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International Responsibility and Accountability of the Corporation:  
International Initiatives for Holding Corporations to Account and their Viability with  
regard to Private Military and Security Companies

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## **Abstract**

While there has been much focus elsewhere on PMSC-specific regulatory projects, as business actors, there is no reason to suggest that PMSCs are, or indeed ought to be, excluded from the scope of broader Corporate Social Responsibility initiatives. This report identifies and evaluates the international CSR initiatives which may encompass PMSC behaviour. It describes some historical CSR initiatives at the UN but focuses, in particular, on the recent work of the UN's Global Compact, the OECD and European Union. It concludes that both the Global Compact and OECD offer viable soft law options for regulating PSMC behaviour.



*International Responsibility and Accountability of the Corporation: International Initiatives for Holding Corporations to Account and their Viability with regard to PSMCs*

SORCHA MACLEOD\* WITH SCARLETT MCARDLE\*

## 1. Introduction

This paper has been drafted as part of Work Package 6 for the PRIV-WAR Project. Its purpose is to analyse the different initiatives established by the international community for the purpose of holding corporate actors accountable for human rights and humanitarian violations and to assess whether they are viable in relation to Private Military and Security Contractors (PSMCs).

Corporate Social Responsibility (CSR) has been on the international radar since the 1970s but the widespread debate led to no tangible outcomes. More recently a variety of different international and regional organisations, each aiming to make corporate actors liable for their misbehaviour and human rights violations in particular, have sought to create regulatory systems applicable to business. Some have sought to establish internationally binding rules, others have relied upon the voluntary participation of business and still others have road tested new hybrid methods. This report will examine some of the key initiatives and demonstrate that there is no reason to suggest that PSMCs are, or indeed should be, excluded from CSR initiatives.

The Report is divided into three sections. Part A is merely a brief introduction while Part B examines the decades-old involvement of the UN in holding business responsible for its misconduct and its current attempts at addressing the problem. Part C scrutinises two examples where a regional or economic grouping has attempted to regulate corporate behaviour. In this instance the focus is on the Organisation for Economic Cooperation and Development (OECD) and the European Union (EU). Their different approaches offer an interesting contrast.

The examples referred to are by no means intended to be exhaustive but rather highlight some of the least successful and most successful CSR initiatives at the international and regional level. They also offer some useful guidance for successful PMSC regulation in the future.

## 2. United Nations

Since its inception the UN has instigated a number of attempts to address corporate misbehaviour.<sup>1</sup> In light of their failure, or at least limited application, in 2005 the UN Secretary-General appointed Professor John Ruggie as Special Representative on Business and Human Rights<sup>2</sup> in order to facilitate progress by learning from previous mistakes and building upon existing best practice in the CSR sphere.<sup>3</sup> So for example, he is extremely critical of what he describes as the “train wreck” of the

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<sup>1</sup> See the UN Commission on Transnational Corporations which was established by ECOSOC as an advisory body, ECOSOC Res. 1913(LVII) E/RES/1913 (LVII) of December 5, 1974 and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights U.N. Doc. E/CN.4/Sub.2/2003/12/rev.2 (2003) and the Global Compact *infra* at p.

<sup>2</sup> Mandate 2005-2008

<sup>3</sup> Presentation of Report to United Nations Human Rights Council, Geneva, 3 June 2008, p.1 <http://www.business-humanrights.org/Documents/Ruggie-Human-Rights-Council-3-Jun-2008.pdf> On the

Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights ('the Norms') but reports positively on the work of the Global Compact.<sup>4</sup> This section of the report examines the historical background to CSR at the UN as well as current initiatives and considers what they have to offer in relation to the regulation of PMSCs.

***A. UN Commission on Transnational Corporations and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights***

Both of the UN's initial attempts at regulation of corporate actors in relation to human rights took the form of a treaty-based apparatus. Neither the UN Commission on Transnational Corporations (UNCTC) nor the Norms, however, succeeded in agreeing the content of a treaty. Indeed both resulted in a failure to agree on a unified approach to CSR standards in any form and ultimately the projects collapsed, albeit for different reasons.<sup>5</sup> Individual political concerns overtook any limited desire to establish a credible device for the enforcement of human rights obligations against business enterprises although the UNCTC's initial objectives seemed to address the core issues. One of its key purposes was:

To secure effective international arrangements for the operation of transnational corporations designed to promote their contribution to national development goals and world economic growth while controlling and eliminating their negative effects.<sup>6</sup>

To that end the UNCTC undertook the creation of a Draft Code of Conduct on Transnational Corporations.<sup>7</sup> The Code reflected many contemporary CSR preoccupations such as voluntarism versus legally binding measures; addressees (to whom or to what should the Draft Code apply?); monitoring and sanctions<sup>8</sup> but ultimately it was decided in the absence of any kind of agreement, that the Draft Code should be "an instrument of moral persuasion" rather than a binding document.<sup>9</sup> State involvement with the UNCTC was highly politicised, with regional and economic groupings

*(Contd.)* \_\_\_\_\_

Global Compact see Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie A/HRC/8/5 7 April 2008 (hereinafter 'Protect, Respect and Remedy') paras 66-67

<sup>4</sup> Remarks by John G. Ruggie U.N. Special Representative for Business and Human Rights Delivered at a Forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics Bamberg, Germany, June 14, 2006

<http://198.170.85.29/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf> at p.2. The remarks regarding the Norms were subsequently repeated in 2007.

<sup>5</sup> Commission on Transnational Corporations and the Sub-Committee on the Promotion and Protection of Human Rights Norms on the ... For an overview of the work of the UNCTC see P. Muchlinski, Multinational Enterprises (2<sup>nd</sup> ed.); Brewer & Young at p.88 et seq.; For more on the UNCTC and the Norms see MacLeod, S. in N. Boeger, C. Villiers and R. Murray, Perspectives on Corporate Social Responsibility (Edward Elgar, 2008) pp

<sup>6</sup> Commission on Transnational Corporations, Report on the Second Session, 1-12 March 1976 (E/5782; E/C.10/16 Economic and Social Council Official Records, 61<sup>st</sup> Session Supplement No.5) p.2, para.6(b)

<sup>7</sup> The term TNC was adopted after much discussion and included "entities" doing business in "two or more countries" both public and private.

<sup>8</sup> Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990

<sup>9</sup> ECOSOC, *Report of the Group of Eminent Persons on the Impact of MNC on the Development Process and International Relations* (NY: UN, 1974) at p.55



disagreeing fundamentally. Developing nations in particular objected to TNCs in principle in an effort to protect their fledgling sovereignty. Writing at the time, Hellman noted that “the developing countries are not willing at this point to renounce part of their newly gained sovereignty to promote control over multinational corporations.”<sup>10</sup> On the other hand, the developed, industrialised nations perceived the draft Code as a constraint on business activities and therefore resisted its implementation. The overarching general preoccupation with defending State sovereignty meant that there was little objection to the notion of a legally binding international instrument which would apply directly to corporations and bring them to account for their actions. In particular there was no objection to human rights obligations being imposed upon TNCs but in any event the enforcement and reporting mechanisms were weak.<sup>11</sup> The only specific human rights provision took the following scant form:

Respect for human rights and fundamental freedoms

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 discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations shall conform to government policies designed to extend equality of opportunity and treatment.<sup>12</sup>

This obligation was not elaborated upon save for the subsequent provisions relating to apartheid and incorporation of the ILO’s Tripartite Declaration into the Code.<sup>13</sup> In terms of proposed dispute settlement, disputes were to be settled at the national level although a reporting mechanism was also proposed.<sup>14</sup>

Irreconcilable political differences meant that that the 1990 Draft Code was abandoned<sup>15</sup> and by 1992 the UNCTC had become defunct.<sup>16</sup> Despite the ultimate failure of the UNCTC its efforts live on in the ongoing work of UNCTAD.<sup>17</sup>

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<sup>10</sup> Hellman, R., Transnational Control of Multinational Corporations (NY: Praeger, 1977)

<sup>11</sup> Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990. Paragraphs 14 and 15 addressed human rights and apartheid respectively and lacked detail so paragraph 14 reads:

“Respect for human rights and fundamental freedoms

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 discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations shall conform to government policies designed to extend equality of opportunity and treatment.”<sup>11</sup>

<sup>12</sup> Proposed Text of the Draft Code of Conduct on Transnational Corporations, 31 May 1990, UN Doc. E/1990/94 of 12 June 1990 para. 14

<sup>13</sup> Ibid. paras 15 and 25 respectively. Paragraph 15 purported to prohibit TNCs from “operations and activities” which supported the apartheid regime in South Africa.

