extraterritorial reach.

States might also supplement private regulatory mechanisms by mandating increased transparency in global business operations with a view to increasing respect for human rights. For example, the UN Global Compact (a very soft version of soft law in this field) asks companies to commit to issuing an annual 'Communication on Progress'⁷⁶ as a means of advancing corporate responsibility for human rights. While the Compact can cajole companies (and as a last resort threaten companies with expulsion) into complying, states can *require* companies they regulate to report on their global activities and the steps they are taking to ensure the protection of human rights. For example, Section 1502 of the US Dodd-Frank law requires all listed companies to report on the sources of minerals used in their products in the areas around the Democratic Republic of Congo.⁷⁷ The purpose of this provision is to provide greater transparency about how the trade in minerals is potentially fuelling and funding the armed struggle in the Democratic Republic of Congo and relies on the adverse reputational impact of such disclosure rather than mandating penalties for actually sourcing minerals from conflict-afflicted regions. In addition, as part of the decision to lift certain economic sanctions applicable to Burma/Myanmar, the Obama administration has established new reporting requirements for US companies that are investing more than \$500,000 in business in Burma. The reporting requirements include a provision that compels companies to outline the steps they are taking to ensure that their commercial engagements do not contribute to human rights abuses.⁷⁸ The European Union (EU) has also recently adopted new laws aimed at increasing the transparency of government income from the oil and gas and logging industries. The 2013 EU *Accounting and Transparency Directives* will require European companies to report payments of more than €100,000 made to the government in the country they are operating in, including taxes levied on their income, production or profits, royalties, and license fees.⁷⁹ These laws feed off the earlier efforts of multi-stakeholder initiatives such as the Extractive Industries Transparency Initiative and Publish What You Pay, which have long championed the need to increase transparency of payments by companies to governments.⁸⁰ Such reporting requirements – both state and non-state sanctioned – indelibly link transparency with accountability, and in a field where accountability is arguably pursued by civil society with often greater vigour than states, the more information that is made available on global business operations, the more doable the work of these non-state actors becomes to privately regulate corporate activities.⁸¹

As these examples illustrate, interactions between public and private regulation can take many different forms and mandating certain aspects of human rights due diligence and reporting is one way in which

⁷⁵ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted by the Negotiating Conference on 21 November 1997) and the UN Convention Against Corruption (adopted 31 October 2003, entry into force 14 December 2005) A/58/422.

⁷⁶ The UN Global Compact offers businesses a strategic framework aligning their operations with ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption. See United Nations Global Compact, 'What is COP?' (20 March 2013) <<http://www.unglobalcompact.org/COP/index.html>>.

⁷⁷ In addition, Sec. 1504 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (see n 61) addresses financial transparency. This section requires all listed oil and mining companies to disclose the revenues they pay to governments worldwide.

⁷⁸ See HumanRights.gov, 'Burma Responsible Investment Reporting Requirements' <<http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf>>.

⁷⁹ See Council Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19; Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC' COM (2011) 683 final.

⁸⁰ Extractive Industries Transparency Initiative <<http://eiti.org/>; <http://www.publishwhatyoupay.org/>>.

⁸¹ There are those that argue that the costs of such transparency initiatives (including funding the reporting and due diligence requirements and potentially directing trade away from developing countries in need of foreign investment) outweigh any potential benefits. For a summary of the pros and cons of such arguments, see a transcript of a discussion held on December 13 2011, hosted by Brookings and Global Witness, 'The Transparency, Conflict Minerals and Natural Resources: What You Don't Know About Dodd-Frank' (20 December 2011) <<http://www.brookings.edu/research/opinions/2011/12/20-debating-dodd-frank-kaufmann>>.

state regulation can supplement private regulatory efforts to improve corporate compliance with human rights standards.⁸² Private regulatory mechanisms might sometimes impose more in-depth transparency requirements that exceed state reporting requirements but public regulation could cast a broader net to include companies that have resisted private regulation and also include sanctions for non-compliance that go beyond the reputational sanctions most commonly associated with private regulation.⁸³

