

HEINONLINE

Citation: 6 Minn. J. Global Trade 153 1997



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Nov 11 17:06:30 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights

Barbara A. Frey*

The struggle to protect fundamental human rights has traditionally focused upon the relationship between the state and the individual. Yet, the half-century consensus on appropriate state action regarding fundamental human rights as defined in the Universal Declaration of Human Rights¹ is not uniformly respected. Given the complexity of the forces determining how individuals are treated in different settings around the world, it is time to examine the roles of other relevant actors, including business, labor, the media, and the general public, in promoting and protecting human rights.

This article attempts to shed some light on existing and proposed human rights guidelines regarding one type of international actor: the transnational corporation (TNC).² First, the article discusses some of the traditional methods of promoting and protecting human rights, including standards adopted by inter-governmental organizations and bilateral pressure for human rights reform. This section also defines the minimum human rights responsibilities of public and private actors, including TNCs. Part two of the article reviews efforts to regulate the activities of TNCs with regard to human rights. An exami-

* Executive Director, Minnesota Advocates for Human Rights, and Adjunct Professor at the University of Minnesota Law School and the Institute of International Studies at the University of Minnesota. The author would like to acknowledge the contributions of Sean Duffy, for his substantial assistance in the original draft of this paper; and Tim Kenny and Jennifer Nestle, for their legal research.

1. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

2. In the context of this article the term "transnational corporation" (TNC) refers to a corporation with affiliated business establishments in more than one country. See Jonathan Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 749 n.1 (1983) (citing WERNER FELD, *NONGOVERNMENTAL FORCES AND WORLD POLITICS* 22-23 (1972)).

nation of these codes of conduct will demonstrate that, although existing corporate and governmental policies provide some guidance for the appropriate role of TNCs in the field of human rights, the policies are too vague to be either a predictor of corporate behavior or a guide for the proper corporate response to specific human rights violations. The article then analyzes the emerging continuum of human rights responsibilities of TNCs, based on the various regulations and voluntary codes that have been adopted by governments, private groups, and by corporations themselves. Existing standards reflect that corporations believe the further removed they are from human rights abuse, the lesser their degree of responsibility to act. Conversely, as a corporation moves to the point of being the actual abuser, the responsibility to intervene becomes the greatest. Thus, the continuum of human rights responsibilities of TNCs is constructed according to the relationship between the TNC's activities in a country, and the degree to which human rights are respected in that country.

I. TRADITIONAL METHODS OF HUMAN RIGHTS PROTECTION

Since the introduction of the term "human rights" into the lexicon of international law, the primary actors in promoting and protecting the rights of all individuals have been intergovernmental organizations, such as the United Nations, as well as individual governments. Corporations have traditionally played a minor role in the protection of human rights. Increasingly, however, private actors, including TNCs, are being scrutinized for their human rights practices. Some corporations have responded by creating their own policies regarding human rights violations in the countries where they operate.

A. ROLE OF THE U.N. IN PROTECTING HUMAN RIGHTS

With the protection of human rights as one of its main purposes,³ the United Nations has been the central forum for developing and enforcing human rights norms.⁴ The U.N. General Assembly, the Economic and Social Council, the Commission on

3. U.N. CHARTER preamble ("We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . .").

4. FRANK C. NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS 5-16 (2d ed. 1996).

Human Rights and various specialized agencies have all had a hand in adopting and implementing human rights standards. The U.N. has become even more proactive in protecting human rights since the end of the Cold War, when the newly cooperative Security Council began to establish field operations in various trouble spots around the world.⁵

Despite these initiatives, the U.N.'s success in protecting human rights has been limited, in part because by its nature it is concerned with the actions of governments as the primary actors in the effort to protect human rights.⁶ In an era of fluctuating efficacy of governmental action, and a concomitant rise in the effect of quasi-governmental and private actors on the economic, social, cultural, civil and political rights of individuals, the monitoring of state action alone does not address the rights of all victims. Recent efforts by the U.N. to act against private sphere violations, such as violence against women in their homes, indicates a recognition of the importance of private actors in respecting and promoting human rights.⁷

B. ROLE OF GOVERNMENTS IN PROTECTING HUMAN RIGHTS

Along with intergovernmental organizations, individual governments are key players in the effort to stem human rights abuses. The most important governmental action taken in the field of human rights is compliance with international obligations regarding treatment of individuals and groups living within the state's boundaries. Governments can also use bilateral relations to effect improvements in the human rights behavior of other states. Some governments, most notably that of the United States, have used human rights practices as a basic indi-

5. *Id.* at 9-16. Since the end of the Cold War, the Security Council of the U.N. has established more than 26 peacekeeping operations. *Id.* On-site U.N. activities with a human rights dimension have taken place in more than a dozen countries, including Angola, Bosnia, Burundi, Cambodia, El Salvador, Guatemala, Haiti, Iraq, Mozambique, Namibia, Nicaragua, Rwanda, Somalia, South Africa, Western Sahara, and the former Yugoslavia. *Id.*

6. *Id.*

7. See, e.g., *Report of the Fourth World Conference on Women, Beijing Declaration*, Annex I, at 5-8, U.N. Doc. A/Conf.177/20 (1995) [hereinafter *Beijing Declaration*]. The Governments adopting the Declaration and Platform "urgel[d] the United Nations system, regional and international financial institutions, other relevant regional and international institutions and all women and men, as well as non-governmental organizations, with full respect for their autonomy, and all sectors of civil society, in cooperation with Governments, to fully commit themselves and contribute to the implementation of the Platform for Action." *Id.* ¶ 38 (emphasis added).

cator of their willingness to maintain political, economic and cultural relations with other nations.⁸ This type of bilateral approach, like the U.N.'s use of intergovernmental pressure, has met with varying degrees of success. The U.S., for example, has used its influence to help secure the release of individuals from prison, such as the celebrated case of Harry Wu,⁹ as well as to pressure governments to improve their human rights practices, such as withholding economic assistance,¹⁰ imposing barriers to trade,¹¹ or blocking loans and grants from international banking institutions.¹²

C. THE ROLE OF TRANSNATIONAL CORPORATIONS IN PROMOTING HUMAN RIGHTS

Historically, TNCs have not acted as moral agents in the countries in which they do business.¹³ In the past there had

8. See, e.g., Prohibition Against Foreign Assistance to Gross Violators of Human Rights, 22 U.S.C. § 2151(n) (1990) (prohibiting economic aid to countries engaged in "a consistent pattern of gross violations of internationally recognized rights"). Other legislation prohibits security assistance to gross violators of human rights. *Id.* § 2304. Under this provision, the President has the authority to determine whether the human rights situation in a proposed recipient country has significantly improved, and may override these prohibitions altogether if "extraordinary circumstances exist." *Id.* § 2304(a)(2).

9. See *The Harry Wu Opening*, N.Y. TIMES, Aug. 25, 1995, at A26. Chinese-American citizen Harry Wu was convicted in a court in Hubei province and sentenced to 15 years in prison for spying; the U.S. government negotiated his release and return to the U.S. in August 1995. *Id.*

10. Steven Greenhouse, *U.S., Protesting Rights Abuses, Ends Military Aid to Guatemala*, N.Y. TIMES, Mar. 11, 1995, at A3.

11. See 19 U.S.C. § 2432(a) (1994) (prohibiting the grant of most-favored nation (MFN) status to countries with non-market economies that deny their citizens the right or opportunity to emigrate).

When the United States granted MFN trading status to the People's Republic of China in 1993, it stipulated that China was to improve its human rights record over the course of the following year as a condition of future renewal. Amy Kaslow, *President Urges Renewal of China's Top Trade Status*, CHRISTIAN SCI. MONITOR, May 28, 1993, at 1. In 1994 the Clinton Administration reversed itself and delinked the MFN decision from U.S. policy regarding China's human rights practices. Ann Devroy, *Clinton Reverses Course on China; MFN Action Separates Human Rights, Trade*, WASH. POST, May 27, 1994, at A1.

12. See, e.g., Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 104, 110 Stat. 785, 794-95 [hereinafter Cuban Liberty Act] (instructing the U.S. executive directors of international financial institutions to support loans or other assistance to Cuba only if it will contribute to a stable foundation for a democratically-elected government there and requiring withholding of U.S. payments from international financial institutions that approve assistance to Cuba over U.S. opposition).

13. Cf. Diane Orentlicher and Timothy Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L.

been no significant detrimental consequences when a TNC refrained from acting in response to a host government's violation of the fundamental human rights of the corporation's workers, or other widespread human rights abuses.¹⁴ As TNCs become publicly linked to grave human rights abuses, however, either through direct involvement or tacit support of governmental violations, the theoretical separation between maximizing profits and responsible corporate activity collapses.¹⁵ Globalization of the economy, characterized by corporations moving into rapidly expanding markets in Asia, Eastern Europe, and Latin America, causes the relationship between TNCs and human rights abuses to become more salient to world governments and to the public. Recent consumer pressure on U.S. companies to ensure that they do not market the products of forced, convict, or child labor,¹⁶ and the decision of many companies to restrict their in-

& Bus. 66, 96-98. Business leaders who reject suggestions that they should be human rights reformers usually defend their position by insisting that democracy and human rights are promoted by free trade. See, e.g., Donna K.H. Walters, *Firms Unshaken by U.S. Terms for China*, L.A. TIMES, June 7, 1993, at D3 (reporting business leaders' resistance to suggestions that they should be involved in promoting human rights in China); Bruce Einhorn & William Gallagher, *Doing Business with Strongmen*, BUS. WK., Apr. 22, 1996, at 52 (describing U.S.-based companies' lobbying effort to delink trade in China from all political and human rights issues).

Both nation-states and private corporations have been discouraged from interfering in the local politics of sovereign states. The prohibition on direct interference in local politics has been one factor in discouraging TNCs from taking an active role in changing local governmental policies regarding human rights. See generally Lori Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. & POL'Y 1 (1989) (reconsidering norms against political nonintervention in foreign countries).