<sup>14</sup> Paragraphs 57, 58 and 69 respectively. For state reporting obligations, see for example Article 16 of the International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 and Article 40 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

<sup>15</sup> Joseph, S., *An Overview of the Human Rights Accountability of Multinational Enterprises* in Kamminga, M. & Zia-Zarif, S., Liability of Multinational Corporations under International Law (Kluwer Law: 2000) at p.84

<sup>16</sup> A putative first draft of the Code was presented at the eighth session of UNCTC in 1982 but it has been criticised by Muchlinksi, P., Multinational Enterprises and the Law (OUP: 2007) as being an “incomplete document”. Commenting that “no drafting had been done on the ‘preamble and objectives’” and that there was considerable disagreement about the substantive content of the Code.

<sup>17</sup> E.g. the World Investment Reports, UNCTAD also publishes the journal *Transnational Corporations*

More recent regulatory attempts came in the controversial guise of the Sub-Committee on the Promotion and Protection of Human Rights' Norms. The Committee endeavoured to draft a convention template which would impose human rights obligations upon business and included a proposal for the monitoring and enforcement of those obligations. This agenda was driven by particular members of the Committee and was opposed wholesale by the members from the western and industrialised States. Several States viewed the Norms as a direct challenge to the international legal status quo and opposed them vociferously as did various employer organisations.<sup>18</sup> There was particular resistance to the application of numerous international human rights instruments in what was perceived as a haphazard, vague and dangerous manner. In endeavouring to impose human rights obligations upon business the Sub-Committee encountered powerful opposition from many quarters in particular the USA which declared that the Sub-Committee was acting ultra vires and exceeding its mandate in seeking to produce such an instrument.<sup>19</sup> Some States, however, welcomed the Norms especially the attempts to create a dispute settlement mechanism.<sup>20</sup> Likewise many NGOs such as Amnesty, Human Rights Watch, Oxfam and Christian Aid supported the Norms.

Ultimately the opponents prevailed and the Norms were dropped from the agenda. To describe the project as a "train wreck" as Ruggie does is rather harsh. The process was undoubtedly flawed but the Sub-Committee succeeded in instigating thought-provoking debate about the value of implementing a hard law approach to corporate misbehaviour with its attendant dispute settlement mechanism.

It is within this context that John Ruggie was granted an initial mandate by the Human Rights Council for two years and which was extended by one year in order to enable him to complete his final report under that mandate. The framework of "Protect, Respect and Remedy" was unveiled in 2008 and consists of three elements. Firstly, it categorically states that the primary duty to protect human rights rests with states *but* secondly, that business has a responsibility to respect human rights and thirdly, that there is a requirement to establish an adequate and appropriate remedy for any human rights abuses. According to Ruggie these three principles together "form a complementary whole in that each supports the others in achieving sustainable progress."<sup>21</sup> Although criticised by some NGOs for demonstrating a lack of action, this framework has been generally well received<sup>22</sup> and Ruggie himself has indicated that it is simply a baseline from which to start and has reiterated the importance of establishing solid foundations for this work.<sup>23</sup> This commitment to agreed basics is rooted in his desire to avoid the lack of consensus which led to the demise of both the UNCTC and the Norms.<sup>24</sup> Ruggie has been critical of the Norms in particular and the overall disparate, "fragmented" and

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<sup>18</sup> e.g. International Chamber of Commerce, Caux Roundtable and the International Organisation of Employers.

<sup>19</sup> US submission to the UNHCHR for the Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, E/CN.4/2005/91, 15 February 2005

<sup>20</sup> Norway's submission to the UNHCHR.

<sup>21</sup> 2008 Report p.2

<sup>22</sup> Joint Written Statement submitted by Stichting Oxfam International (OI) a non-governmental organisation in general consultative status, Action Aid International, Amnesty International (AI), EarthRights International, International Commission of Jurists (ICJ), International Federation of Human Rights Leagues (FIDH), Human Rights Watch (HRW), Tides Center, non-governmental organisations in special consultative status, Friends of the Earth International (FOEI) and Women's Environment and Development Organisation (WEDO), non-governmental organisations on the Roster A/HRC/8/NGO/5, 26 May 2008

<sup>23</sup> 2008 Report p.4

<sup>24</sup> 2006 Report, paras.56-69

“kaleidoscopic” attempts at regulation in this area.<sup>25</sup> This has led him, to look at previous and current attempts at regulation in order to draw upon success and learn from mistakes. By determining “what works, what doesn’t, and where the gaps are,” he hopes to create “a backdrop to the mandate’s own processes of developing guiding principles.”<sup>26</sup> In creating these guiding principles it is clear that Ruggie will draw not only upon past and present experience but he will also seek to incorporate new ideas on CSR.<sup>27</sup> To that end, in 2008 Ruggie’s mandate was renewed for a further three years, and in more substantial detail, to allow him to develop “concrete and practical” guidance and recommendations to “operationalise” the Protect, Respect, Remedy framework.<sup>28</sup>

One of the recurring ideas that Ruggie is keen to embrace is stakeholder involvement.<sup>29</sup> Since 2005 Ruggie himself has involved a range of actors in developing this framework.<sup>30</sup> Ruggie’s proposed work plan commits him to working with a variety of stakeholders, including the UN Global Compact.<sup>31</sup> Ruggie himself has established working relationships, and expressed the desire to maintain these relationships, with other initiatives such as the OECD and its National Contact Points, the UN Treaty Bodies and other Special Procedures.<sup>32</sup> This coordinated approach can already be seen through the commitment to working with the UN Global Compact, the involvement of NGOs and there has already been a public meeting hosted by the European Parliament Sub-Committee on Human Rights in which Ruggie was involved.<sup>33</sup> A two day consultation on operationalising the framework as requested by the Human Rights Council is scheduled to take place in Geneva in October 2009, involving States and all relevant stakeholders.<sup>34</sup>

It has become evident via this continuing engagement with civil society that NGOs support the general concept of Ruggie’s framework but they have argued for a more in-depth analysis of specific situations and cases. Such a power was not granted in the new mandate of the Special Representative. Many NGOs agree that the framework provides a workable starting point, but consider that this starting point needs to be developed. Most importantly for the purposes of this report there is divergence of opinion between NGOs as regards the development of principles governing business in conflict zones and crucially whether PMSCs ought to be treated as a separate concern. Ruggie himself does not refer to PMSCs as a distinct category of business requiring specific regulation but he has, however, indicated his particular concerns about business operations within conflict zones. NGOs are split on the issue. Some, such as ActionAid, have argued that ‘business is business’ and that the Special Representative should be creating principles applicable to *all* business enterprises irrespective

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<sup>25</sup> 2008 Report; Presentation of Report to United Nations Human Rights Council, Geneva, 3 June 2008, p.1 <http://www.business-humanrights.org/Documents/Ruggie-Human-Rights-Council-3-Jun-2008.pdf> p.2-3

<sup>26</sup> Ruggie Work plan 2008-2011.

<sup>27</sup> 2007 Report p.23

<sup>28</sup> Mandate 2008-2011

<sup>29</sup> See e.g. Global Compact, OECD *infra*.

