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CHILD LABOUR: SHOULD COMPANIES 'STAND AT BAY' OR 'ENTER THE WATER'?

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Abstract

The paper explores the responsibility of corporations regarding child labour. It offers a critical review of a representative sample of the relevant regulatory regimes to ascertain the nature of corporate responsibility outlined therein. All regulatory regimes, especially those that were drafted in the 20th century, focus mostly on a negative responsibility of not hiring children below a certain age. However, the goal of eliminating child labour cannot be accomplished unless this negative 'static' responsibility is complemented with other 'responsive' measures aimed at dealing with the root causes of child labour. The paper, therefore, develops the idea of *responsive responsibility*. It is contended that instead of merely obligated not to employ children below the minimum age, companies should also be obligated to take positive measures such as providing education or suitable vocational training to such children, or offering employment to the adult members of the children's family. In other words, companies should not only have a responsibility to respect, but also a responsibility to protect and fulfil rights of children.

I Introduction

DESPITE VIGOROUS campaign and efforts to eliminate child labour, a 2013 report of the International Labour Organisation (ILO) estimates that there are still about 168 million child labourers in the world, accounting for almost 11 per cent of the total child population.[1] About half of these child labourers (approximately 85 million) are engaged 'in hazardous work that directly endangers their health, safety and moral development'.[2] Since most of the children work in agriculture, services and industry sectors,[3] the role of non-state actors – such as farmers, families and businesses – becomes critical in dealing with the problem of child labour.

* Associate Professor, School of Law, City University of Hong Kong, Hong Kong. The author is thankful to Kavitha Ramanathan for providing useful research and editorial assistance.

1 International Labour Office, *Marking Progress against Child Labour: Global Estimates and Trends 2000-2012* (Geneva: ILO, 2013). *Available at*: http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—ipec/documents/publication/wcms_221513.pdf (last visited on June 18, 2014). A great majority of child labourers– about 137 million – are found in the Asia-Pacific and Sub-Saharan Africa.

2 *Id.* at 3.

3 *Id.* at 7-8.

Against this backdrop, this paper seeks to explore the responsibility of one prominent non-state actor, corporations,[4] regarding child labour. What are companies expected to do under the existing regulatory regimes, what are they actually doing, and what more should they do to eliminate child labour? To find answer to the first two questions, selected regulatory regimes will be reviewed in order to ascertain the corporate responsibility outlined therein. Under international law generally, the responsibility for the protection of human/labour rights was traditionally and primarily conceived with reference to states.[5] This state-focal nature, however, has been undergoing a change in recent years. For example, more importance is now being given to states' duty to ensure that non-state actors within their respective territory and/or jurisdictions comply with the goal of eliminating child labour.[6] In addition to this indirect approach, responsibility *vis-à-vis* child labour is also being imposed directly on companies. Moreover, one may notice a voluntary assumption of responsibility by many corporations in their codes of conduct. An attempt will be made in this paper to review some of these diverse regulatory initiatives.

In exploring what companies *should* do to deal with the problem of child labour, this paper tries to grapple with a normative question by examining the notion of 'responsibility'[7] in relation to the idea of corporations being 'responsive' to the state of child labour. 'Responsiveness' can be contrasted with 'responsibility' in that the former focuses more on strategy and action rather than outlining what duties corporations have on a given issue.[8] Another dimension of being responsive is that one does not have a pre-defined inflexible response applicable to all situations. Instead of only having a static and mostly negative responsibility, the exact contours of

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4 In this paper, the terms 'companies' and 'corporations' are used interchangeably. These terms are used in a wider sense so as to include all types of business enterprises.

5 'International law – and human rights law in particular – has traditionally concerned itself with state responsibility, rather than the responsibility of non-states actors such as companies.' Sarala Fitzgerald, "Corporate Accountability for Human Rights Violations in Australian Domestic Law" 11 *AJHR* 33 (2005). 'International law and human rights law have principally focused on protecting individuals from violations by governments.' David Weissbrodt, "Business and Human Rights" 74 *U. Cin. L. Rev.* 55, 59 (2005).