14. See George Black, *Why the Debate? The Outcome Was Clear: Business as Usual*, L.A. TIMES, May 27, 1994, at A14 (reporting that the business lobby did not contest that there are human rights violations in China, but still succeeded in reversing President Clinton's China MFN policy).

15. See, e.g., *Shell Game in Nigeria*, N.Y. TIMES, Dec. 3, 1995, at A14 (asserting that Shell cannot responsibly continue to do business in Nigeria as if unaware of human rights abuses); Marjorie Kelly, *Though H.B. Fuller May Wish It, Resistol Issue Won't Go Away*, MINNEAPOLIS STAR-TRIB., Dec. 4, 1995, at D3 (questioning whether manufacturer should be liable to tens of thousands of street children who sniff glue, even if they were not intended consumers of product); Bob Herbert, *The Sweatshop Lives*, N.Y. TIMES, Dec. 28, 1994, at A16 (asserting that industry leaders should bear responsibility for working conditions in manufacturing facilities).

16. See, e.g., *Human Rights: Ethical Shopping*, THE ECONOMIST, June 3, 1995, at 35 (reporting introduction of new business terms by Levi Strauss after discovery that conditions in Saipan factory were unacceptable); Marjorie Kelly, *Angry Kids Kick up a Big Fuss over Child Labor for Soccer Balls*, MINNEAPOLIS STAR-TRIB., Sept. 23, 1996, at D3 (reporting the introduction of a landmark code

vestments in human rights "hot spots" such as Burma and China¹⁷ demonstrate the increasing sensitivity of companies and the public to significant human rights problems present in many of the countries in which TNCs operate.

The United Nations and its individual member states face increasing pressure to regulate the behavior of non-state actors in regard to human rights.¹⁸ Some of the most significant non-state actors in the world today are private corporations, particularly TNCs. Since the 1970s, the United Nations and other inter-governmental bodies have encouraged the creation of transnational codes of conduct for TNCs.¹⁹ In drafting these codes, the primary goals were regulating TNCs to prevent interference with the internal politics of host countries, and limiting the adverse effects of TNC activities on national economic objectives.²⁰ In recent years, to promote foreign direct investment in developing countries, the U.N. has placed greater emphasis on "strengthening the cooperation between host developing countries and transnational corporations."²¹ Critics contend that this courting of TNCs by developing countries neglects the issue of how foreign direct investment and competition affects the ethical behavior of TNCs.²²

Activities of United States businesses in other countries are regulated by the U.S. government to the extent that U.S. corporate investment in countries considered to be serious human rights violators may be banned altogether.²³ In addition to enforcing government regulations, the Clinton Administration has

of ethical conduct by the Geneva-based Federation Internationale de Football Association in response to a campaign by child labor activists).

17. See, e.g., William Beaver, *Levi's is Leaving China*, 38 BUS. HORIZONS 2, Mar. 1, 1995 (reporting that Levi Strauss is ending its business dealings in China due to what the company calls "pervasive human rights abuses"); Evelyn Iritani, *Giant Firms Boycott Burma Factories*, SEATTLE POST-INTELLIGENCER, Oct. 27, 1994, at B7.

18. See *Beijing Declaration*, *supra* note 7, at 8.

19. P.T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 5-11, 457 (1995).

20. MUCHLINSKI, *supra* note 19, at 593; see also *infra* notes 61-67 and accompanying text.

21. G.A. Res. 49/130, U.N. GAOR, 49th Sess., Supp. No. 49, at 152, U.N. Doc. A/49/130 (1994); MUCHLINSKI, *supra* note 19, at 596 ("No longer is the control of the potentially negative impacts of TNCs the major issue; rather it is how best to reintegrate developing countries into the global economy in a manner that ensures inflows of new investment capital.").

22. *Report of the Commission on International Investment and Transnational Corporations*, at 13, U.N. Doc. TD/B/42(1)/4, (1995) [hereinafter *Transnational Corporations Report*] (statement of Consumers International).

23. See *infra* notes 78-102 and accompanying text.

publicly encouraged U.S. businesses abroad to regulate their own actions regarding human rights and social responsibility by adopting ethical codes of conduct.²⁴

The proper relationship between human rights and TNCs is a topic drawing increasing attention from citizens, governments and corporations. No international code or standards have yet been adopted specifying the responsibilities of TNCs to protect and respect international human rights, but governments and corporations themselves have begun to suggest the appropriate framework of responsibility for addressing human rights abuses in host countries.²⁵ Nongovernmental organizations (NGOs) are also taking steps to encourage TNCs to use their influence to promote and protect human rights in countries in which they are doing business.²⁶

An additional and very important factor is the push by consumers, shareholders, and labor unions for corporate management awareness of human rights abuses in the countries in which they do business. Raising the visibility of human rights issues with consumers may be an effective tool for changing the behavior and policies of TNCs.²⁷ Shareholder dissatisfaction and labor concerns have also led to policy changes.²⁸

While internal or external policy statements may provide general guidelines and goals for corporate behavior, specific regulations regarding corporate responsibility for human rights are

24. See, e.g., MODEL BUSINESS PRINCIPLES (United States Dep't of Commerce 1996).

25. See discussion *infra* Part II.

26. See, e.g., *A Working Paper: Corporate Measures on Behalf of Basic Human Rights in China*, (Human Rights Watch, New York, N.Y.), 1994; *The Minnesota Principles: Toward an Ethical Basis for Global Business*, (Minnesota Center for Corporate Responsibility, Minneapolis, Minn.), 1992 (promoting a set of principles developed by a group of business leaders to foster fairness and integrity in global business relationships).

27. See Stephen W. Pruitt & Monroe Friedman, *Determining the Effectiveness of Consumer Boycotts: A Stock Price Analysis of Their Impact on Corporate Targets*, 9 J. CONSUMER POL'Y 375, 382 (1986) (finding that consumer boycotts have a significant effect on corporate stock values).

28. See Jay Mathews, *Pepsi to Sell Burma Plant, Citing Protests*, WASH. POST, Apr. 24, 1996, at F3. Consumer and shareholder actions regarding Pepsi's investments in Burma were significant factors in the company's announcement in May 1996 that it would sell its 40 percent stake in a bottling franchise in that country, which is ruled by a military government responsible for grave human rights abuses. *Id.*; see also *New Sears Policy*, MINNEAPOLIS STAR-TRIB., Apr. 1, 1992, at D5 (reporting that Sears, Roebuck & Co. released a new policy regarding purchases of products made by prison or forced labor after its unions and shareholders voiced significant concerns over the lack of a specific policy).

not likely to gain easy acceptance. Due to world economic and ideological shifts, there has been a retreat from the international control model that was in vogue in the 1960s and 1970s regarding TNCs. States once critical of TNCs now find themselves competing for the benefits of foreign direct investment from multinational companies.²⁹ TNCs have enormous influence both in their home countries and abroad because of the direct and indirect benefits of their investments.³⁰ It is this influence which stimulates human rights activists to engage corporate decision-makers in the effort to promote human rights and democracy in the countries where they operate.

D. DEFINING INTERNATIONAL HUMAN RIGHTS

Before a TNC can be expected to promote and protect international human rights, those rights must be defined.³¹ While the rights that accrue to individuals vis-a-vis governments are generally defined, determining what specific rights should be the concern of TNCs is not as straightforward an exercise. Of guidance, however, are several international documents, ratified by and binding upon the international community of states, containing specific international human rights guarantees. The most definitive interpretation of human rights obligations at the international level is contained in the International Bill of Human Rights.³² It is composed of the Universal Declaration of Human Rights (Universal Declaration or UDHR),³³ the International Covenant on Economic, Social and Cultural Rights (ESC Covenant),³⁴ the International Covenant on Civil and Political Rights (Civil and Political Covenant),³⁵ and the Optional Proto-

29. See MUCHLINSKI, *supra* note 19, at 9.

30. *Id.* at 10.

31. For a thorough analysis of relevant human rights and labor standards for TNCs, see Orentlicher and Gelatt, *supra* note 13, at 108-16.

32. See Philip Alston, *The Commission on Human Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS 126-27 (Philip Alston ed., 1992). The drafting and subsequent adoption of an International Bill of Human Rights was one of the first tasks appointed to the newly created U.N. Commission on Human Rights, which first met in San Francisco in 1947. *Id.*

33. Universal Declaration, *supra* note 1.

34. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49-52, U.N. Doc. A/6316 (1966) [hereinafter *ESC Covenant*].

35. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52-58, U.N. Doc. A/6316 (1966) [hereinafter *Civil and Political Covenant*].

col to the International Covenant on Civil and Political Rights.³⁶ Taken together, these documents set forth the basic definitions of human rights and identify the responsibilities of nations and individuals to respect those rights.

The Universal Declaration is accepted as the definitive interpretation of the human rights to which all member states are bound as parties to the United Nations Charter.³⁷ Several of the articles of the Universal Declaration are incorporated into customary international law which is binding on all states.³⁸ The UDHR contains thirty articles that cover civil and political rights, as well as some fundamental economic rights.³⁹ These rights may be described broadly as rights to control one's own

36. *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 59-60, U.N. Doc. A/6316 (1966).

37. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1995) ("The Universal Declaration remains the primary source of global human rights standards, and its recognition as a source of rights and law by states throughout the world distinguishes it from conventional obligations.").

38. *Id.* at 289.