<sup>30</sup> 2008 Report at p.3 Ruggie had “convened 14 multi-stakeholder consultations on five continents.” The 2009 Report indicates that further consultations have been convened.

<sup>31</sup> Ruggie Work Plan 2008-2011

<sup>32</sup> Speech to the UN general Assembly on Business and Human Rights, following the Renewal of his Mandate, 63<sup>rd</sup> Session, third Committee, Agenda Item 64(6), 24<sup>th</sup> October 2008 <http://www.reports-and-materials.org/Ruggie-statement-UN-General-Assembly-27-Oct-2008.pdf>

<sup>33</sup> Thursday 16<sup>th</sup> April 2009

<sup>34</sup> Resolution 8/7, Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, para.6; Office of the UN High Commissioner for Human Rights establish consultation <http://www2.ohchr.org/english/issues/globalization/business/consultation102009.htm>

of the existence of a conflict in the host state.<sup>35</sup> Others such as Amnesty International make direct reference to PMSCs on the basis that “there are specific accountability issues” because of the contractual relationships between PMSCs and States.<sup>36</sup> Amnesty is keen to ensure that “States cannot contract out of human rights responsibilities” as a consequence of commercial dealings. To this end Amnesty singles out PMSCs for attention and encourages Ruggie “to look at the role played by private military and security contractors in conflict and beyond.”<sup>37</sup> It is not clear how Ruggie will tackle the issue at this point in time. Conflict zones are undoubtedly a concern but Ruggie will have to decide whether PMSCs are to be treated differently from other business entities or whether the principles he develops are to be applied to business across the board.

## Conclusion

There is no doubt that both the UNCTC and the Norms are significant historical footnotes in relation to the UN’s consideration of CSR. Much of the subsequent empirical work undertaken by UNCTAD on TNCs has its roots in the efforts of the UNCTC<sup>38</sup> and the controversy surrounding the Norms demonstrates the disinclination of States to regulate business and human rights via international covenants. Special Representative Ruggie can draw much from these projects, if only the simple fact that these attempts at hard regulation failed. Neither project specifically addressed the issues surrounding PMSCs or even conflict situations but there is no reason to believe they would have been excluded from the application of either the Draft Code or the Norms. Both initiatives appeared to adopt a ‘business is business’ approach. Ruggie appears to have learned from earlier UN mistakes and is adopting a multi-stakeholder approach which seems to be steering a middle course somewhere between voluntarism and hard regulation. In doing so he is keen to draw upon the experiences of the Global Compact and the OECD.

## ***B. UN Global Compact***

Aside from Ruggie’s endeavours, the only CSR project currently functioning within the UN is the Global Compact (GC).<sup>39</sup> Kofi Annan established the GC in 1999 as a stakeholder network comprising corporate and civil society participants, all of whom work with the freestanding Global Compact Office and a variety of UN agencies.<sup>40</sup> The architects of the GC have always emphasized its voluntary nature, stating that it is not a “regulatory instrument” nor does it “police, enforce or measure the behavior or actions of companies”.<sup>41</sup> Voluntarism dominates with an emphasis on accountability and transparency. It is the “enlightened self-interest of companies, labour and civil society” which

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<sup>35</sup> ActionAid

<sup>36</sup> Amnesty International Submission to the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, IOR 40/018/18/2008 1 July 2008 at p.4. AI is particularly concerned with what it regards as State failure to protect human rights standards and the apparent immunity granted to PMSCs. It focuses particularly on Iraq and Afghanistan.

<sup>37</sup> Ibid.

<sup>38</sup> <http://unctc.unctad.org/asp/UNCTCContribution.aspx>

<sup>39</sup> See [www.unglobalcompact.org](http://www.unglobalcompact.org) and UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 Aug. 2003

<sup>40</sup> See further MacLeod, ‘The United Nations and Transnational Corporations: Challenging the international Legal Order’, in N. Boeger, R. Murray, and C. Villiers (eds), *Perspectives on Corporate Social Responsibility* (2008), at 64–84.

<sup>41</sup> See [www.unglobalcompact.org/AboutTheGC/index.html](http://www.unglobalcompact.org/AboutTheGC/index.html).

underpins the GC.<sup>42</sup> Businesses of all types are encouraged to engage in “socially responsible business” in order to establish and preserve “good social reputation” and “reduction of damaging criticism”, as well as “being more in touch with markets, customers and consumers.”<sup>43</sup>

Participants in the GC are asked to sign up to the Ten Principles on a voluntary basis. The Principles address human rights, labour standards, the environment, and corruption.<sup>44</sup> International Humanitarian Law is not included. Participants are requested to ‘embrace, support and enact’ the internationally recognized standards and they agree to support and respect human rights as well as guaranteeing that they are not and will not be complicit in human rights violations.<sup>45</sup> The basic principles are derived from several key instruments, namely the Universal Declaration of Human Rights, the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on the Environment, and the UN Convention against Corruption. As the GC is not a legally binding regulatory instrument the Ten Principles are drafted in indistinct terms and cannot be relied upon before a court. It is nonetheless important to note that the Ten Principles are founded on acknowledged international human rights norms. Furthermore, companies which commit to the GC are required to give further assurances that they will promote the Compact via corporate documentation, e.g. annual reports, mission statements, training programmes, and press releases. The nature of PMSC activities demands that any regulatory attempt must make reference to both human rights and humanitarian law standards. From a PMSC regulatory perspective, the key omission is the lack of reference to international humanitarian law which consequently limits the relevance of the GC to PSMCs to some extent. In any event there are further general concerns about the GC’s lack of enforcement mechanism which renders the GC open to abuse.

Despite its inherently voluntary nature there are a variety of mechanisms built into the GC to try to ensure compliance. So, for example, corporate participants are obliged to submit annual concrete examples of measures undertaken to comply with the Ten Principles. These examples must be posted on the GC website to ensure that there is an element of transparency in the process.

It is important to note that while the GC appears to adopt voluntarism wholesale, it has also adopted and maintained a participatory stakeholder approach. Corporations of all sizes and civil society representatives are involved. Currently it is not possible to ascertain whether any PSMCs participate in the GC but they are certainly not excluded.

Overall the GC has been successful in involving large numbers of participants and there are currently 5,200 active business participants from 130 states.<sup>46</sup> The remaining participants are largely NGOs, with additional participants coming from UN agencies, business associations, labour organizations, and educational establishments. The GC has been particularly effective at harnessing UN ‘inter-agency cooperation’, and has brought together the International Labour Organization (ILO), the UN Environmental Programme (UNEP), the UN High Commissioner for Human Rights (UNHCR), and the UN Development Programme (UNDP). Establishing a truly collaborative network is important for engaging especially wide, indirect stakeholder participation.<sup>47</sup> The “collaborative solutions” to the

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<sup>42</sup> Ibid. See H. Ward, *Corporate Responsibility and the Business of Law* (International Institute for Environment and Development Globalt Ansvar, Swedish Partnership for Global Responsibility) Report No 6, Sept. 2005, at 20–21.

<sup>43</sup> ‘The Global Compact and Human Rights’, available at: [www.globalcompact.org](http://www.globalcompact.org).

<sup>44</sup> See [www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html](http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html).

<sup>45</sup> United Nations Global Compact, ‘The Ten Principles’, available at: [www.globalcompact.org](http://www.globalcompact.org).

<sup>46</sup> See [www.unglobalcompact.org/ParticipantsAndStakeholders/index.html](http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html), as of 30 June 2009.

<sup>47</sup> Global Compact Report 2002, on file with the authors, at 3.