The challenges of relying purely on soft law and private regulation to enforce human rights compliance can be somewhat mollified by the supplementary involvement of the state. However, like reliance on soft law and private regulatory mechanisms, the involvement of the state in regulating corporate compliance with human rights, also has its challenges. While legally, it is arguable that states have the ability to impose extraterritorial human rights due diligence and reporting requirements on companies, the political will-power to do so is often lacking. The larger question of how the state might most effectively be involved in this blending of public and private regulation is also significant. For example, the FLA (discussed earlier with regard to the regulation of Apple's Foxconn factories) was convened by government⁸⁴ which provided an important moral imperative that drew together a variety of stakeholders to address the issue of working conditions both in the US and abroad. But it was probably equally important that the US government then withdrew and let the newly formed not-for-profit organisation (the FLA) get on with the job. This allowed the FLA to be more agile and creative than it could have been had government remained at the table. It also allowed the FLA to operate in exporting countries without being challenged as an agent of US foreign or trade policy. By contrast, another multi-stakeholder initiative, the Voluntary Principles on Security and Human Rights (operating in the extractive sector) has developed with governments assuming a firm seat at the table alongside companies and NGOs and taking a lead role in developing this essentially private form of regulation. What is most effective in terms of blending public and private regulation is thus likely to differ sector by sector, and this can significantly impact the replication capacity of such initiatives. What might work to firm up commitments on security and human rights for the extractive industry where companies often operate in a joint venture with government may not be applicable to the garment sector where a company's supply chain is not generally directly or formally linked with the state.

Regionally too, approaches may differ. Civil society movements (with a strong element of consumer support) based in northern Europe and North America have actively prodded and pushed both companies and governments to take action on solidifying the concept and requirements of corporate responsibility for human rights for several decades. Such issues have only figured more recently on the regional agenda of South East Asian nations despite the ASEAN⁸⁵ population of approximately 600 million having long provided an abundant and often attractively priced labour force. This potential workforce, combined with lands rich in natural resources, have together acted as a compelling incentive for transnational corporations to source their goods from this region. While consumer advocacy movements are gradually becoming more vocal in this region, other state based compliance triggers, such as trade incentives, are proving to be effective in supplementing private regulation.

One prominent example that showcases regulatory renaissance at work with its mix of public and private regulation is Cambodia's Better Factory program.⁸⁶ The program developed out of the 1999 US-Cambodia bilateral trade agreement in which increased access to the US market (quota) was linked to tangible improvements in working conditions in Cambodia's garment factories.⁸⁷ The project, launched in 2001, monitors factory performance against international and national labour standards and was established by the ILO in cooperation with the US and Cambodian governments. Monitoring reports were used not just by the US

⁸² See Locke (n 10) 156-73 for discussion of other ways in which public regulation can be layered on private mechanisms to strengthen compliance with human rights standards.

⁸³ As one commentator argues 'A soft-law standard will allow an infraction to be cost-effective: that is, a violator of a norm of soft law may suffer reputational loss, but reputational damage may well be worth the benefits that are derived from non-compliance with the norm. By contract, a hard-law system must, without exception, endeavour to make every violation cost-ineffective.' A D'Amato, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont' (2009) 20 EJIL 897, 902.

⁸⁴ President Clinton's original impetus brought a variety of stakeholders together to form the Apparel Industry Partnership. The US government generally supported the process, but was not directly involved in the governance of the organization. The Apparel Industry Partnership eventually transformed into a non-profit organization in the form of the FLA.

⁸⁵ The Association of Southeast Asian Nation (ASEAN) is a geo-political and economic organisation of ten countries located in South-east Asia, which was formed on 8 August 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand. Since then, membership has expanded to include Brunei, Burma (Myanmar), Cambodia, Laos, and Vietnam.

⁸⁶ Better Factories Cambodia <<http://betterfactories.org/>>.

⁸⁷ The US - Cambodia Textile Trade Agreement was the first agreement of its kind to link increased access to US markets to improved working conditions in an exporting country. Textile and garment quotas were eliminated in January 2005 with the end of the Multi-Fiber Agreement (MFA).

government to assess quota increases but also by global corporate buyers to determine where they should place their orders. Although quotas were eliminated in 2005, the ILO program continues with the ongoing support of the Garment Manufacturers' Association in Cambodia, international buyers and unions. The program is jointly funded by the US Department of Labor, USAID, Agence Francaise de Development, the Garment Manufacturers' Association in Cambodia, the Royal Government of Cambodia and international buyers.⁸⁸ Key to the continuation of the program, are the global reputation-conscious buyers who 'in the continuing absence of a [local] well-funded labor inspectorate...appear to be driving improved compliance with ILO labor standards.'⁸⁹ While international standards such as those found in ILO and human rights treaties are the appropriate baselines against which to monitor corporate compliance they only have meaning if effective remedies and enforcement mechanisms are put in place, or if local governments take them up. To date this has not generally happened and the ILO with its tri-partite structure (business, labour, and government) is often constrained in its efforts to implement the standards it has created. The Better Factories Cambodia project provides a concrete example of how international standards, together with strong monitoring, trade incentives and encouragement by global buyers (in the form of orders), can usefully be combined to form a strong and sustainable basis for improving working conditions.⁹⁰