39. The articles of the UDHR pertain to the following rights:

ARTICLES 1-2: Human dignity, non-discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status;

ARTICLE 3: Right to life, liberty and security of person;

ARTICLE 4: Freedom from slavery;

ARTICLE 5: Freedom from torture or cruel, inhuman, or degrading treatment;

ARTICLES 6-8: Right to recognition before the law, equal protection, and to an effective legal remedy for violations;

ARTICLE 9: Freedom from arbitrary arrest, detention, and exile;

ARTICLES 10-11: Right to full and fair hearing of criminal charges, presumption of innocence;

ARTICLE 12: Right to privacy;

ARTICLE 13: Freedom of movement;

ARTICLES 14-15: Right to seek asylum; right to a nationality;

ARTICLE 16: Marriage rights;

ARTICLE 17: Right to own property;

ARTICLE 18: Freedom of thought, conscience and religion;

ARTICLES 19-20: Freedom of expression and association;

ARTICLE 21: Right to participate in government;

ARTICLE 22: Right to social security and free development of personality;

ARTICLES 23-24: Right to work, equal pay for equal work, just and favorable remuneration, to form and join trade unions, to reasonable limitation of working hours, and to periodic paid holidays;

ARTICLES 25-27: Right to an adequate standard of living, to free primary education, and to participate in the cultural life of the community;

ARTICLE 28: Right to a social and international order in which rights and freedoms can be realized.

Universal Declaration, *supra* note 1.

body and actions, and rights to be free from discriminatory or persecutorial state interference. Some particular rights include the right to human dignity and non-discrimination on a variety of bases: life, liberty and personal security; freedom from slavery; the right to work and for equal pay for equal work; the right to equal protection; marriage rights; and the right to own property. TNCs often find themselves faced directly and indirectly with issues involving the human rights defined in the UDHR.

The rights contained in the UDHR and the U.N. Covenants are universal.⁴⁰ Recent international conferences including the U.N. Fourth World Conference on Women, held in Beijing in 1995, and the U.N. World Conference on Human Rights, held in Vienna in 1993, reaffirmed the principle of universality over calls for some religious or cultural interpretation of those norms.⁴¹

All the rights contained in the Universal Declaration will be relevant at one time or another to the TNC, if for the sole reason that it exists in an ever-changing political and social context. TNCs may be presumed to be faced with labor issues, such as those involving equal pay, the ability to form and join labor unions, and paid leisure time. TNCs must also concern themselves with broader political issues, such as government-imposed political indoctrination of employees in the workplace as a violation of freedom of religion or political belief as guaranteed by article 18 of the Universal Declaration. Prohibitions against forced la-

40. *Vienna Declaration and Programme of Action*, U.N. GAOR, World Conference on Human Rights, 48th Sess., at 21-22, U.N. Doc. A/Conf.157/24 (Part I) (1993) [hereinafter *Vienna Declaration*] ("The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights is beyond question.")

41. *See, e.g., id.* at 23 ("While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."). Even though, as a legal matter, the human rights defined in international law are universal, TNCs still face workplace issues regarding cultural or religious interpretations of those rights. TNCs, for example, must resolve the divergence between the international mandate of non-discrimination against women and cultural or religious traditions which treat women as second class citizens. TNCs must constantly walk a fine line between upholding universal human rights standards and not imposing culturally insensitive practices in the workplace that reflect ethnocentric thinking. Codes of conduct clarifying the TNC's positions on these issues may facilitate a more open dialogue between TNCs and their host countries.

bor, torture, and arbitrary arrest and detention, are also all rights protected by the UDHR and are issues that many of today's TNCs are facing.⁴²

E. TNC OBLIGATIONS TO RESPECT AND PROTECT HUMAN RIGHTS

Although the Universal Declaration provides a general guide for a government's responsibility to its citizens, it is unclear whether TNCs are bound to respect these rights. The U.N. human rights covenants are instruments of international law that bind ratifying governments rather than non-state actors such as TNCs.⁴³ Corporations, however, do have a duty under the International Bill of Human Rights to *respect* the rights of others. Articles 29 and 30 of the Universal Declaration and corresponding articles 5(1) of both the ESC Covenant and the Civil and Political Covenant prescribe the limitations on individual or corporate actions in relation to the fundamental rights defined in these instruments: no person or private entity may engage in an activity which treads upon any other person's rights and freedoms.⁴⁴ These covenants do not, however, expressly hold individuals or corporations responsible for affirmatively *protecting*, i.e., taking steps to prevent others from violating, human rights. That responsibility is assigned to governments who may, in turn, regulate corporations as private actors. In terms of international legal liability, therefore, TNCs risk little if they are complying with the domestic laws of the countries in which they are doing business.⁴⁵

Absent a legal duty, TNCs may have an ethical or moral duty to respect the fundamental human rights contained in the UDHR. Commentators argue that even absent international

42. Universal Declaration, *supra* note 1, arts. 4, 5, 9.

43. NEWMAN & WEISSBRODT, *supra* note 4, at 14.

44. The language in these three instruments is nearly identical. See Universal Declaration, *supra* note 1, art. 30 ("Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."); *ESC Covenant*, *supra* note 34, at 50 ("Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."); *Civil and Political Covenant*, *supra* note 35, at 53.

45. This view of TNCs, however, is losing validity in contemporary discussions of the role of TNCs in international law. See Charney, *supra* note 2, at 762-67.

law directed at TNCs, there are particular moral and ethical duties that TNCs must recognize.⁴⁶ One commentator has proposed a detailed analytical framework for determining the minimal fundamental international human rights that must be respected and protected by TNCs.⁴⁷ His central premise is that if governments, individuals and corporations can each "afford" to respect and protect human rights, they have an ethical obligation to do so.⁴⁸

Convincing TNCs that they have an ethical duty to intervene in human rights cases may be an uphill battle.⁴⁹ A TNC is unlikely to adopt proactive human rights policies without some form of pressure.⁵⁰ Currently, that pressure is building both internally and externally. Internally, it arises from company stakeholders and from the troublesome situations in which companies find themselves in international business.⁵¹ The United Nations, the United States Government, labor and community groups have added to internal pressures by formulating laws and corporate policies that either require or encourage TNCs not only to respect human rights, but indeed to protect them actively.⁵²

II. REGULATION OF TNCs TO PROMOTE INTERNATIONAL HUMAN RIGHTS

Several international and national bodies, as well as private corporations themselves, have enacted or attempted to enact schemes for regulating the activities of TNCs in host countries.⁵³ Until very recently, the majority of these regulatory ef-

46. Mark Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 409 (1992-93).

47. See THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 81-85 (1989).

48. *Id.* at 82.

49. See, e.g., Paul L. Ferrari, *U.S. Business and Human Rights Guidelines*, SOC. ISSUES SERVICE 1995 (Investor Responsibility Research Center, Washington, D.C.), Mar. 3, 1995, at 4 (noting that business involvement in human rights issues might interfere with goals of maintaining political neutrality, building long-term business relationships, and avoiding cultural imperialism); Walters, *supra* note 13 (describing U.S. companies' reluctance to push for human rights in China).

50. Brian Tumulty, *Businesses Participate in Chinese Human Rights*, Gannett News Service, May 26, 1993, available in LEXIS, News Library (reporting that Wal-Mart and Sears human rights policies have come at the prodding of stockholder activists).

51. See Mathews, *supra* note 28.

52. See generally Orentlicher and Gelatt, *supra* note 13.

53. Baker, *supra* note 46, at 409.

forts have been aimed at economic issues, including environmental exploitation, anti-trust issues and truth in business dealings.⁵⁴ For instance, in the 1970s a main discussion forum for codes of conduct for TNCs was international governmental organizations interested in trade and investment.⁵⁵ Among the organizations seeking to regulate TNC actions were the International Labour Organization (ILO),⁵⁶ the Organization for Economic Cooperation and Development (OECD),⁵⁷ the Council of Europe, the European Economic Community, and the Organization of American States (OAS).⁵⁸ The Chinese Government's violent crackdown on pro-democracy demonstrators at Tiananmen Square in June 1989 brought corporate policies regarding human rights in foreign countries into sharp relief.⁵⁹ Since that event— which juxtaposed the eagerness of TNCs to take advantage of the emerging market in China with the horror of the public at the government's repressive tactics— there has been a significant trend towards defining the responsibilities of TNCs for respecting and protecting international human rights.⁶⁰

A. UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

Many of the early U.N. actions to formulate policies for TNCs focused on regulating restrictive business practices.⁶¹ The newly independent states in the United Nations formed the Group of 77 (G-77). With the support of the then-socialist East Bloc states, the G-77 worked within the U.N. to control the ability of TNCs to threaten the sovereignty of host states through

54. SIDNEY DELL, *THE UNITED NATIONS AND INTERNATIONAL BUSINESS* 73-74 (1990).

55. Baker, *supra* note 46, at 409.

56. See Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 I.L.M. 422 (1978). The ILO is a tripartite organization with representatives of governments, business and labor having access to its decision-making organs as members of national delegations. MUCHLINSKI, *supra* note 19, at 458.

57. See 1976 OECD Declaration and Guidelines on International Investment for Multinational Enterprises, 15 I.L.M. 967-79 (1976). The OECD reviewed these guidelines in 1979, 1982, 1984, 1986 and 1991. MUCHLINSKI, *supra* note 19, at 607.

58. Baker, *supra* note 46, at 409 (citing Hans W. Baade, *Codes of Conduct for Multinational Enterprises*, in 1 LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 407 (Norbert Horn ed., 1980)).

59. Orentlicher and Gelatt, *supra* note 13, at 70.

60. *Id.* at 70-79.

61. See DELL, *supra* note 54, at 24-26.

the evasion of national regulation and taxation, the distortion of market conditions, or the introduction of alien cultural values.⁶² In 1974, through the efforts of the G-77, the U.N. General Assembly passed the Declaration on the Establishment of a New International Economic Order⁶³, which included *inter alia* the recognition of the right of the state to control the activities of TNCs acting within its borders and calling for a code of conduct for TNCs that would prevent economic exploitation of host countries.⁶⁴ In that same year, the U.N. Economic and Social Council (ECOSOC) established the United Nations Commission on TNCs (the Commission) comprised of members from forty-eight states.⁶⁵ The highest priority of this Commission was to formulate a code of conduct for TNCs.⁶⁶ Capital-exporting states intended to use the code as a means of protecting TNCs against discriminatory treatment; capital-importing countries wanted to use it as a means of subjecting the activities of TNCs to greater regulation.⁶⁷

Work on the code began in 1977, and the Commission finally transmitted a completed draft to ECOSOC in 1990.⁶⁸ The completed United Nations Code of Conduct on Transnational Corporations (the Code) was an attempt to strike a balance between the competing interests of regulating corporate conduct and setting forth fundamental standards for nondiscriminatory host government behavior towards TNCs.⁶⁹ The final 1990 draft of the Code explicitly stated that TNCs must respect human rights and provided in relevant part the following paragraphs:

13. Transnational corporations *should* respect the social and cultural objectives, values and traditions of the countries in which they operate. . . .