“challenges facing business and society” are to be achieved by harnessing the “moral authority and convening power” of the UN and the diverse problem-solving expertise of the private sector and civil society. To that end, participants are invited to sign up for one of the eighty Local Networks established under the GC. This ‘bottom up’ approach of these Local Networks aims to ensure that “local priorities and needs” are addressed but it is impossible to measure the success or otherwise of the networks. The GC itself States that the:

networks provide opportunities for participants to improve understanding and share experiences on the Ten Principles and partnerships, as well as how to report on progress in these areas. Collective action campaigns and government policy dialogues are also increasingly organised through the Local Networks.<sup>48</sup>

Furthermore the GC points to various meetings, workshops and conferences as indicative of the success of the networks.<sup>49</sup> Overall 60% of active participating companies belong to a local network which is useful in terms of disseminating information to companies which have an existing interest in CSR issues but it seems as if the networks have much to do in terms of reaching non-participating companies. Indeed the Annual Review for 2008 gives no indication that to indicate that new participants have signed up for the GC or that business misconduct has been thwarted as a result of the efforts of the networks. At present it seems that the key function of the networks is limited to the dissemination of information about the GC and CSR generally.

Nevertheless it is clear that the GC has established several fresh approaches to preventing business violations of agreed standards in the areas of human rights, the environment and corruption in addition to seeking a measure of accountability where breaches do occur. The fact that more businesses than ever are actively participating in the GC and are submitting Communications on Progress (COP) is not insignificant and is probably a direct result of the endeavours of the Local Networks. Adoption of a genuinely multistakeholder approach involving all relevant parties is vital to the successful operation of the GC. It can be seen in the operations of the Local Networks as well as in the reports and documents which are being produced to give guidance to business and which are clearly employing cross-sector expertise.<sup>50</sup> Many of those documents also rely on the work of Special Representative Ruggie and it is important to note this move towards a more ‘joined up’ approach by international organisations to the problem of business and human rights. This truly multistakeholder involvement is one of the great strengths of the GC and is why the dissemination programme will be successful in ensuring greater respect for human rights standards, at least where businesses *want* to be involved.

Notwithstanding the positive aspects of the GC project, it still faces many of the same regulatory challenges that it encountered at its inception and throughout its existence.<sup>51</sup> The persistent issue of corporate failure to communicate and report requires urgent attention.<sup>52</sup> While the number of reporting participants continues to increase year on year, hundreds of companies have been delisted

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<sup>48</sup> Annual Review 2008 at p.18.

<sup>49</sup> Ibid.

<sup>50</sup> See for example *Human Rights Translated: A Business Reference Guide 2008* which has been published by a consortium comprising Castan Centre for Human Rights Law, Monash University, the Office of the High Commissioner for Human Rights, the International Business Leaders Forum and the Global Compact itself. The publication aims to explain the content of international human rights and to act as “a tool for companies wanting to engage in activities in support of human rights.”(at p.xiii)

<sup>51</sup> For an overview of the work of the GC see <http://www.unglobalcompact.org/AboutTheGC/>

<sup>52</sup> United Nations Global Compact, ‘Annual Review 2008’ (UN Global Compact Office: NY, March 2009) [http://www.unglobalcompact.org/docs/news\\_events/9.1\\_news\\_archives/2009\\_04\\_08/GC\\_2008AR\\_FINAL.pdf](http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2009_04_08/GC_2008AR_FINAL.pdf)

for completely failing to meet the communication obligations.<sup>53</sup> This gives rise to the conclusion that there are different types of GC participants. Firstly, there are those participants which are *willing and able* to adhere to the GC principles by meeting the reporting requirements and contributing to a Local Network. These tend to be the big high-profile, high-street names which respond to reputational carrots.<sup>54</sup> Secondly, there are those businesses which are *willing but unable* to adhere to GC commitments such as submitting COPs. Most offenders in this category belong to the SME sector and a ‘naming and shaming’ policy to shame these participants into meeting their obligations is unlikely to be effective.<sup>55</sup> SMEs generally have a lower public profile and it must therefore be assumed that they are less susceptible to bad publicity and the consumer campaigns and boycotts which often plague the big high-profile participants and act as a lever for better behaviour.<sup>56</sup> Lastly, there are those businesses which do not become involved with CSR initiatives at all. It is this final renegade group which presents the greatest challenge for any voluntary CSR project and highlights the key weakness of the GC. From its earliest days, the CSR project has sought to persuade companies that adhering to human rights standards (among others) is good for business. It is essential, therefore, that methods of involving businesses which “fly under the radar” need to be developed over and above those which reach businesses which are responsive to the threat of losing consumer confidence or their reputation. The reality is that the majority of businesses which are currently engaged in human rights violations will never be persuaded by the reputational carrot held out by voluntary initiatives.<sup>57</sup> Companies out of the public eye are far less susceptible to the notion of the “price of getting it wrong and it may well be that many PMSCs fall within this category<sup>58</sup>

Given these continuing problems, the GC will have to persevere with the issue of non-communicating participants and inactive/delisted companies. This is being addressed partly through the implementation of a reporting programme which is standardised and reliable.<sup>59</sup> Such a scheme will be of unquestionable value for SMEs who struggle with the administrative burden of institutional paperwork and red tape at the best of times. Nevertheless, the GC will also have to demonstrate that it is more than a mere ‘talking shop’ or opportunity for philanthropy and move towards material prevention of human rights violations by business. There is no question that the dissemination of information about human rights standards (and the rest) is valuable in terms of ensuring respect for principles but there are ongoing breaches which require urgent attention and the GC remains unable to tackle them. While the GC is an important tool in relation to encouraging adherence to some aspects of CSR, nevertheless, the current institutional arrangements are simply not capable of addressing ongoing violations of human rights and certainly do not fully meet Ruggie’s requirements for an

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<sup>53</sup> A total of 404 companies were delisted in 2008 which amounts to over 800 delisted companies in total.

<sup>54</sup> See for example Daimler Chrysler in the earliest days of the GC.

<sup>55</sup> Only 32% of SMEs are active participants in comparison to 67% for other companies which have been participants for more than two years. The overall figure is a much higher 76% when new participants are included. 2008 Annual Review p.53

<sup>56</sup> See for example the footwear industry e.g. NIKE, Reebok and the changes to operating practices after consumer boycotts.

<sup>57</sup> See ‘Human Rights Translated’ at ppvii-viii “Good human rights practice may bring commercial rewards...Companies implicated in human rights scandals often see their reputations and brand images suffer, resulting in the loss of share value, and face increased security and insurance costs, as well as expensive lawsuits such as those pursued under the Alien Tort Claims Act, and consumer boycotts. The price of getting it wrong cannot be underestimated.”

<sup>58</sup> Ibid.

<sup>59</sup> Practical Guide to the Communication on Progress, ‘Human Rights – A Call to Action, September 2008

“effective remedy.”<sup>60</sup> The GC was never designed with any sort of enforcement mechanism or punishment in mind for active human rights breaches and while the ‘bottom up’ reporting approach and dissemination activities are commendable in terms of preventing business misbehaviour, huge cracks appear in the system when businesses simply refuse to meet their reporting obligations and the system itself cannot remedy ex post facto situations of human rights abuse.

## Conclusion

At present, PSMCs are not specifically included in the GC project. This may be due to the fact that the military, security and defence sectors are not integrated into GC business categories. It is therefore hard to tell whether PSMCs are self-excluding or not. Certainly the Ten Principles could be as applicable to PMSCs as to any other type of business. Special Representative Ruggie seeks to identify best practice in relation to business and human rights and there is no doubt that the GC has much to offer in this regard via the evolving use of COPs and Local Networks in particular. The GC is doing good work promoting human rights standards but it is simply not in a position to offer any kind of *remedy* or redress for human rights violations by business unless its terms of reference change. It continues to evolve and its inclusive stakeholder approach in particular may offer a helpful example of good practice to those seeking to regulate PMSCs.

## 3. Regional / Economic Groupings

### A. OECD

One of the earliest and most important CSR instruments to emerge on the international plane is the OECD’s Guidelines for Multinational Enterprises (the Guidelines) which consist of voluntary recommendations regarding social and environmental standards. They are addressed to multinational enterprises (MNEs) based in OECD states and member states undertake to promote observance of the Guidelines among MNEs<sup>61</sup> and ‘good practice’ in the spheres of human rights, labour standards, and the environment.<sup>62</sup> The regulatory emphasis is on voluntary activities, self-regulation, and reporting mechanisms,<sup>63</sup> although the stress on labour and environment issues would tend to suggest that many PMSC activities fall outside the scope of the Guidelines.