6 The first pillar of the UN 'Protect, Respect and Remedy' Framework and the Guiding Principles on Business and Human Rights acknowledge the important role of state duty to protect human rights. Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (Mar. 21, 2011) (GPs).

7 Although a distinction can be made between 'responsibility' and 'accountability', the author uses the former here to denote legally binding obligations.

8 See Andrew Crane and Dirk Matten, *Business Ethics* 53 (OUP, Oxford, 2nd edn, 2007).

corporate responsiveness should be determined, to some extent, by what is necessary to achieve an agreed goal.[9]

Let us consider an example to understand this proposition better. What should be the responsibility of a corporation operating in developing countries where child labour is a social reality for a number of reasons? One approach could be to pre-define the responsibility of all kinds of corporations operating everywhere to not hire child labour (in whatever way we define 'child' and 'labour'). However, merely putting an absolute prohibition on hiring child labour may be both inadequate and in fact counter-productive in some cases.[10] In such situations, one alternative approach could be to contemplate responsibility of companies with reference to the measures that are necessary to accomplish a pre-defined goal, *i.e.* the effective abolition of child labour in this instance. In other words, corporations should respond as per the demands of the situation.

The author, therefore, argues that the responsibilities of corporations in the area of child labour should include both negative and positive elements: instead of merely obligated not to employ children below the minimum age, companies should also be obligated to take positive measures such as providing education or suitable vocational training to such children, or offering employment to adult members of the children's family. Responsiveness, in short, requires that the means employed are robust enough to achieve a given end. In the context of child labour, this would entail companies not only having a responsibility to respect, but also a responsibility to protect and fulfil rights of children. As a social organ, companies – in addition to states – should engage with all economic, social and cultural factors that force children into (hazardous) work.

Part II of the paper provides a critical review of selected regulatory frameworks concerning child labour in order to ascertain the current state of play concerning corporate responsibility. In addition to reviewing several international regulatory initiatives, the domestic legal framework of India is analysed. India is selected as a representative case study for two reasons: first, India is one of the states in which child labour is a big problem and second, India has been a prominent site for discussing and/or taking measures to eliminate child labour. Part III of the paper then draws some general observations and also outlines how corporate responsibility *vis-à-vis* child labour should be construed broadly in light of the idea of responsiveness. Part IV of the paper gives some concluding remarks.

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9 Citing Maturing Frederick, Hess considers social responsiveness as the ability of a corporation to respond effectively to social pressures and demands. David Hess, "Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness" 25 *J. of Corp. Law* 41, 54-55 (1999).

10 See Ans Kolka & Rob van Tulder,"The Effectiveness of Self-regulation: Corporate Codes of Conduct and Child Labour" 20:3 *European Management Journal* 260 (2002).

II Ascertaining the responsibility of corporations

This part reviews a representative sample of regulatory regimes that outline the responsibility of corporations regarding child labour. In terms of their nature, the regimes reviewed here range from voluntary (corporate codes of conduct; Children's Rights and Business Principles) to non-voluntary (UN human rights norms) and obligatory (constitutional and other municipal laws). Whereas some regimes are initiated internally by corporations (codes of conduct), the others owe their origin to external sources and could be part of a multi-stakeholder initiative (ILO Tripartite Declaration; Global Compact). Some regulatory regimes impose responsibility regarding child labour on states (ILO Conventions), while others adopt a more direct approach in canvassing the responsibility of corporations (Children's Rights and Business Principles; OECD Guidelines). Finally, the regimes surveyed here operate at various levels, from municipal to international. In short, a representative sample has been selected so as to enable us to draw some general conclusions.[11]

Corporate codes of conduct

Corporations, especially the bigger or more prominent ones with a reputation to protect,[12] are increasingly formulating and adopting voluntary codes of conduct to show their commitment to labour/human rights.[13] The adoption of these codes – which can take various forms in terms of their nature, scope, objective, label, applicability, and implementation[14] – is driven by several considerations.[15] For example,

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11 For an elaboration and application of this methodology, see Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* 50-65 (London: Routledge, 2012).