14. Transnational corporations *shall* respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations shall not

62. MUCHLINSKI, *supra* note 19, at 5-6.

63. G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, at 527, U.N. Doc. A/9559 (1974).

64. *Id.* at 528.

65. See E.S.C. Res. 1913, U.N. ESCOR, 57th Sess., Supp. No. 1A, at 3, U.N. Doc. 5570/Add. 1 (1975).

66. E.S.C. Res. 1908, U.N. ESCOR, 57th Sess., Supp. No. 1, at 13, U.N. Doc. E/5570 (1974).

67. MUCHLINSKI, *supra* note 19, at 593.

68. *Development and International Economic Co-Operation: Transnational Corporations*, U.N. ESCOR, 2d Sess., U.N. Doc. E/1990/94 (1990).

69. DELL, *supra* note 54, at 73-74.

discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion.⁷⁰

It was not until the late stages of the drafting process that these two paragraphs were reconciled. Earlier drafts of the Code included a "should" or "shall" option for each of these paragraphs.⁷¹ The final draft of the Code clearly required that human rights take precedence over cultural norms.

Negotiations on the Code ground to a halt in 1992.⁷² TNCs and Western governments opposed the adoption of the Code because, while it would impose significant duties on TNCs regarding local ownership and control, safeguards on corruption, taxation, and other business practices, the Code did not force host governments to abide by equally stringent rules regarding expropriation, intellectual property, and profit repatriation.⁷³

In 1994, as part of the Secretary-General's decision to consolidate all activities related to transnational corporations within the U.N. Conference on Trade and Development (UNCTAD), the Commission on Transnational Corporations was moved from its niche under ECOSOC to become a commission of the Trade and Development Board.⁷⁴ The new emphasis of the Commission's activities in UNCTAD is to facilitate flows of foreign direct investment, especially to developing countries.⁷⁵ As a result, the Commission's name was broadened to the "Commission on *International Investment* and Transnational Corporations," underscoring the shift that has taken place in the relationship between TNCs and host countries.⁷⁶ With the end of the Cold War and the acute shortfall of investment in developing countries, TNCs are no longer seen as suspicious intruders by developing countries, but rather, as welcome and wealthy guests.⁷⁷

70. *Development and International Economic Co-Operation: Transnational Corporations*, *supra* note 68, at 7 (emphasis added).

71. See, for example, the 1983 version of the code, U.N. ESCOR, U.N. Doc. E/C.10/1983/S/2 (1983), *reprinted in* 22 I.L.M. 177 192-206 (1983).

72. MUCHLINSKI, *supra* note 19, at 594.

73. Baker, *supra* note 46, at 411.

74. G.A. Res. 49/130, *supra* note 21, at 152.

75. *Transnational Corporations Report*, *supra* note 22, at 4 (statement of the Officer-in-Charge of UNCTAD) ("Within today's globalized world economy, characterized by increased interplay between investment, trade, technology and services, member States placed increased emphasis on the contribution that transnational corporations could make to growth and development. There had been a marked shift towards greater openness of national economies to inward foreign investment and the activities of transnational corporations.")

76. G.A. Res 49/130, *supra* note 21, at 152.

77. MUCHLINSKI, *supra* note 19, at 596.

B. UNITED STATES POLICIES AND LEGISLATIVE INITIATIVES

In addition to the U.N., individual states have taken steps to guide the conduct of TNCs. The United States Government has long regulated the activities of TNCs. In 1930, for instance, Congress passed the Hawley Tariff Act, prohibiting the importation into the United States of products made by convict labor.⁷⁸ Direct regulation of TNCs began in earnest in the 1970s. Initially, U.S. policies regarding international commerce were concerned with purely economic issues rather than human rights. For example, in 1975 Secretary of State Henry Kissinger gave a speech at the Seventh Special Session of the U.N. General Assembly that included a detailed proposal for a U.S.-endorsed U.N. Code of Conduct for TNCs.⁷⁹ His proposal focused on protecting the economic rights of TNCs and preventing TNCs from interfering in the local politics or domestic affairs of their host countries.⁸⁰ Kissinger did not, however, include any mention of protecting human rights.⁸¹

Even if human rights have not been central to its actions, Congress has not been shy to use its power to prohibit U.S. companies from trading or investing in disfavored countries. Economic sanctions are a tool used to punish offending governments; these sanctions have a direct impact on TNCs doing or seeking to do business in these countries.⁸² The U.S. Government has sought to extend its influence even further in the cases of Cuba, Iran, and Libya, by adopting legislation that would penalize non-U.S. businesses that have certain types of investments in these rogue states.⁸³ These attempts are not re-

78. Pub. L. No. 71-361, 46 Stat. 590 (1930).

79. Henry Kissinger, *Global Consensus and Economic Development*, Address Read by Daniel P. Moynihan Before the Seventh Special Session of the U.N. General Assembly (Sept. 1, 1975), in *DEP'T ST. BULL.*, Sept. 1975, at 432-33.

80. *Id.*

81. *Id.*

82. *See, e.g.*, Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (1995), regulating economic sanctions against North Korea in the areas of sales, purchases, specifically designated nationals, sending gifts, travelling to North Korea, and accounts and assets.

83. *See* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (requiring the President to commence diplomatic efforts with U.S. allies to establish multilateral trade sanctions); Cuban Liberty and Democratic Solidarity Act, *supra* note 12, § 102 (urging the President to apply sanctions against countries assisting Cuba).

ceived well by neighboring countries.⁸⁴ U.S.-based TNCs are also subject to the Foreign Corrupt Practices Act of 1977 that bars American companies from bribing officials of foreign governments.⁸⁵

Despite its willingness to regulate business activities in foreign countries, the U.S. government has made relatively few successful legislative and executive efforts to specifically regulate TNCs on human rights issues. The most comprehensive legislative response to human rights was the Anti-Apartheid Act in 1986, prohibiting U.S. companies from doing business directly in South Africa because of the South African government's apartheid policies.⁸⁶

Legislation introduced in 1995 by Senator Mitch McConnell proposes to ban U.S. investment in, and trade with, Burma.⁸⁷ The Burma Freedom and Democracy Act, modeled after the Anti-Apartheid Act, seeks to prohibit investments that support — knowingly or unknowingly — the abusive Burmese military government known as SLORC (State Law and Order Restoration Council).⁸⁸ The bill mandates that the U.S. Government withhold support for loans to Burma from international financial institutions, prevent direct assistance to SLORC and exclude the members of SLORC from the United States.⁸⁹ Carrying the flag of free trade, the Clinton Administration is not supportive of efforts to prohibit investment in foreign countries. The Administration opposes the McConnell bill, and it is not likely to become law.⁹⁰ In an April 5, 1995 letter to AFL-CIO President Lane Kirkland, U.S. Secretary of State Warren Chris-

84. D'Jamila Salem-Fitzgerald, *Furor over Helms-Burton*, L.A. TIMES, July 13, 1996, at A8 (reporting negative reactions of Canada, Mexico, and the European Union to the Cuban Liberty and Democratic Solidarity Act).

85. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1994).

86. Comprehensive Anti-Apartheid Act, Pub. L. No. 99-440, 100 Stat. 1086 (1986) (repealed 1993). The Act contained a code of conduct that required protection of human rights. § 208, 100 Stat. 1097-98. The code of conduct was required to be followed by any United States national employing more than twenty-five people in South Africa. § 207, 100 Stat. 1097.

87. S. 1511, 104th Cong. § 4 (1995).

88. See 141 CONG. REC. S211 (daily ed. Dec. 29, 1995) (statement of Sen. Moynihan) ("This bill makes clear our intention that such a regime will no longer enjoy investments from the United States. Investments which so often supported—knowingly or unknowingly—its totalitarian and abusive rule. The bill also codifies our intention to withhold our support for loans to Burma from international financial institutions, to prevent direct assistance to the SLORC, and to exclude the members of SLORC from the United States.")

89. *Id.*

90. Reese Erlich, *Burma Regime Still Shackled by Rights Issue Despite Release of Dissident*, S.F. CHRONICLE, Aug. 2, 1995, at A8, A10.

topher acknowledged concern for the human rights situation in Burma, but refused to support the full trade and investment embargo proposed by Kirkland and captured in the McConnell bill.⁹¹ According to the Secretary of State, "To be effective such an embargo would need international backing. . . We have found no interest in an U.N. embargo. Indeed, many of Burma's largest trading and investment partners argue for more trade and investment and profess to believe that more interaction with the world economy and with states where political diversity is respected will encourage change for the better in Burma."⁹²

Another method of regulating TNC actions abroad is to legislate or suggest codes of corporate conduct. A bill introduced in the U.S. Senate in 1989 sought to formulate a code of conduct for U.S. corporations doing business in the Soviet Union.⁹³ The proposed legislation called upon U.S.-based TNCs to promote human rights and democratic reform in the Soviet Union and to ensure that the rights of Soviet workers were protected.⁹⁴ The proposed code of conduct was based on the "Slepek Principles," developed by Vladimir Slepek, a Soviet emigre and one of the founders of the Moscow Helsinki Monitoring Group, an organization for monitoring Soviet compliance with international human rights standards.⁹⁵

In 1991 Congressman John Miller introduced similar legislation, designed to create a voluntary code of conduct for U.S. companies doing business in China.⁹⁶ The Miller bill provided one of the first major U.S. Congressional initiatives to encourage U.S. corporations to adopt and comply with a code of conduct regarding human rights abuses.⁹⁷ Although the Miller bill passed in the House of Representatives as part of the 1991 Om-

91. Letter from Warren Christopher, U.S. Secretary of State, to Lane Kirkland, President, AFL-CIO (Apr. 5, 1995) reprinted in *Christopher Clarifies U.S. View on Burma Investment*, Soc. ISSUES REP. (Investor Responsibility Research Center, Washington, D.C.), May 1995, at 13 [hereinafter Christopher Letter].