Although the Guidelines are non-binding, states are obliged to set up National Contact Points (NCPs) in order to implement and promote the Guidelines among all MNEs operating in or from their territory and this would obviously include PMSCs.<sup>64</sup>

The OECD has embraced a cooperative approach to business and human rights and one which

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<sup>60</sup> Protect, Respect and Remedy, p.24 para.92

<sup>61</sup> For a general overview of the structure and workings of the Guidelines see OECD, Guidelines for Multinational Enterprises, Revision 2000 (OECD: Paris) particularly the Commentary; see also Karl, ‘The OECD Guidelines for Multinational Enterprises’, in M.K. Addo (ed.), Human Rights Standards and the Responsibility of Transnational Corporations (1999), at 89.

<sup>62</sup> OECD Guidelines, supra note 61, I(1) and II(1) and (2).

<sup>63</sup> Ibid., II(3), (6), and (7). Also Guideline III(1), (2), (3), and (4).

<sup>64</sup> For a discussion of the OECD Guidelines and the NCPs see MacLeod, ‘Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared’, 13 European Public Law (2007) 671; see the Guidelines’ Annex 1, ‘Structure of the National Contact Points’, at 20, 24.



operates at both the international and national levels. In harnessing the consensual authority of the Guidelines coupled with institutional clout of the OECD as well as National Contact Points the OECD seeks to bring business to account for its actions. The Guidelines affirm that States have the primary obligation to protect individuals from human rights abuses but they also acknowledge that MNEs have obligations too and that human rights can only be protected, respected and remedied by a combined arrangement.

The Guidelines set out a number of recommendations which are endorsed by adhering States, are to be observed by MNEs and have been described as “the only comprehensive, multilaterally endorsed code of conduct for multinational enterprises.”<sup>65</sup> While the Guidelines are not legally binding upon MNEs (they emphasise self-regulation and reporting mechanisms<sup>66</sup>) they do tackle the issue of human rights (as well as the environment and particular labour issues).<sup>67</sup> The efforts to ensure accountability are particularly noteworthy and make the OECD’s embryonic experiences in attempting to regulate business behaviour significantly different from the Global Compact. Arguably the nascent NCP system offers something approaching what Ruggie would classify as a “remedy.” Nevertheless, the OECD system displays structural problems which have hampered openness, transparency and the involvement of civil society as well typical troubles in relation to enforcement and remedies.

From their inception the Guidelines espoused an open, multistakeholder approach which reflected the attitude of the highest ranks of the OECD. As the Guidelines fall within the sphere of responsibility of the Committee on International Investment and Multinational Enterprises (CIME) it is required to coordinate “exchanges of views” with stakeholders.<sup>68</sup> Relevant stakeholders include the Business Industry Advisory Council (BIAC), the Trade Union Advisory Council (TUAC)<sup>69</sup> as well as “other non-governmental organisations.”<sup>70</sup> However, a clear distinction was drawn, at least initially, between the various stakeholders as regards their involvement. The role of both TUAC and BIAC is specifically recognised in the Guidelines and are to be treated equally, with an emphasis being placed on “strict parallelism of treatment.”<sup>71</sup> Although NGOs *may* be consulted by CIME as relevant stakeholders, in fact they have been formally excluded from the Guidelines’ international implementation process and this has resulted in much frustration in the past.<sup>72</sup> Recently, however, CIME has involved NGOs in its “monitoring and reviewing” efforts and while their participation has not become formalised it certainly demonstrates a desire on the part of the OECD to increase and augment the involvement of civil society within the operation of the Guidelines.

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<sup>65</sup> Department for Business Enterprise and Regulatory Reform <http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html>

See also for example, Statement by the United Kingdom National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises: DAS Air, 17 July 2008 para.2

<sup>66</sup> Ibid. II(3), (6) & (7). Also Guideline III(1), (2), (3) & (4).

<sup>67</sup> Guideline II(2)

<sup>68</sup> Council Decision, June 2000 II(1).

<sup>69</sup> BIAC is consists of representatives from both industry and employers’ associations within OECD member States. Similarly TUAC is composed of national trade union organisations from all OECD members. Both TUAC and BIAC have secretariats are based in Paris and engage in formal and informal contact with the OECD. See OECD document ‘Relations with BIAC and TUAC’ 7.6.2001.

<sup>70</sup> OECD Council Decision, June 2000, II(1) and (2).

<sup>71</sup> Ibid.

<sup>72</sup> ‘NGO Statement on the OECD Guidelines for Multinational Enterprises’ in *OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility*, Annual Report 2001 (OECD, 2001) at p.46 “The unconvincing explanation given is that the NGOs are not organised in a similar fashion as BIAC and TUAC.”

Recently there has been a definite push towards a further general review of the Guidelines but this does not mean that there has been no progress since the 2000 Revision. In 2006 the Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones was created and represents an important advance, as it applies to states which are 'unable or unwilling to assume their obligations' under international law and refers to the 'positive contributions' that corporations can make to 'social progress' among other things in such zones. Such a tool appears to bring PMSCs firmly within the remit of the OECD certainly those operating in conflict zones and whose home State is an OECD member.

Notwithstanding the stakeholder participation and the Risk Awareness Tool, the fact remains that the Guidelines are voluntary in nature and limited in scope and that their value is predicated upon the effectiveness of the NCPs. There is evidence that the Guidelines are not actually being implemented successfully and this is principally to do with the composition of the National Contact Points (NCP). In Ruggie's estimation, they have "failed to meet their potential." To say that they have failed to meet their potential is to suggest that they could have achieved more but it is not clear how this would be possible given the current systemic limitations imposed by the adherent States themselves. NCPs are only as effective as their structure allows and this is entirely the responsibility of adherent States. Fault lies with the adherent States, not the NCPs.

As a result of the 2000 Revision of the Guidelines, each OECD Member State was required to establish an NCP for the purpose of, inter alia, monitoring the implementation of the Guidelines and to contribute to the resolution of complaints. Each NCP is unique but most exclude NGOs, trade unions and often business from their structure which is problematic and removed from the arguably enlightened multistakeholder approach of the OECD itself.<sup>73</sup> On a positive note, eleven of the thirty-nine NCPs adopt a tripartite or even a quadripartite structure and work with business and civil society informally mostly in the form of trade unions although the Finnish and Chilean NCPs also embrace NGOs.<sup>74</sup> This is a notable improvement on previous years mostly as "a result of choices made by new adherents" to the Guidelines.<sup>75</sup> While many NCPs do not engage with trade unions, NGOs or even the business sector at governmental level, many of them do "use advisory committees or permanent consultative bodies whose members include non-government partners" while others meet or consult informally with stakeholders.<sup>76</sup> It would seem that there has been a conscious effort on the part of some but not all States to do this and also to restructure NCPs in order to step away from purely government-based institutions and to make them more transparent.<sup>77</sup> At the G8 Heiligendamm Summit in 2007 States made clear that they are actively seeking "better governance" via the NCPs hence this restructuring.<sup>78</sup>

It is irrefutable that individual State discretion and the belief that "there is no perfect structure for

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<sup>73</sup> Report of the 2007 Annual Meeting of the National Contact Points, 19-20 June 2007, OECD at p.4. Of the thirty-nine NCPs twenty are composed of a single government department, seven involve multiple government departments, one is bipartite (government and business), nine are tripartite (government, business and trade unions) and two are quadripartite (government, business, trade unions and NGOs)

<sup>74</sup> Belgium, Denmark, Estonia, France, Latvia, Lithuania, Luxembourg, Norway and Sweden.