12 'One would be hard-pressed to find any major corporation today that did not make some claim to abiding by a code of conduct that comprised, at least in part, adherence to human rights standards. Indeed, more often than not, such adherence to codes is trumpeted by major corporations.' David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" 44 *Va. J. Int'l L.* 931, 953 (2004).

13 See, for example, the codes/policy statement *available at*: http://www.business-humanrights.org/Documents/Policies (last visited on June 5, 2014).

14 'Corporate codes of conduct vary widely in their scope, detail, and particularly in their provisions for monitoring activities and compelling compliance.' Sarah H. Cleveland, "Global Labour Rights and the Alien Tort Claims Act" 76 *Tex. Law Rev.* 1533, 1551 (1998). See also Kinley and Tadaki, *supra* note 12 at 954-55; Barbara A. Frey, "The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights" 6 *Minnesota Journal of Global Trade* 153, 177-80 (1997); Sol Picciotto, "Rights, Responsibilities and Regulation of International Business" 42 *Colum. J. Transnat'l L.* 131, 141-42 (2003); Su-Ping Lu, "Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law" 38 *Colum. J. Transnat'l L.* 603, 611-12 (2000).

15 See John C. Anderson, "Respecting Human Rights: Multinational Corporations Strike Out" 2 *U. of Penn. J. of Lab. & Empl't L.* 463, 486 (2000).

whereas certain corporations might have adopted codes of conduct because it is a 'right' or 'just' way of doing business (*i.e.* by making a public commitment to respecting labour/human rights),[16] many others might have been forced to respond to market pressure, including the behaviour of consumers, investors, the media, non-governmental organisations (NGOs), and trade unions.[17] Some others might have perceived such codes as a current fashion statement in business, or even as a means of pre-empting state regulation,[18] as well as a way of gaining competitive advantage over their business rivals in terms of the solicitation of public support.[19] Similarly, certain companies may adopt codes to satisfy their 'responsibility to respect' human rights under the Guiding Principles on Business and Human Rights (GPs).[20] On the other hand, some corporations might use the codes as a smokescreen,[21] or a 'window dressing' device – a human face for inhuman business activities.

To gain a clearer picture of the responsibility assumed by corporations regarding child labour, one can take a closer look at the code of conduct adopted by Nike, a

16 Cassel, for example, puts forth two ethical motives for corporations assuming human rights responsibilities: that people who run corporations have a conscience, and that the proper role of MNCs in the globalised economy has changed. Douglass Cassel, "Corporate Initiatives: A Second Human Rights Revolution?" 19 *Fordham Int'l L.J.* 1963, 1978-80 (1996).

17 'MNCs submit to codes of conduct and labelling schemes as a result of pressure from consumers, investors, the media, and non-governmental organisations.' Robert J. Liubicic, "Corporate Codes of Conduct and Product Labelling Schemes: The Limits and Possibilities of Promoting International Labour Rights through Private Initiatives" 39 *Law & Pol'y Int'l Bus.* 111, 114 and generally 114-16 (1998). Cassel also points out that 'many of today's corporate codes for human rights were adopted following pressure from consumers, social investors, labour, or the press, often in combination.' Douglas Cassel, *supra* note 16, at 1978. See also Frey, *supra* note 14 at 177-78; Erin Elizabeth Macek, "Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights" 11 *Minnesota Journal of Global Trade* 101, 110-12 (2002); Elisa Westfield, "Globalisation, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century" 42 *Va. J. Int'l L.* 1075, 1100-01(2002).

18 The Organization for Economic Co-operation and Development (OECD), *Corporate Responsibility: Private Initiatives and Public Goals* 18 (OECD, Paris, 2001).