92. *Id.*

93. Slepek Principles Act, S. 1018, 101st Cong. (1989). The Bill was introduced in the Senate by John Heinz (R-Penn.) and Dennis DeConcini (D-Ariz.). *Id.* The bill established seven principles for U.S. companies operating in the Soviet Union including the refusal to use materials made by forced labor, and the safeguard of Soviet employees victimized by political, religious, or ethnic discrimination. *Id.* § 3(1)-(2).

94. David B. Ottoway, *Code of Business Conduct in Soviet Dealings Sought*, WASH. POST, May 17, 1989, at A18.

95. *Id.*

96. H.R. 3489, 102d Cong. (1991).

97. See H.R. 3489, 102d Cong. § 401(b) (1991).

nibus Export Amendment Act, it was not enacted into law.⁹⁸ Senator Edward Kennedy and Representative Jolene Unsoeld considered sponsoring a new bill patterned on the Miller legislation in the 103rd Congressional session, but backed away when President Clinton, as part of his decision to remove human rights from the MFN equation on China, vowed to propose his own code of conduct for companies doing business in China.⁹⁹

Another recent legislative initiative potentially affecting the practices of TNCs abroad and at home is the Child Labor Deterrence Act, introduced by Senator Tom Harkin.¹⁰⁰ The bill prohibits the importation of goods produced abroad with labor of children under the age of fifteen. If enacted, the prohibition would affect the sourcing practices of virtually all U.S. retailers.¹⁰¹ Due to the heightened public awareness of the problem of child labor, many U.S. businesses now require that their partners and vendors employ only persons who have reached the age of fifteen.¹⁰² The Harkin legislation would mandate this kind of scrutiny for all sources of U.S. imports.

C. EXECUTIVE INITIATIVES: MODEL BUSINESS PRINCIPLES

The U.S. President, imbued with the power to conduct U.S. foreign policy, has significant authority to control the actions of U.S.-based TNCs in foreign nations. The President and the Executive agencies have the ability to enforce U.S. policy through economic sanctions such as the revocation of most favored nation status, the suspension of economic and security assistance, and the vetoing of assistance from international financial institutions.¹⁰³ President Clinton, like his predecessors, has been loathe to use this authority in a way that limits the interna-

98. See Orentlicher & Gelatt, *supra* note 13, at 82. The bill was passed out of a joint House-Senate conference but failed to come to a vote in the House for reasons unrelated to the code of conduct itself. *Id.*

99. Telephone Interview with Gare Smith, Former Legislative Aide to Senator Kennedy (Sept. 16, 1995). While the President did propose a voluntary set of principles, the Clinton Code did not focus solely on China. See *infra* notes 104-15 and accompanying text (discussing the President's efforts to renew trade with China and various responses to his policy).

100. Child Labor Deterrence Act of 1995, S. 706, 104th Cong. (1995). The Bill was introduced in the House by Rep. Barney Frank (D-Mass.). H.R. 2065, 104th Cong. (1995). The bill was read twice on April 6, 1995, and referred to the Committee on Finance. *Id.*

101. H.R. 2065, 104th Cong. (1995).

102. See Memorandum from Wal-Mart Stores, Inc. Regarding Standards for Vendor Partners (undated) [hereinafter Wal-Mart Standards] (on file with the *Minnesota Journal of Global Trade*).

103. See *supra* notes 10-12 and accompanying text.

tional commercial activities of U.S. companies.¹⁰⁴ The foremost example of this reticence is President Clinton's human rights policy toward China.¹⁰⁵ While he vowed during his 1992 campaign to be tough on China's human rights violations, as President, Clinton actually has gone further than his immediate predecessors, Presidents Bush and Reagan, to loosen economic sanctions against China by delinking U.S. trade policy from our national concerns about China's serious human rights violations.¹⁰⁶ In place of the annual MFN decision, Clinton vowed to design a set of principles for companies doing business in China as part of a "new and vigorous" effort to promote human rights there.¹⁰⁷

In May 1995, President Clinton unveiled a set of Model Business Principles, a voluntary code of business ethics to be used by U.S.-based TNCs to show their commitment to upholding fundamental human and labor rights.¹⁰⁸ The Clinton Code, written as a general code and not specific to China as suggested in the May 1994 MFN announcement, represents the first significant effort by the Executive to create a minimum standard of conduct for corporations with regard to human rights.

The Clinton Code has been criticized from all sides. The human rights community argues that the principles embodied in

104. See Christopher Letter, *supra* note 91.

105. See Devroy, *supra* note 11, at A1 (describing successful lobbying effort by American business interests seeking continued trade privileges for China).

106. *Id.* "Clinton in his [1992] presidential campaign had sharply attacked Bush for extending trade privileges to China in the years following the 1989 crackdown on pro-democracy activists in Beijing's Tiananmen Square, accusing him of 'coddling criminals.'" *Id.* at A28.

107. Robert S. Greenberger, *Code for Firms Selling Abroad Arrives Soon*, WALL ST. J., Mar. 24, 1995, at A2.

108. The principles are as follows:

- 1) Provision of a safe and healthy workplace.
- 2) Fair employment practices, including avoidance of child and forced labor and avoidance of discrimination based on race, gender, national origin, and respect for the right of association and the right to organize and bargain collectively.
- 3) Responsible environmental protection and environmental practices.
- 4) Compliance with U.S. and local laws promoting good business practices, including laws prohibiting illicit payments and ensuring fair competition.
- 5) Maintenance, through leadership at all levels, of a corporate culture that respects free expression consistent with legitimate business concerns, and does not condone political coercion in the workplace; that encourages good corporate citizenship and makes a positive contribution to the communities in which the company operates and where ethical conduct is recognized, valued and exemplified by all employees.

MODEL BUSINESS PRINCIPLES, *supra* note 24.

the Clinton Code are vague,¹⁰⁹ duplicative of existing laws,¹¹⁰ provide no method of implementation or enforcement, and clearly are *not* intended as legislation.¹¹¹ U.S. business leaders, in turn, criticized the Clinton Code as attempting to make TNCs agents of the U.S. Government and placing them at a comparative disadvantage with their competitors.¹¹² Still, several companies were willing to sign on to the Clinton Administration's initiative as "a useful reference point for framing the codes of conduct of individual businesses."¹¹³ The Administration proposed the Clinton Code despite taking the position that U.S. business already plays a positive role in upholding and promoting universal human rights standards.¹¹⁴ The Department of Commerce also announced several additional initiatives to further this positive role including an annual award ceremony for those businesses that have demonstrated a commitment to preservation and promotion of human rights.¹¹⁵

109. The provisions regarding environmental protection and the maintenance of a "corporate culture" that respects democracy and free expression are so vague as to be nearly meaningless, especially given the voluntary nature of the code as a whole. *Comments on White House Business Principles, Press Release*, HUMAN RIGHTS WATCH/ASIA (Human Rights Watch, New York, N.Y.), Mar. 27, 1995, at 1.

110. For example, the provisions regarding a safe and healthy work environment and labor standards are redundant of existing international labor standards. See, e.g., Occupational Safety and Health Convention, Convention No. 155, 2 International Labour Conventions and Recommendations, at 1230-31 (1981) (regulating safety, health, and the working environment); Freedom of Association and Protection of the Right to Organize Convention, July 9, 1948, 68 U.N.T.S. 17 (1948) (protecting workers' right to organize). Similarly, U.S. companies are already obligated to "[c]ompl[y] with U.S. and local laws promoting good business practices." MODEL BUSINESS PRINCIPLES, *supra* note 24.

111. See, e.g., *Comments on White House Business Principles, supra* note 109 (commenting that the Model Business Principles are "far less specific, and therefore may be less effective, than bills considered or pending in Congress to legislate a code of conduct for businesses operating in China").

112. Evelyn Iritani, *White House Unveils its Overseas Code of Corporate Conduct*, L.A. TIMES, Mar. 28, 1995, at D1.

113. *U.S. Outlines Business Ethics Code*, SAN DIEGO UNION-TRIB., May 27, 1995, at C3. The companies listed in support of the principles were Boeing, Honeywell, General Electric, Westinghouse Electric, Eastman Kodak, Rockwell International and Loral. *Id.* According to Gare Smith, Deputy Secretary of Democracy, Human Rights and Labor, U.S. Department of State, the Clinton Administration is not seeking out companies to sign onto the principles, which are intended as voluntary guidelines for businesses to incorporate into their own codes of conduct. Telephone Interview with Gare Smith, *supra* note 99. The Department of Commerce, however, is setting up a clearinghouse of codes of conduct adopted by U.S. companies. *Id.*

114. MODEL BUSINESS PRINCIPLES, *supra* note 24.

115. *Clinton Administration Encourages Voluntary Business Code*, INT'L LABOR OFFICE WASH. FOCUS, Summer 1995, at 8, 9. The first awards by the De-

D. PRIVATE INITIATIVES TO REGULATE TNC CONDUCT REGARDING HUMAN RIGHTS

Not satisfied with the pace of government reforms regarding human rights, several private groups have proposed standards for corporate behavior in countries with a pattern of human rights violations. Two of the most noteworthy efforts to channel the conduct of TNCs into ethical and socially responsible patterns were the Sullivan Principles on doing business in South Africa and the MacBride Principles regarding Northern Ireland.¹¹⁶ These privately created and controlled efforts to monitor corporate involvement in countries with serious human rights problems have had a significant impact on the consciousness and conduct of TNCs in those countries. Additionally, the Sullivan and MacBride Principles advanced to corporations the recognition that they play a significant role in promoting human rights.