<sup>75</sup> Estonia, Latvia, Lithuania and Romania. Review of NCP Performance: Key Findings 2008 (background document to the OECD-ILO Conference on Corporate Social Responsibility, 23-24 June 2008, Paris) at p.4.

<sup>76</sup> Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' ; Report of the 2007 Annual Meeting of the National Contact Points, 19-20 June 2007, OECD at p.4.

<sup>77</sup> Review of NCP Performance 2008 at p.4. The Netherlands NCP is now made up of independent experts appointed to work with selected government advisors as opposed to its previous inter-departmental incarnation.

<sup>78</sup> G8 Summit Declaration Heiligendamm, 'Growth and Responsibility in the World Economy' Germany 7<sup>th</sup> June 2007 at paragraph 24.

NCPs” have led to a lack of coherence in NCP arrangement and consequently a lack of consistency in the implementation of the Guidelines.<sup>79</sup> Numerous States adhere to a system whereby the NCP is rooted entirely in government departments and which seems to fly in the face of the multipartite ethos which underpins the Guidelines. In the NCP Review 2008, States set out their reasoning for this position. They point to the fact that it is governments that “are the primary guarantors of the Guidelines” and which also have the requisite economic expertise to deal with the issues and thus it makes sense for the NCP to be based solely within government.<sup>80</sup> This does not justify the apparent formal exclusion of civil society from many NCP structures. Furthermore States point to the difficulties of reaching consensus on contentious issues when civil society is included in the process but the evidence demonstrates that such snags can be dealt with in a straightforward manner.<sup>81</sup> Declarations by States which stress the fact that civil society *can* be involved with the process irrespective of the structure of the NCP betray the inherent overarching multistakeholder architecture of the Guidelines. It is also difficult to see how an entirely government based NCP ensures proper accountability. Certainly proponents of the multipartite approach argue that true “objectivity, transparency and accountability” can only be realised within an inclusive, multistakeholder NCP structure.<sup>82</sup> A coherent and consistent configuration across adherent states can only add to the esteem of the NCPs, ensuring the proper application and protection of human rights standards.

Over and above their monitoring function, the NCPs play an important role by contributing to the “resolution of issues that arise relating to implementation of the Guidelines in specific instances.”<sup>83</sup> Like the Global Compact, the NCPs are expressly non-judicial in nature which in and of itself is not problematic, as non-judicial approaches can be a valuable tool for protecting human rights, as seen with the GC, but it inevitably raises further issues around lack of enforcement and binding redress.<sup>84</sup>

Such criticism is confirmed by the experience of the UK NCP, although it suffered from a variety of additional systemic problems since it was first established. It came under fire as a result of chronic delays; lack of transparency and accountability; and general mismanagement.<sup>85</sup> The UK government reacted by reorganising its NCP, firstly by removing it from the sole domain of the Department for Business, Enterprise and Regulatory Reform (BERR) and secondly by formalising the roles of the Foreign and Commonwealth Office and the Department for International Development. Furthermore, it has created a Steering Group and implemented a Specific Instance procedure. Despite the restructuring, various stakeholders have continued to criticise the NCP. In a report published by RAID, CORE and the TUC highlights the limitations of the current structure:

The NCP is a non-judicial mechanism that provides a degree of accountability for the environmental and human rights impacts of British companies operating abroad. It does not have any powers of enforceability, cannot impose penalties on companies or award compensation to victims. It has some capacity to investigate complaints brought to it by NGOs or unions directly,

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<sup>79</sup> Review of NCP Performance 2008 at p.5

<sup>80</sup> Review of National Contact Points 2008 at p.6

<sup>81</sup> *Ibid.* at p.7-8. So, for example, in Sweden the chair of the NCP retains a casting vote.

<sup>82</sup> *Ibid.* at p.7

<sup>83</sup> Guidelines p.47, Part C Implementation in Specific Instances

<sup>84</sup> Guidelines II(3), (6) & (7). Also III(1), (2), (3)

<sup>85</sup> RAID/CORE/TUC, ‘Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises 2008,’ A report by Rights and Accountability in Development (RAID) in association with The Corporate Responsibility (CORE) Coalition and The Trades Union Congress (TUC) November 2008 [http://www.corporatejustice.org/IMG/pdf/NCP\\_report\\_2008.pdf](http://www.corporatejustice.org/IMG/pdf/NCP_report_2008.pdf)

by seeking information from parties to the dispute and plays a mediating role in trying to bring them together to facilitate dialogue and a resolution to the case. If there is no resolution, the NCP can review the evidence, consult experts, make a determination and issue a statement on the case”<sup>86</sup>

Critics take the view that the UK NCP procedures are no substitute for judicial proceedings, particularly in relation to the lack of enforcement measures and penalties. Nevertheless, it is clear that some States at least are implementing more effective Specific Instance measures which have the potential to provide remedies for business misbehaviour. For example, the UK and the Netherlands have adopted a policy of naming the parties to initial assessments for Specific Instance proceedings and some NCPs publicise the acceptance of a Specific Instance on their website.<sup>87</sup> Transparency of process is therefore achieved.<sup>88</sup> On the other hand, where a case is rejected every NCP, with the exception of The Netherlands, keeps the parties anonymous. Crucially, however, under the Guidelines the NCPs may only mediate a resolution in relation to a complaint and may only make recommendations. Nevertheless, it is significant that the final statements issued by an NCP at the end of the Specific Instance process are becoming more detailed and are generally always published even if there has been no mediated agreement. The statement of the UK NCP in relation to Afrimex illustrates the strengths and weaknesses of the Specific Instance procedure.<sup>89</sup> It is, however, one of only two condemnatory statements made by the UK NCP both of which relate to companies operating in conflict zones.<sup>90</sup>

In February 2007 the NGO Global Witness lodged a complaint against Afrimex (UK) Ltd with the UK NCP on the basis of its investigations into the British registered company’s activities in the Democratic Republic of Congo. Specific allegations were made regarding the use of child labour and forced labour in mines within a conflict zone which supplied minerals to companies linked to Afrimex. There were additional allegations that Afrimex had paid so-called ‘taxes’ to rebel forces operating in Congo and which contributed to the conflict. Afrimex denied the allegations on the basis that there was no link between it and the alleged human rights violations because it was not directly involved in the mining process and it had never paid any ‘taxes’ to rebel forces.<sup>91</sup> The existence of a conflict was significant to the outcome of the procedure not least because the UN Security Council’s Panel of Experts on the Illegal Exploitation of Natural Resources had previously stated that companies such as Afrimex were the “engines” of conflict.<sup>92</sup> After an unsuccessful attempt at mediation between the parties, the NCP made a determination. Significantly the determination is rooted in Ruggie’s notion of due diligence, that is, the practical implementation of the obligation to protect human rights: “the steps a company must take to become aware of, prevent and address adverse human rights impacts.”<sup>93</sup> The NCP concluded that Afrimex had failed to exercise due diligence in relation to its supply chain and

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<sup>86</sup> Ibid. p.ii

<sup>87</sup> NCP Review 2008. UK, Brazil and Japan.