More recently ASEAN as a whole has started to open its doors to embracing the concept of corporate social responsibility, even though particular states in this region have a history of reluctance in discussing human rights.⁹¹ In its 2009 ASEAN Socio-Cultural Community Blueprint, ASEAN noted that one of its strategic community objectives was to 'ensure that Corporate Social Responsibility is incorporated in the corporate agenda.'⁹² Accordingly, in 2010, the newly formed ASEAN Intergovernmental Commission on Human Rights commenced an (ongoing) thematic study focused on 'Corporate Social Responsibility and Human Rights in ASEAN'.⁹³ A recent study of regional state practices with respect to business and human rights found that while most ASEAN States have substantial legal frameworks governing the rights intersection with business, the key challenge is the weak regulatory effectiveness vis-à-vis corporations which results in greater reliance being placed on private regulation to encourage corporate rights compliance.⁹⁴ In this region, with a less vocal consumer movement to drive corporate respect for human rights, a variety of regulatory techniques that blend public and private measures can complement each other and lead to improved working conditions.

V. Conclusion

The rise of, and reliance on, soft law and private regulation to drive corporate compliance with human rights is symptomatic of the fact that governments in many of the countries where the goods are produced are unable or unwilling to implement improved working conditions. The logical involvement of the non-

⁸⁸ ILO, 'Better Factories Cambodia' (14 October 2008) <http://www.ilo.org/asia/whatwedo/projects/WCMS_099340/lang-en/index.htm>.

⁸⁹ See Locke (n 10) 171.

⁹⁰ In October 2013, the ILO and the International Finance Corporation (IFC) announced a partnership to launch Better Work Bangladesh which will provide factory-level services, including assessments of compliance with national labor laws and international standards, <<http://betterwork.org/global/?p=3735>>. However, while the ILO program has brought benefits to Cambodia's flourishing garment industry it is a program in process rather than a template for resolving problematic working conditions. Recent labour unrest by Cambodian garment workers demanding an increase in their minimum wage illustrates the temporary nature of any 'solution' to improving working conditions, see: G Mullany, 'Workers face police gunfire amid unrest in Cambodia' *The New York Times* (New York, January 3 2014) <http://www.nytimes.com/2014/01/04/world/asia/cambodia-protests.html?_r=0>.

⁹¹ C Renshaw, 'The ASEAN Human Rights Declaration 2012', (2013) 3 HRLR 557, 579; B Saul and J Mowbray and I Baghoomians, 'Resistance to Regional Human Rights Cooperation in the Asia-Pacific: Demythologizing Regional Exceptionalism by Learning from the Americas, Europe and Africa' in H Nasu and B Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building*, (107-126). A Byrnes and A Durbach and C Renshaw 'A Tongue but No Teeth? The Emergence of a New Human Rights Mechanism in the Asia Pacific Region' (2009) 31 (2) SLR 211, 238.

⁹² ASEAN, 'ASEAN Socio-Cultural Community Blueprint' (2009) <<http://www.asean.org/archive/5187-19.pdf>>. But there has been persistent criticism from civil society in the region about the lack of consultations on these issues, and the slow pace with which discussions are proceeding. See Solidarity for Asian Peoples Advocacy, 'Civil Society Statement on Corporate Accountability in ASEAN' (13 November 2012) <<http://seaca.net/viewArticle.php?aID=1058>>.

⁹³ Part of the newly established regional Intergovernmental Commission on Human Rights' mandate, since its establishment in October 2009, is to promote and protect human rights that will complement the building of the ASEAN Community. This involves, it argues, developing a common framework to accelerate the promotion of CSR and human rights in the region, and policy development. The 'Five Year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2010 – 2015)' notes CSR as one of its thematic studies. The study is still ongoing, <<http://aichr.org/documents/>>.