1. The Sullivan Principles

The code of conduct known as the Sullivan Principles was the brainchild of Rev. Leon H. Sullivan, a black Baptist minister from Philadelphia who served on the Board of Directors of General Motors.¹¹⁷ Sullivan's code of conduct included six principles which placed businesses in the position of direct advocates of non-discrimination in the workplace and the community during the period of apartheid in South Africa.¹¹⁸ During its height of

partment of Commerce were scheduled to be presented in fall 1996. Telephone Interview with Gare Smith, *supra* note 99.

116. See Stratford P. Sherman, *Scoring Corporate Conduct in South Africa*, FORTUNE, July 9, 1984, at 168; Dermot O'Callaghan, *From Belfast to Brixton: Could New Monitoring Measures Cross the Irish Sea?*, PERSONNEL MGMT., Aug. 1988, at 44, 45.

117. Sherman, *supra* note 116, at 168.

118. The Sullivan Principles are as follows:

- 1) Nonsegregation of the races in all eating, comfort, locker room, and work facilities.
- 2) Equal and fair employment practices for all employees.
- 3) Equal pay for all employees doing equal or comparable work for the same period of time.
- 4) Initiation and development of training programs that will prepare blacks, coloreds, and Asians in substantial numbers for supervisory, administrative, clerical, and technical jobs.
- 5) Increasing the number of blacks, coloreds, and Asians in management and supervisory positions.
- 6) Improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation, and health facilities.

effectiveness, the Sullivan code had more than 125 companies as signatories, including giants such as Exxon, Mobil, IBM, Citicorp and Merck.¹¹⁹ The Sullivan Principles required not only non-discrimination in the workplace, but community investments to increase opportunities for oppressed racial groups.¹²⁰

These Principles were implemented aggressively by the signatory companies because they were actually graded for their efforts to comply.¹²¹ The "scorekeeper" was D. Reid Weedon, a senior vice president of Arthur D. Little, a Cambridge Massachusetts consulting firm.¹²² Weedon graded the companies on a curve; he increased the incentive for companies to shake the pillars of apartheid by failing a third or more of the TNC signatories in any given year.¹²³ This method resulted in the desegregation of hundreds of enterprises, education and job training for approximately 50,000 workers a year, and significant investment in the infrastructure of black and desegregated education in South Africa.¹²⁴ Ultimately, however, these efforts were not enough to do away with the fundamental human rights violations of apartheid, and Sullivan himself supported an all-out prohibition on investment through the Anti-Apartheid Act.¹²⁵

2. The MacBride Principles

Inspired by the success of the Sullivan Principles, a U.S.-based group of advocates drafted its own code of conduct to encourage TNCs to combat the legacy of discrimination and strife in Northern Ireland.¹²⁶ Named after the late Sean MacBride, Irish nationalist and a founder of Amnesty International, the MacBride Principles offer detailed non-discrimination standards to fit the context of the Northern Ireland situation.¹²⁷ In addition to promoting hiring, training, and advancement on a non-sectarian basis, the principles call for a ban on "provocative, sectarian, or political emblems from the workplace," and adequate

Id.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 171.

125. See *supra* note 86 and accompanying text.

126. Robert L. Stivers, *Northern Ireland and the MacBride Principles*, 105 *CHRISTIAN CENTURY* 166, 167 (1988).

127. *Id.*

security to protect employees from sectarian violence.¹²⁸ The MacBride Principles are not followed by the corporate community, largely because of the lack of public pressure like that associated with apartheid in South Africa.¹²⁹ Political problems prevent adoption of the MacBride Principles as well. Examples of such political problems include the nationalist connections of Sean MacBride, the fact that the government itself is making efforts at non-discrimination, and the concerns of many in Northern Ireland that the campaign would have a chilling effect on investment, thus further disabling an already poor economy and increasing sectarian tensions.¹³⁰ Shareholder resolutions are the main vehicle for these principles' implementation, and all shareholder resolutions failed.¹³¹ Nevertheless, five states — Connecticut, Massachusetts, New Jersey, New York, and Rhode Island — adopted the MacBride Principles to guide their investment policies regarding TNCs in Northern Ireland, causing many companies to take notice.¹³²

128. The MacBride Principles call for:

- 1) Increasing the representation of individuals from under-represented religious groups in the workforce, including managerial, supervisory, administrative, clerical and technical jobs.
- 2) Adequate security for the protection of minority employees, both at the workplace and while traveling to and from work.
- 3) The banning of provocative, sectarian, or political emblems from the workplace.
- 4) All job openings to be publicly advertised; and special recruitment efforts to be made to attract applicants from under-represented religious groups.
- 5) Layoff, recall, and termination procedures not to be practised in favour of particular religious groupings.
- 6) The abolition of job reservations, apprenticeship restrictions, and differential employment criteria, which discriminate on the basis of religion or ethnic origin.
- 7) The development of training programmes that will prepare substantial numbers of minority employees for skilled jobs, including the expansion of existing programmes and the creation of new programmes to train, upgrade, and improve the skills of all categories of minority employees.
- 8) The establishment of procedures to assess, identify, and actively recruit minority employees with potential for further advancement.
- 9) The appointment of a senior management staff member to oversee the company's affirmative action efforts and the setting up of timetables to carry out affirmative action principles.

O'Callaghan, *supra* note 116, at 45.

129. Stivers, *supra* note 126, at 167.

130. *Id.* at 168.

131. *Id.* at 167.

132. *Id.*

E. TNC SELF-REGULATION THROUGH CODES OF CONDUCT

A number of major U.S. companies that can be defined as TNCs have voluntarily promulgated internal policies and procedures for dealing with human rights abuses in host countries.¹³³ Although the policies vary in degree and specificity, they represent a growing trend for the many visible TNCs to state their commitment to respecting and protecting human rights. Internal standards are useful to companies, especially if made public, because they offer proof of their concern about these issues. Many of these policies reflect a belief that economic leverage may be used to persuade foreign governments to abide by international human rights standards. These internal codes of conduct can be roughly divided into three types: vendor standards regarding forced and child labor; standards in support of civil and political rights; and criteria for investment.

1. Vendor Standards

Several companies have enacted minimum standards regarding conditions of employment for their workers and those of their business partners. The common features of these standards include a prohibition on forced, convict, or child labor. Companies with these standards for their overseas operations include K-Mart, J.C. Penneys, Phillips-Van Heusen, Reebok International Ltd., Sears, Roebuck & Co., Timberland, and Wal-Mart Stores, Inc.¹³⁴ In addition to these retailers, Starbucks Coffee Company adopted a code of conduct in 1995 for workers at the coffee plantations from which it buys its coffee beans, thereby becoming the first U.S. company address the human rights issues associated with sourcing practices for a major agricultural commodity.¹³⁵

Wal-Mart's policies are typical of these codes of conduct, and result from a 1993 NBC-TV expose of children working in a Bangladesh factory under contract to make shirts for Wal-Mart.¹³⁶

133. Ferrari, *supra* note 49, at 5.

134. *Id.* Telephone Interview with Aron Kramer, Businesses for Social Responsibility, San Francisco, Cal. (Sept. 16, 1996).

135. Telephone Interview with Aron Kramer, *supra* note 134. The Starbucks code limits child labor and supports workers' access to safe housing and healthy work places, supports progressive environmental practices, safeguards freedom of association, and supports a wage level that addresses the basic needs of workers and their families. URGENT ACTION UPDATES (Christian Task Force on Central America, B.C., Canada), Jan. 11, 1996, at 2.

136. See *Human Rights: Ethical Shopping*, *supra* note 16, at 58.

The policy states, in pertinent part, that all foreign vendors shall:

[C]omply with applicable U.S. import laws (including forced labor products prohibition) . . . Vendors shall meet conditions of employment that include appropriate compensation for employees, maintain reasonable hours, refrain from engaging in forced or prison labor practices, refrain from using child labor, [and] demonstrate a commitment to basic human rights (allowing for cultural differences).¹³⁷

Sears, Roebuck & Co. has a similar formal policy regarding goods produced by forced labor.¹³⁸ Sears announced this policy in March of 1991 after several of its unions complained that the buying practices of Sears did not adequately ensure that products produced by forced or convict labor were not purchased by the company.¹³⁹

137. See Wal-Mart Standards, *supra* note 102, at 1-5.

138. The entire Sears policy is as follows:

1. Sears will provide to its buying office in Hong Kong a policy statement and advisory regarding goods made by forced or convict labor. The statement shall emphasize that it is against Sears policy and U.S. law to purchase such goods for importation into the United States. The buying office shall also be provided with a copy of the relevant U.S. laws and regulations pertaining to the importation of goods made by forced labor.
2. Copies of Sears (sic) policy statement shall be provided to all manufacturers and trading companies from which Sears purchases goods made in China.
3. Sears shall include in each contract it makes with a manufacturer in mainland China or a trading company sourcing goods from a manufacturer in mainland China a representation by the manufacturer or trading company that none of the goods being provided have been made by convict or forced labor. Sears will not do business with any supplier found to be violating this provision and will report evidence relating to violations to the U.S. Custom Service.
4. Sears will maintain a list of the names and addresses of all manufacturing sites in mainland China whose products Sears purchases. . . . Sears shall require of the trading companies with which it contracts for goods made in mainland China that they provide Sears with a list of names of and addresses of the manufacturers whose goods Sears will be purchasing. Said list shall be available for shareholder inspection upon written request.
5. Sears shall attempt to obtain a list of the addresses of sites of forced labor in mainland China for the purposes of checking that list against the supplier list referred to above.
6. Sears employees may from time to time conduct unannounced inspections of manufacturing sites in mainland China to determine compliance with U.S. law as regards the use of forced or convict labor.