<sup>88</sup> Ibid. p.14

<sup>89</sup> Final Statement by the UK National Contact Point for the OECD Guidelines for

Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008, URN 08/1209 (hereinafter Afrimex Final Statement) <http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html>

<sup>90</sup> The other being Das Air. Final Statement by the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises : Das Air, 21 July 2008 <http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/nationalcontactpoint/page45873.html>

<sup>91</sup> Afrimex Final Statement p.5

<sup>92</sup> Afrimex Final Statement p.3

<sup>93</sup> Protect, Respect and Remedy, p.17 para.56

was in breach of a multitude of provisions of the Guidelines.<sup>94</sup> Specifically the NCP stated that it was “unacceptable” for Afrimex to fail to impose conditions on its suppliers “given the context of conflict and human rights abuses taking place.”<sup>95</sup> It went on to declare in no uncertain terms that Afrimex had funded a conflict which “prevented the economic, social and environmental progress key to achieving sustainable development and contributed to human rights abuses.” The NCP made several recommendations at the centre of which was the practical integration of the contents of a corporate responsibility policy. It proposed that the policy document should make explicit reference to international human rights instruments and sought assurances that the document would change corporate culture and not be a “worthless piece of paper.”<sup>96</sup> In making its recommendations the NCP again explicitly reverts to Ruggie’s work by advising Afrimex to adopt the due diligence standard and to require that its suppliers ‘do no harm.’<sup>97</sup> It also recommends that Afrimex monitor its suppliers to ensure compliance with these standards as well as referring the company to a number of tools to assist with the development and application of its policy.<sup>98</sup> Despite the non-binding nature of the recommendations the NCP’s determination has been welcomed. Global Witness stated in a Press Release that it sent the “right message” to business and that the “British government’s ruling provides positive guidance to help...change...practices.”<sup>99</sup> The message *is* unequivocal: “The UK government expects British companies to exercise the highest levels of due diligence in situations of widespread violence and systematic human rights abuses.”<sup>100</sup> There is no doubt that this new enhanced procedure offers a measure of accountability, the question is whether it can also offer realistic protection against human rights abuses in the absence of a binding mechanism or an effective remedy. The NGO and trade union community says that it does not and recommends a new body with the power of sanctions and remedies for individuals.<sup>101</sup> Ruggie too emphasises that an effective remedy is one which will “investigate, punish, and redress abuse” and it is clear that while the Specific Instance procedure involves an investigation of business behaviour, and an outcome which may act as a deterrent, it neither punishes nor provides redress for human rights abuses. Nevertheless, Afrimex is now firmly on the human rights ‘radar’ and even absent any punishment or redress it is to be hoped that the inevitable monitoring of its future activities will be a sufficient deterrent to breaches of the Guidelines.

## Conclusion

The OECD Guidelines and the use of NCPs offer a very real and effective opportunity for monitoring business behaviour in general and PMSC behaviour in particular. An element of accountability, if not remedy, is attainable. PMSCs are not excluded from the scope of the Guidelines and given that the vast majority of PMSCs are located within adherent States, together with emphasis on conflict zones, it would appear that PMSCs which may be engaging in human rights violations (even a step removed) will be asked to account for their actions. As always, there is a danger that PSMCs will relocate to non-OECD states in order to escape regulatory capture.

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<sup>94</sup> Guidelines II(1), II(2), II(10), IV(1)(b), IV(1)(c) and IV(4)(b)

<sup>95</sup> Afrimex Final Statement p.10-11 para.47

<sup>96</sup> Ibid. para.66

<sup>97</sup> Ibid. paras 64,65 and 66

<sup>98</sup> E.g. the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones; the Sanctions Unit at the Foreign and Commonwealth Office

<sup>99</sup> Global Witness Press Release, ‘UK company Afrimex broke international guidelines, says British government 28 August 2008’

<sup>100</sup> Afrimex Final Statement p.16, para.75

<sup>101</sup> RAID/CORE/TUC Report p.iv

## **B. The European Union**

Measured against the UN and the OECD, the EU has been slow to engage with the general CSR project and does not offer any accountability mechanism in the traditional sense, despite its stated aim to be a 'pole of excellence' in the field. Furthermore there is almost no reference to corporations operating in a conflict zone, let alone PSMCs, although it would be logical to conclude that PSMCs would be covered by general CSR provisions as with the GC and OECD.

Much of the early EU CSR impetus came from the desire to improve corporate environmental performance rather than the protection of human rights or humanitarian law, for example, the EU Ecolabels project, and the Eco-Management and Audit Scheme (EMAS).<sup>102</sup> All of the early attempts encouraged CSR among European enterprises on a purely voluntary basis, a theme which subsists to this day. There was no reference to humanitarian law, PMCs, or conflict situations.

The Göteborg Summit agenda included a consideration of the role of companies within society and within the context of a 'sustainable development strategy' for Europe, and the upshot was the publication in 2001 of the European Commission's 'Green Paper on Corporate Social Responsibility'.<sup>103</sup> Its stated aim was to stimulate debate about CSR within the European context rather than 'making concrete proposals for action' and it sought views from all stakeholders.<sup>104</sup> The Commission has always relied upon a business-oriented definition of CSR, describing it as a 'concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.<sup>105</sup> It is not surprising that this approach has found little favour with NGOs and trade unions, particularly in relation to monitoring and compliance.<sup>106</sup> They backed a 'regulatory framework' which established 'minimum standards' and ensured 'a level playing field', which conversely was not well received by the business community.<sup>107</sup>

Another criticism levelled against the Green Paper concerned the intense focus on the 'business case', with little consideration for the interests of the wider constituency of stakeholders. This is a recurring criticism of the Commission's attitude to CSR. Critics also argued that the Commission's definition of CSR is flawed.<sup>108</sup> In particular, it is not clear what the Commission is seeking to protect through the adoption of CSR.

The reference to a wide variety of international legal instruments, such as the Universal Declaration on Human Rights, ILO Conventions, and the UN Convention on the Rights of the Child, has caused much confusion while there is no reference to any humanitarian law standards. There is, however, clear conflict between those who want regulation and those who do not, and the debate is framed in those

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<sup>102</sup> See the EU Eco-label Homepage, available at: [http://europa.eu.int/comm/environment/ecolabel/index\\_en.htm](http://europa.eu.int/comm/environment/ecolabel/index_en.htm).

<sup>103</sup> European Multistakeholder Forum on CSR, Final Results & Recommendations (2004), 2, available at: [http://circa.europa.eu/irc/empl/csr\\_eu\\_multi\\_stakeholder\\_forum/info/data/en/CSR%20Forum%20final%20report.pdf](http://circa.europa.eu/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/CSR%20Forum%20final%20report.pdf). European Commission Green Paper Promoting a European Framework for Corporate Social Responsibility, COM(2001)366. Final responses were invited from interested parties and submitted by 31 Dec. 2001.

<sup>104</sup> *Ibid.*, at 23.

<sup>105</sup> *Ibid.*, at 6.

<sup>106</sup> See, e.g., Submission from Amnesty International on the Green Paper, available at: [http://europa.eu.int/comm/employment\\_social/soc-dial/csr/pdf2/091-NGOINT\\_Amnesty-international\\_int\\_01121\\_9\\_en.htm](http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/091-NGOINT_Amnesty-international_int_01121_9_en.htm) (§ 1 Definition of CSR).

<sup>107</sup> Commission Communication concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002)347, at 4.

<sup>108</sup> *Ibid.* See also the individual responses of the NGOs and trade unions to the Green Paper.

terms.

The Commission's response failed to address these issues and is largely couched in terms of voluntarism with no attempt to clarify the definition of CSR, including its extension to humanitarian law principles.<sup>109</sup> There is, however, clear backing for the OECD Guidelines on Multinational Corporations, which may impact positively upon the operation of the OECD NCPs (as discussed above) and result in deeper cooperation.<sup>110</sup> Further, utilizing the OECD's Guidelines as well as the ILO's Conventions encourages convergence between codes of conduct emanating from different regulatory regimes, by providing 'a common minimum standard of reference' something that Ruggie is also keen to encourage. In addition, two practical proposals were made: first, a proposal to establish an EU Multi-Stakeholder forum on CSR (EMS forum) with 'the aim of promoting transparency and convergence of CSR practices and instruments';<sup>111</sup> and, secondly, and of particular relevance to PSMCs, a proposal that the EMS forum should consider the integration of CSR into all EU policies, including employment and social affairs policy, enterprise policy, environmental policy, consumer policy, and public procurement policy.<sup>112</sup> The Business Contribution Communication also specifically addresses external relations policies. It advocates the promotion of CSR in line with the 'Communications on the EU role in promoting human rights standards and democratisation in third countries'.<sup>113</sup> This promotion of CSR includes 'the use of bilateral dialogue with Governments' and 'trade incentives', as well as 'engaging directly with multinational enterprises', and significantly it engages the governments of third party countries.<sup>114</sup>