19 'Reputational damage could quickly affect bottom-line profits, while investment in social responsibility could reap long-term benefits.' Picciotto, *supra* note 14 at 139-40. Lu also thinks that these codes 'are an asset in public relations with consumers, employees and investors/shareholders.' Lu, *supra* note 14 at 613. See also Kinley & Tadaki, *supra* note 12 at 953-54; and OECD, *Codes of Corporate Conduct: An Expanded Review of their Content* 20-22, TD/TC/WP(99)56/FINAL, June 2000.

20 See Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (Mar. 21 2011), Principles 15-16.

21 Engle suggests that 'voluntary codes of good conduct can be used as camouflage to delay, confuse and conceal real reform.' Eric Engle, "Corporate Social Responsibility: Market-Based Remedies for International Human Rights Violations?" 40 *Willamette L. Rev.* 103, 120 (2004).

multinational corporation (MNC).[22] Nike had adopted a code in the early 1990s in view of the intense public scrutiny of its labour practices in Asia. The criticism was directed, in particular, against the practices adopted by Nike's contractors. One may note that Nike tried to address this issue directly in its 1997 Code.[23] The code stated that Nike is 'driven to do not only what is required, but what is expected of a leader' and it expected its 'business partners to do the same'.[24] Under the code, Nike binds 'business partners … to specific standards of conduct' outlined therein. The code contained the following provision regarding child labour: 'Child Labor (Contractor) certifies it does not employ any person under the minimum age established by local law, or the age at which compulsory schooling has ended, whichever is greater, but in no case under the age of 14.'[25]

It is clear that Nike's voluntary 1997 Code focused on the *non-employment* of child labour by its contractors. The minimum age for child labour was specified to be 14 years or higher if so demanded by local laws. The 1997 Code barely satisfied the requirements of the ILO Convention No. 138 on the Minimum Age for Admission to Employment, but did not respond to a common practice that indirectly allowed the employment of children, that is, work being taken and done at home. Nike's 2007 Code tried to address this problem and also made improvements in other areas. The provision specific to child labour reads as follows: [26]

> The contractor does not employ any person below the age of 18 to produce footwear. The contractor does not employ any person below the age of 16 to produce apparel, accessories or equipment. If at the time Nike production begins, the contractor employs people of the legal working age who are at least 15, that employment may continue, but the contractor will not hire any person going forward who is younger than the Nike or legal age limit, whichever is higher. To further ensure these age standards are complied with, the contractor *does not use any form of homework* for Nike production.

In addition to increasing the minimum age limit and prohibiting the use of work done at home, the 2007 Code introduced a pragmatic provision: if the contractor had already employed workers above the age of 15 but less than 18, they may continue to

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22 For a comparative analysis of the codes of six MNCs, see Kolka & Tulder, *supra* note 10.

23 Nike's Code of Conduct, March 1997, *available at*: http://actrav.itcilo.org/actrav-english/telearn/global/ilo/code/nike2.htm (last visited on June 9, 2014).

24 *Ibid*.

25 *Ibid*.

26 Nike's Code of Conduct, 2007 (emphasis added), *available at*: http://reports. tradedoubler.com/pan/display PageHelp.action?textKey= AFFILIATE_NIKE _CODEOF CONDUCT &textKeyTitle=AFFILIAT E_NIKE_CODEO FCON DUCT_TITLE (last visited on June 9, 2014).

work as long as the contractor did not hire workers below 18 years in future. This provision made sense because Nike may not always have exclusive contractors to manufacture its products and not all other corporations may have a similar policy on child labour. Two other provisions of the 2007 Code are worth noting. First, it required contractors to post the code 'in all major workspaces, translated into the language of the employees'.[27] Furthermore, contractors were obligated to 'train employees on their rights and obligations as defined by [the] Code and applicable local laws'.[28] The second improvement that the 2007 Code made over the 1997 Code was regarding the inspection of documents maintained by contractors showing compliance with the code: the documents could now be inspected by Nike or its designated monitor even without a prior notice.