Memorandum from Sears, Roebuck & Co. Announcing Policy on Goods Made by Forced Labor in China (Mar. 31, 1992) [hereinafter Sears Memorandum] (on file with the *Minnesota Journal of Global Trade*).

139. *New Sears Policy*, MINNEAPOLIS STAR-TRIB., Apr. 1, 1992, at D5.

2. Standards Supporting Civil and Political Rights

Some companies go beyond labor issues to expressly commit themselves to protecting political rights, including freedom of association, freedom from compulsory political indoctrination, and freedom from labor as a punishment for holding or for peacefully expressing political views. Reebok International Limited's policy is an example of this more expansive human rights policy. Reebok's practice includes a commitment to withdraw from countries violating political rights and active encouragement of those rights in countries where the company operates.¹⁴⁰

3. Investment Criteria

A few companies have publicly stated bottom line principles guiding decisions about whether or not to do business in a country with significant human rights problems. Most notable is the Levi Strauss & Co. policy that commits the company not to do business in countries with pervasive violations of basic human rights.¹⁴¹ In its "Global Sourcing Guidelines," Levi Strauss & Co. explicitly declares its standards for country selection and

140. Reebok announced the following principles in November 1990 specifically in response to human rights abuses in China:

1. Reebok will not operate under martial law conditions or allow any military presence on its premises.
2. Reebok encourages free association and assembly among its employees.
3. Reebok will seek to ensure that opportunities for advancement are based on initiative, leadership and contributions to the business, not political beliefs. Further, no one is to be dismissed from working at its factories for political views or non-violent involvement.
4. Reebok will seek to prevent compulsory political indoctrination programs from taking place on its premises.
5. Reebok reaffirms that it deplores the use of force against human rights.

Reebok Code of Conduct, *in* Orentlicher and Gelatt, *supra* note 13, at 108 [hereinafter Reebok Code of Conduct]. In 1992 Reebok adopted "Human Rights Production Standards" governing its relations with suppliers and business partners. Orentlicher and Gelatt, *supra* note 13, at 108 & app. at 127-28.

141. Memorandum from Levi Strauss & Co. Regarding Business Partner Terms of Engagement and Guidelines for Country Selection (Jun. 28, 1993) [hereinafter Levi Memorandum]. Levi Strauss's policy also has the following labor standards for vendors:

Use of child labor is not permissible. . . . We will not knowingly utilize prison or forced labor in contracting or subcontracting relationships in the manufacture of products. . . . While recognizing and respecting cultural differences, we believe that workers should be employed on the basis of their ability to do the job, rather than on the basis of personal characteristics or beliefs. . . . We will not utilize business partners who use corporal punishment or other forms of mental or physical coercion.

Id. at 3.

lists criteria the company believes "to be beyond the ability of the individual business partner to control."¹⁴² These criteria include adverse effects on global brand image, evidence that employees would be exposed to unreasonable risk, evidence of pervasive violations of basic human rights, threat to trademarks or other legal interests, and evidence of political or social turmoil that unreasonably threatens Levi's commercial interests.¹⁴³

Levi Strauss's guidelines ostensibly led the company to announce in early 1992 that it was terminating business arrangements with suppliers in Burma after discovering that the Burmese Government, notorious for human rights abuses, held substantial ownership stakes in major suppliers.¹⁴⁴ In May 1993 Levi's announced that it would phase out its ties with most contractors in China and would not make any direct investments in the country because of the Chinese Government's pervasive human rights violations.¹⁴⁵

III. CONTINUUM OF RESPONSIBILITY

An analysis of the inter-governmental, governmental, privately initiated and corporate codes of conduct described above illustrates their various strengths and weaknesses. These codes do give some limited guidance for TNCs that wish to comply with minimum norms regarding human rights. Existing codes, however, are grossly inadequate. In light of the human rights violations occurring in countries where TNCs operate, a company's goodwill, business culture, and knowledge of best practices largely determine how it chooses to respond to human rights violations affecting its employees or other stakeholders.

What can be gleaned from existing and proposed codes suggests that TNC responsibility falls into a continuum of legal and moral responsibility that can be divided into four broad levels.

142. *Id.*

143. *Id.*

144. Ferrari, *supra* note 49, at 5.

145. *Id.* For an interesting analysis of Levi's decision-making process concerning China, see Beaver, *supra* note 17. Since the mid-1980s, under the leadership of CEO Robert Haas, Levi Strauss has redefined its business strategy, focusing on a value-centered management emphasizing socially responsible employee rights. *Id.* The company has severed relationships with 30 business partners and demanded change from 120 others in various countries. *Id.* Critics accuse Levi's of leaving China as a marketing stunt, noting that the company has no direct investment in China and easily will be able to find other low-cost sub-contractors in Asia. *Id.*

At the primary level of responsibility, the TNC has the greatest duty to act when the company itself is compelled to participate in the human rights abuse. On the other end of the continuum are situations imposing the least responsibility for action by the company. Such situations include scenarios in which the company lacks involvement in the human rights violations as well as influence over the perpetrator of the violations.

A. PRIMARY CORPORATE RESPONSIBILITY

Where a TNC is actively involved in violating the human rights defined in the International Bill of Human Rights, the TNC must take action to prevent or correct the violation. This primary level of responsibility is illustrated in the following hypothetical case, which represents a human rights issue facing employers in many politically oppressive environments: freedom of political expression.

CASE A. Employee X is a production supervisor in the plant of TNC, a company doing business in a country with serious human rights problems. X has become involved as a leader of a democracy movement in opposition to the host government. X has been active at the TNC's plant and outside of work, encouraging democratic reform. X discusses his political views with a group of fellow employees during lunch time on the plant premises. Government officials contact the TNC's management and request that X be fired for expressing his political opinions.

The government's efforts to punish X for his political activities clearly violates several fundamental human rights norms. If TNC succumbs to government pressure to fire X, it too would be violating international norms. Firing X for expressing his political beliefs violates article 18 (Freedom of conscience), article 19 (freedom of expression), article 20 (freedom of association), and article 21 (right to participate in government) of the UDHR.¹⁴⁶

What, then, are the TNC's responsibilities to act? Under the current draft of the U.N. Code of Conduct for TNCs, the company is required under paragraph 13 to respect human rights and fundamental freedoms, and especially is prohibited from basing employment decisions on political beliefs.¹⁴⁷ Under the proposed U.N. Code of Conduct, the company would be required

146. Universal Declaration, *supra* note 1.

147. *Development and International Economic Co-Operation: Transnational Corporations*, *supra* note 68, at 7. While the code was never adopted, it reflects the most recent views of the U.N. on the activities of TNCs regarding human rights.

to protect the employee's rights and not to fire X.¹⁴⁸ Under section 401(b)(1) of the Miller Bill,¹⁴⁹ requiring that employment decisions not be made on the basis of political belief or activity, the result would be the same. The Miller Bill goes further than the U.N. Code of Conduct, providing that corporations ensure their employees enjoy freedom of expression and association.¹⁵⁰

Under the Clinton Administration's Model Business Principles, the TNC pledges to respect the right of association.¹⁵¹ The Clinton Administration's principles also call for "a corporate culture that respects free expression consistent with legitimate business concerns."¹⁵² Presumably, the condition regarding legitimate business concerns has to do with protection of intellectual property and trade secrets, and is not intended as a curb on political expression. Still, the Clinton Code does not go as far as the Miller Bill in safeguarding the right to political speech for employees.

The internal codes of those companies with vendor standards are generally silent regarding the employee's right to political expression.¹⁵³ Some companies, however, such as Levi Strauss & Co. and Reebok International Limited, expressly forbid employment decisions based on political belief. Levi Strauss's policy states that employment will be based on ability and not belief.¹⁵⁴ Reebok's policy directly states that employees will not be terminated for peaceful political participation.¹⁵⁵

It appears then, that there is general agreement under the codes presented that a TNC should not fire an employee who exercises his or her political beliefs. The duty of a TNC to respect the human rights defined in the International Bill of Human Rights also supports this agreement.¹⁵⁶ The important distinction between the first level of responsibility, illustrated here, and the other levels is that the company is the direct actor.

148. *Id.*

149. H.R. 3489, 102d Cong. § 401(b)(1) (1991). While the Miller Bill was never enacted, it represents the most comprehensive legislative effort to regulate the overseas actions of U.S.-based TNCs.

150. *Id.* § 401(b)(5), (7).

151. *See* MODEL BUSINESS PRINCIPLES, *supra* note 24.

152. *Id.* art. 5.

153. *See, e.g.,* Sears Memorandum, *supra* note 138. The Sears policy addresses only the use of forced labor. *Id.*

154. *See* Levi Memorandum, *supra* note 141.

155. *See* Reebok Code of Conduct, *supra* note 140, art. 3.

156. *See supra* note 44 and accompanying text.

B. PASSIVE INVOLVEMENT, IN HUMAN RIGHTS VIOLATIONS

At the second level of responsibility the corporation passively allows human rights abuses in a situation where it has some ability to prevent such abuses. Case B illustrates the TNC's responsibility at this level.

CASE B. TNC is aware that the government has arrested employee B for her role in organizing employees in TNC's plant to form a labor union for purposes of collective bargaining. Employee B has been a particular thorn in the side of TNC, which prefers that its plant not be unionized. TNC therefore appears to benefit from the arrest of B, even if though did not participate in the arrest in any way.

The arrest of B violates several international human norms, especially basic workers rights, contained in the UDHR including article 3 (security of person), article 8 (effective legal remedy), article 9 (freedom from arbitrary arrest), article 19 (free expression), article 20 (freedom of association), article 23(4) (right to form and join trade unions).¹⁵⁷ The International Labor Organization's (ILO) Convention No. 87, Concerning Freedom of Association and Protection of the Right to Organise, also expressly guarantees the freedom to form and join labor organizations.¹⁵⁸

Given the violation of these rights, what is the TNCs responsibility to act? The proposed U.N. Code of Conduct requires corporate action in respect for human rights, but it is not explicit about whether a company must act to prevent arrest for internationally lawful activities. The Miller Bill on the other hand clearly states that U.S.-based TNCs must "undertake to protect the freedom of assembly and association among employees."¹⁵⁹ The Miller bill language indicates that the TNC in Case B has an affirmative responsibility to intervene with the government on behalf of employee B.