Nevertheless, the European Parliament was particularly critical of the Commission reporting that it was 'frozen out of the process in a way that is unacceptable: the Commission Communication was effectively written before the Parliament's response to the Green Paper had been absorbed'.<sup>115</sup> In addition, various reporting committees contradicted the Commission's approach by supporting certain mandatory rules. For example, the Committee on Industry, External Trade, Research, and Energy (CIETRE) demanded a 'Global Convention on Corporate Accountability' on the basis that 'world society has a right to accountability in terms of environmental, social and human rights from transnational corporations and SMEs'.<sup>116</sup> Especially significant in relation to PSMCs is the attempt by the Committee on Development and Cooperation to establish the extraterritorial scope of EU CSR standards by asking the Commission to 'create an agency which would be responsible for introducing a system for assessing and monitoring observance of international and national standards on CSR and the environment by EU companies operating in developing countries'.<sup>117</sup>

In essence the Commission's position has not altered from its 2001 Green Paper position, to the annoyance of many stakeholders. While in the past NGOs and trade unions wanted the EU to create a concrete legal CSR framework, with all that such a framework would entail, their current position has

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<sup>109</sup> Commission Communication concerning Corporate Social Responsibility, *supra* note 91.

<sup>110</sup> *Ibid.*, at 13–14.

<sup>111</sup> *Ibid.*, at 17. The EMS Forum was established in 2002 and reported in 2004.

<sup>112</sup> Communication on Corporate Social Responsibility, *supra* note 91, at 21–22.

<sup>113</sup> European Commission, *The European Union's Role in Promoting Human Rights and Democratisation in Third Countries*, COM(2001)252.

<sup>114</sup> Communication on Corporate Social Responsibility, *supra* note 91, at 22–23.

<sup>115</sup> European Parliament Committee on Employment and Social Affairs, *Report on the Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM(2002)347 2002/2261(INI), 12 A5-0133/2003, 28 Apr. 2003.

<sup>116</sup> *Ibid.*, at 16.

<sup>117</sup> *Ibid.*, at 22.

changed. Now these stakeholders are seeking a combination or third way approach to CSR.<sup>118</sup> From their perspective, the key limitation of the EMS report is the failure to recommend any form of monitoring or compliance procedure. A letter from the NGOs to the Commission and Council commented on the necessary steps for future progress. Taken together, the recommendations, if they are fully implemented by the relevant actors, will help to generate a significant advance. For that to happen, it will be necessary to develop them into a proper framework that complements the voluntary commitment of a steadily growing number of companies with proactive and consistent public policies to create the right enabling environment and ultimately to ensure accountability by all companies.<sup>119</sup> Clearly this would be applicable to PSMCs.

Finally, after numerous delays, the Commission published a second Communication in 2006 entitled 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility' (the Pole of Excellence Communication).<sup>120</sup> NGOs were extremely concerned by what they perceived as the increasing marginalization of CSR as well as their exclusion from the consultation process.<sup>121</sup> In their view corporate attitudes seemed to favour the minimal impact of CSR.<sup>122</sup> The Commission did reinstate the EMS at a late stage, and, after intense lobbying, via the Poles of Excellence Communication.<sup>123</sup>

Rather than seeking the imposition of strict legally binding instruments, NGOs are now seeking the establishment of compromise regulatory mechanisms. They have recommended, among other options, mandatory social and environmental reporting, redress mechanisms, extra-territorial application of human rights and labour standards, and a duty of care upon companies and their directors regarding social and environmental impacts.<sup>124</sup> The justification for this is that voluntary initiatives gain credibility when they are supported by 'effective legal safeguards'.<sup>125</sup> To this end, the NGOs have proposed some alternative regulatory CSR mechanisms such as independent monitoring and verification, and multistakeholder initiatives as a means of achieving transparency.<sup>126</sup> Of course such mechanisms will function only within a strong EU regulatory framework. The Commission could easily build on the 'naming and shaming' approach embraced by the Global Compact or adopt a state-based system in the vein of the OECD. Such approaches appear to be supported by the European Parliament citing the weaknesses of self-regulation.<sup>127</sup>

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<sup>118</sup> For an overview of the NGO position see the European Coalition for Corporate Justice (ECCJ) Advocacy Briefing, 'Corporate Social Responsibility at EU Level: Proposals and recommendations to the European Commission and the European Parliament', Nov. 2006, at 4ff, available at: [www.corporatejustice.org/spip.php?article75&:lang=eng](http://www.corporatejustice.org/spip.php?article75&:lang=eng).

<sup>119</sup> Letter from Anne-Sophie Parent, President, Social Platform, et al., to Commissioner Liikanen et al. (29 June 2004), available at: [http://psicondec.rediris.es/RSC/legalissues\\_corporate.pdf.europa.eu.int/comm/enterprise/csr/documents/29062004/ngocs.pdf](http://psicondec.rediris.es/RSC/legalissues_corporate.pdf.europa.eu.int/comm/enterprise/csr/documents/29062004/ngocs.pdf).

<sup>120</sup> COM(2006)136, 22 Mar. 2006.

<sup>121</sup> ECCJ Advocacy Briefing, supra note 102, at 1, 3, and 4: '[a] multistakeholder approach ... has been abandoned outright'.

<sup>122</sup> Letter from the NGO UNICE, 26 Nov. 2001, Responses to the Green Paper, at 5, available at: [www.ec.europa.eu/employment\\_social/soc-dial/csr/csr\\_responses.htm](http://www.ec.europa.eu/employment_social/soc-dial/csr/csr_responses.htm).

<sup>123</sup> Ibid., at 4. See also Press Release, 'Europe sees progress on Corporate Social Responsibility', IP/06, Brussels, 8 Dec. 2006.

<sup>124</sup> Ibid., at 3-4.

<sup>125</sup> Ibid., at 3.

<sup>126</sup> ECCJ Advocacy Briefing, supra note 102, at 6.

<sup>127</sup> European Parliament Resolution on Corporate Social Responsibility: A New Partnership, A6-0471/2006,



Since 2001 the Commission's CSR strategy has been consistently censured on the basis, first, that there has been an unjustifiable reliance upon voluntarism and, secondly, that the interests of stakeholders have been marginalized and in some cases ignored. That said, the website of the Directorate General for External Trade describes CSR as not a substitute, but a complement to hard law. As such it must not be detrimental to public authorities' task to establish binding rules, at domestic and/or at international level, for the respect of certain minimum social and environmental standards. The focus of the debate in this respect has now moved on from a simple dichotomy between voluntary and binding instruments, towards the overarching challenge of devising reporting tools and verification mechanisms to ensure proper compliance with CSR commitments.<sup>128</sup>

#### **4. Conclusion**

There have been no EU policy developments since the report on the 'Pole of Excellence' and in many respects the EU remains a regulatory wasteland for bringing any business to account for its behaviour in relation to both human rights and humanitarian standards. There are however encouraging signs. Special-Representative Ruggie has met with the European Parliament Sub-Committee on Human Rights and DG Enterprise and Industry is actively involved in the promotion of good CSR practice through the European Multistakeholder Forum.<sup>129</sup> Of particular note is the DG's emphasis on supporting SMEs.<sup>130</sup> Nevertheless, at this point in time, the Global Compact and the OECD offer more viable options for the regulation of PSMCs.

*(Contd.)* \_\_\_\_\_

adopted 13 Mar. 2007.

<sup>128</sup> See [http://ec.europa.eu/trade/issues/global/csr/index\\_en.htm](http://ec.europa.eu/trade/issues/global/csr/index_en.htm)

<sup>129</sup> Thursday 16<sup>th</sup> April 2009. See <http://ec.europa.eu/enterprise/csr/multistakeholder.htm>

<sup>130</sup> <http://ec.europa.eu/enterprise/csr/sme.htm>