⁹⁴ Human Rights Resource Centre Business and Human Rights in ASEAN, *A Baseline Study 2013* <<http://hrrca.org/data/business-and-human-rights-asean-baseline-study>>.

state sector (including companies, NGOs, unions, industry bodies and/or international organisations) has been a useful, if not a sufficient tool to temper this governance gap. Private intervention alone is unlikely to be sufficient to develop longevity and consistency around corporate compliance for human rights. For real change to occur governments must get involved. Violations occurring in a far flung factory in Bangladesh are not a problem that can simply be isolated or fixed by focusing on improvements at the factory level. Attention also needs to be directed to the corporate and state policies and practices that are being foisted on the factory from within their borders and beyond, both by states and the global buyers who place the orders in those factories. A blend of private and public regulation is required to tackle these inherent labour problems, and how this unfolds in a world of volatile consumer markets that require increased flexibility in production, rigid labour markets prohibiting flexibility, and rising costs that incentivise cost cutting, is challenging.

There is a convoluted and complex relationship between human rights and corporations, and it is clear that the interplay between national and international law and state and non-state actors is crucial in establishing both a legal and quasi-legal basis and mechanism for holding corporations accountable for human rights violations. While it is uncontested that corporations should obey the law in the jurisdictions in which they operate, where the content of rights in such jurisdictions does not meet the standards of international law or the law is not enforced, there is a failure in the legal governance regime for protecting human rights. The steady evolution of a global social expectation that companies should respect international human rights standards, combined with the occasional foray by states in adopting an expansive extraterritorial approach to protecting rights, is changing the nature and possibility of developing a firmer basis for corporate legal accountability for human rights and in so doing, refining the rules of the game. The growth and depth of soft law mechanisms that have developed around the theme of corporate responsibility have come about partly in recognition of the failure of legal regulation (both internationally and domestically) to hold corporations to account, but these soft law initiatives have become an important tool in attempting to prevent and remedy corporate rights violations.

While this re-regulatory process is slowly but surely refining the rules of the game so that achieving greater respect for human rights is a responsibility not only assumed, but also implemented by state and non-state actors, greater attention needs to be focused on the practical impacts rendered by such a process. Initiatives that might combine elements of public and private regulation, whether in the form of the FLA, the Voluntary Principles on Security and Human Rights or the Cambodia Better Factory project, are still in their relative infancy but new forms of private/public regulation are continuing to emerge. The Global Network Initiative⁹⁵, the International Code of Conduct for Private Security Service Providers⁹⁶, the Guiding Principles themselves, and most recently the Bangladeshi garment factory initiatives, are all projects that both emulate and at times, seem to be 'reinventing the wheel' of earlier efforts that combine aspects of soft/hard law and private/public regulation to improve adherence to human rights. More research is needed on what particular aspects of this re-regulation process are most effective in providing greater protection for human rights. Is state involvement a necessity in all sectors to maximise human right protection? What lessons can be learned from those initiatives that have been in operation for the last decade? Does reliance on soft law impede efforts to develop global laws to regulate corporate rights adherence? Would the development of such global laws be effective in tempering rights violations at the ground level? Under what conditions and in what sectors, are government imposed transparency or due diligence regulations likely to be most useful in protecting rights? In what situations should private regulation act as a substitute for state regulations, and are such tactics sustainable in the long term as a rights protection mechanism?

Accepting that rights must be respected by corporations, wherever in the world they operate is one thing, making it happen is quite another. In practical terms, non-state actors have either deliberately or by default, assumed the protective duties of states while some states have sat idly by.⁹⁷ Utilizing the involvement of other stakeholders in a re-regulatory manner does not absolve a state from acting but rather recognizes that at times, a joint regulatory effort may be more effective than simply relying on the command and control tactics of yesteryear. The questions raised above indicate that there is a vast field of unknowns in this field of research. One mechanism that is being trialled by some states is to legislate extraterritorially and mandate human rights transparency requirements. The information disclosed under such laws can benefit both state

⁹⁵ Global Network Initiative <<http://www.globalnetworkinitiative.org/>>.

⁹⁶ International Code of Conduct for Private Security Service Providers <<http://www.icoc-psp.org/>>.

⁹⁷ Human Rights Watch (n 12) 30.

and non-state actors in monitoring the impact of corporate activities on human rights but whether such laws will require penalties to be attached to ensure compliance remains to be seen, as does the flow on effect from the disclosures themselves.

What is clear is that the protective role traditionally assigned to states in international human rights law and as recognised in the Guiding Principles will remain relevant only as long as states act on the duties delegated to them. Non-state actors are not so much usurping the role of states but rather simultaneously filling a lacuna and building capacity for governments to get involved and institutionalise the norms being established via soft law. States must not only be able, but be willing to step up to their duty to protect human rights and this will likely be done most effectively by working with the non-state actors who are currently carrying the lion's share of the regulatory burden in this sector.

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