Under the Clinton Administration's Model Business Principles, the TNC pledges to engage in fair employment practices "including . . . respect for the right of association and the right to organize and bargain collectively."¹⁶⁰ Like the Clinton Code, ex-

157. Universal Declaration, *supra* note 1.

158. Freedom of Association and Protection of the Right to Organize Convention, *supra* note 110. The ILO is a tripartite organization involving governments, representatives of labor and representatives of business. As such, it binds its members, including businesses, to respect a broad array of labor standards. Freedom of association, including the right to organize, is one of the core principles in the laws promulgated by the ILO. See Orentlicher and Gelatt, *supra* note 13, at 109-16.

159. H.R. 3489, 102d Cong. § 401(b)(5) (1991).

160. MODEL BUSINESS PRINCIPLES, *supra* note 24, art. 2.

isting corporate codes are silent on their obligation or intention to intervene with a host government on behalf of employees whose rights are violated. The vendor codes focus solely on forced, convict, and child labor and do not even discuss freedom of association. Only the Reebok and Levi Strauss principles state an affirmative policy to protect an employee's freedom of association.¹⁶¹

While many of these codes stop short of imposing an affirmative responsibility on TNCs to intervene with host governments on behalf of their employees, Case B offers a clear example of where such a duty should apply. Here, as the agent of the TNC, the government can be said to be carrying out a violation. This practice occurs frequently in countries where the TNC has significant economic leverage, and therefore the TNC has an affirmative duty under international law to respect the freedom of association of its workers. Even without strict legal liability for B's arrest, TNC may want to protect its public image and its relationship with its workers by standing up for B's rights in this case. The TNC should not only act as an advocate on behalf of B, but it should also assure its employees that it will take steps to protect their right to organize.

C. CORPORATION HAS EFFECTIVE INFLUENCE

Corporations must consider how to act at a third level of responsibility, in which the TNC is not responsible in any way for the human rights violation, but where it has the power to intervene to protect an individual's right. While a corporation has limited legal responsibility at this level, there are several good reasons for using its influence to prevent further abuse.

CASE C. Bank teller C at TNC-Bank, is on the verge of losing her job because of excessive absenteeism as the result of being beaten by her husband. TNC-Bank is operating in a country that does not have adequate laws to protect women from domestic violence. The host country also has a serious unemployment problem; it would be quite easy to replace C. Does TNC-Bank have any responsibility to intervene to protect C's rights?

Violence against women, once categorized as a private sphere violation, is now considered a human rights violation contravening the following rights, among others, guaranteed in the UDHR: article 2 (non-discrimination), article 3 (security of the person), article 5 (freedom from torture); article 7 (equal pro-

161. Reebok Code of Conduct, *supra* note 140, art. 2; Levi Memorandum, *supra* note 141, at 2.

tection); article 8 (effective legal remedy for violations); article 13 (freedom of movement).¹⁶² Based on existing or proposed codes of conduct, the legal responsibility for a TNC not to fire C, but to intervene to protect her right to be free from violence in the home, is not particularly strong.¹⁶³ The proposed U.N. Code of Conduct prohibits discrimination on the basis of sex. That code, however, also encourages corporations to "respect local culture."¹⁶⁴ Several corporate codes of conduct also suggest a balancing act between non-discrimination in employment and "cultural differences."¹⁶⁵ Since other bases of discrimination, such as race, religion, and ethnicity, are anathema in the international community, this "allowance" for cultural differences comes to play primarily in employment decisions affecting women. This loophole in the enforcement of non-discrimination by corporations allows enormous discretion by TNCs in their actions regarding the role of women in the workplace.

While the Miller Bill and the Clinton Code do not use conditional language regarding the prohibition on sex discrimination, neither do they suggest an affirmative duty for companies to intervene in situations that take place outside the workplace. The most instructive lessons in this area may be learned from privately initiated codes, such as the Sullivan Principles and the MacBride Principles. TNCs desiring to take progressive action to improve the status of women in the workplace and in the communities in which they must live should follow the lead of these country-specific codes by instigating a system of equal employment practices, training programs, and advancement procedures specifically targeted at women. In addition, like the signatories to Sullivan Principles, TNCs could take steps to improve the quality of employees' lives outside the work environment.

Considering best practices in the case of C, the TNC could give employee C social and health support, while considering legal support to encourage state action in her case and to stimu-

162. Universal Declaration, *supra* note 1; see ELIZABETH BRUCH ET AL., MINNESOTA ADVOCATES FOR HUMAN RIGHTS, *LIFTING THE LAST CURTAIN: A REPORT ON DOMESTIC VIOLENCE IN ROMANIA* 16 (1995) (stating that the Universal Declaration of Human Rights and other international treaties obligate governments to provide an adequate remedy for the denial of women's fundamental rights to security of the person and freedom from torture and cruel and inhuman treatment).

163. See generally *Development and International Economic Co-Operation: Transnational Corporations*, *supra* note 68.

164. *Id.* ¶ 13.

165. See, e.g., Levi Memorandum, *supra* note 141.

late effective redress system-wide. Ultimately, it will pay off in terms of worker loyalty and productivity for the TNC to initiate education programs for employees regarding violence against women.

D. PERVASIVE VIOLATIONS

A fourth scenario regarding corporate responsibility under governmental and corporate codes of conduct occurs when a corporation is aware that pervasive violations of human rights are occurring in the country, unrelated to TNC's operations. In this scenario, the TNC has the lowest level of responsibility under existing codes.

CASE D. TNC-resorts is considering building a hotel on the beautiful unadulterated coast of an island country that is seeking to promote its tourism industry. The host government is known for brutal repression, including mass killings, of indigenous minority groups in the interior of the island.

TNC-resorts in this case is unlikely to find much guidance regarding its human rights responsibilities from the existing codes. If there is no relation between the government's action and TNC-resort's purpose, then there is no apparent restriction on TNC-resort's investment in the country, nor is there an affirmative responsibility for TNC-resort to act to protect the rights of ethnic minorities in the country.

With the exception of a few rogue states,¹⁶⁶ U.S. policy does not favor disinvestment by private companies in countries with even the poorest human rights records.¹⁶⁷ In fact, in unveiling its model business principles, the Clinton Administration underscored its assumption that "U.S. business can and does play a positive and important role promoting the openness of societies, respect for individual rights, the promotion of free markets and prosperity, environmental protection and the setting of high standards for business practices generally."¹⁶⁸ The Executive branch, therefore, would not regulate TNC-resort's decision to invest in the island country, but would encourage the business to act as a model, "encouraging similar behavior by their partners, suppliers, and subcontractors."¹⁶⁹ Whether or not TNC-resort will be able to positively influence the government's ac-

166. See *supra* note 83 and accompanying text.

167. See Christopher Letter, *supra* note 91.

168. MODEL BUSINESS PRINCIPLES, *supra* note 24, at 2.

169. *Id.* at 1.

tions is a factor for the company to consider in its investment decision.

On the other hand, the Miller bill indicates that, in some circumstances, such as doing business in China, Congress may assign an affirmative duty to a TNC to advocate on behalf of oppressed individuals or groups. The bill does not go so far, however, as to prohibit TNCs from doing business in China.¹⁷⁰

The internal policy of Levi Strauss & Co. suggests some guidelines for deciding whether to invest. Levi's criteria for getting out of, or not getting into, a country with pervasive human rights problems include a potential adverse effect on the company's image, unreasonable risk to employees, and evidence of political and social turmoil that would unreasonably threaten Levi's commercial interests.¹⁷¹ Using similar criteria, and prompted by vocal consumers, labor unions and shareholders, several U.S. companies, including Levi Strauss itself, Liz Claiborne, Eddie Bauer Inc., and Macy's, have chosen not to do business in Burma.¹⁷²

TNC-resort's decision whether to invest in the island country is ultimately a business decision. In a consumer-sensitive industry like tourism, TNC-resort must consider what public reaction it may face for building a hotel in a country with serious human rights violations. The TNC in Case D must consider the appearance that its investment would be "propping up" an unjust regime. Besides the Levi's criteria, TNC-resort should weigh the following ethical considerations: (1) the degree of seriousness of the ongoing human rights violations; (2) the level of interaction TNC-resort will have with the offending government; (3) the ability of TNC-resort to have a positive influence on the human rights situation; and (4) any potential or perceived connection between the work of the company and the human rights violations. These factors may have more of an impact on a TNC's decision to invest or to intervene actively in human rights violations in the host country than any code of conduct, especially when consumer pressure is brought to bear upon it.

IV. CONCLUSION

Human rights advocates are constantly looking for new levers to exert pressure on governments to stop their human

170. H.R. 3489, 102d Cong. § 401(b)(9) (1991).

171. See Levi Memorandum, *supra* note 141, at 2.

172. G. Pascal Zachary, *Macy's is Latest to Cut Ties with Burma*, *ASIAN WALL ST. J.*, Apr. 13, 1995, available in WESTLAW, WSJ-ASIA database.

rights violations. The past fifty years have been characterized by international and national efforts to define and enforce human rights norms. This international diplomatic activity can be supported and strengthened by appropriate policies, both public and private, for corporate action to discourage human rights abuses.

Public pressure and corporate concerns about operating in a stable business environment have resulted in rudimentary policies regarding corporate responsibility in the face of human rights abuses. These policies are bound to be refined as international business decision-makers confront more and different situations of government violations of fundamental human rights. A proactive approach by TNCs will result in a more coherent, and more humane, response to human rights abuses in the countries in which they operate.