The evolutionary nature of corporate responsibility in relation to child labour is further reflected by Nike's 2010 Code.[29] The 2010 Code acknowledges that it sets the 'minimum standards' that Nike expects 'each factory to meet'.[30] This commitment has two significant implications. First, the standards stated in the code should be regarded by Nike business partners as 'minimum' rather than being taken as the maximum: Nike business partners are thus implicitly encouraged to look beyond the code if necessary in given circumstances. Second, the 2010 Code for the first time uses the term 'factory' or 'factories' several times – thus unmasking the place where most of the child labour actually takes place instead of hiding it under innocuous terms such as suppliers and contractors.

The 2010 Code also makes clear Nike's intention to accord centrality to the code in managing its supply chain: 'It is our intention to use these standards as an integral component of how we *approach* NIKE, Inc. *sourcing strategies*, how we *evaluate factory performance*, and how we *determine with which factories Nike will continue to engage* and grow our business.'[31] Compliance with the code and the accompanying Code Leaderships Standards have thus become a pre-condition of doing business with Nike.

In terms of the content too, the 2010 Code along with the Code Leaderships Standards has shown marked improvements over previous Nike codes. Instead of imposing a negative obligation on contractor of not employing any person below a certain age (18 or 16 years as the case may be), the 2010 Code imposes a positive duty that contractor's employees 'are at least 16 or over the age for completion of compulsory

27 *Ibid.*

28 *Ibid.*

29 Nike's Code of Conduct, August 2010, *available at*: http://nikeinc.com/system/assets/2806/Nike_Code_of_Conduct_original.pdf?1317156854 (last visited on June 10, 2014).

30 *Ibid.*

31 *Ibid* (emphasis added).

education or country legal working age, whichever is higher.'[32] The difference is more than about semantics: the Code Leaderships Standards lay down several due diligence steps expected of contractors to ensure that the minimum age requirement is complied with.[33]

Moreover, it is worth noting that whereas the 2007 Code had provided that any person below the age of 16 years should not be employed 'to produce apparel, accessories or equipment', the 2010 Code does not limit the employment of below 16 aged children to these selected production lines. Similarly, the 2010 Code prohibits the employment of persons below 18 in any hazardous conditions, unlike the 2007 Code which had applied this prohibition only to the production of 'footwear'.[34]

Nike's Code Leaderships Standards also reflect a change from 'corporate *responsibility*' (*e.g.*, not to employ any person below 18 years of age, as reflected in the 2007 Code) to 'corporate *responsiveness*' (*i.e.*, taking a number of steps to solve – rather than shift – the problem of child labour). The Code Leaderships Standards stipulate that when a contractor is found to have employees who are under the minimum age standard, the contractor will be required to take several actions such as the following:[35]

1. remove the underage employee from the workplace;
2. provide adequate, financial and other support to enable such underage employee to attend and remain in school or a vocational training program until age 16;
3. if the underage employee is able to provide documentation that he or she is enrolled and attending school classes or vocational training program, the contractor must continue to pay the underage employee the base wage until the time he or she either finishes school/training or reaches age 16 or the minimum legal working age; and
4. when the underage employee reaches age 16 or legal minimum working age, whichever is higher, he or she must be given the opportunity to be re-employed by the contractor.

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32 *Ibid*.

33 For example, the 'contractor shall put in place and maintain adequate human resource systems and practices to verify that an applicant meets the minimum age requirement'; the 'contractors must require "proof of age" at time of hire, which may include birth certificate, family book, personal registration (ID) card, driver's license and voting registration card'; and the 'contractor should take reasonable measures to ensure that such proof of age documents are accurate and complete'. Code Leaderships Standards, 5-6, *available at*: http://nikeinc.com/system/assets/6276/Nike_Code_ Leadership_ Standards_ Jan2012_ original.pdf?1325287549 (last visited on June 10, 2014).

34 The Code Leaderships Standards, which complements the 2010 Code, further provides that the 'contractor is to have a process to identify work assignments that may be hazardous. Examples include working with or near hazardous chemicals, working with dangerous machinery, night work or as otherwise identified by country law.'

35 *Ibid*.

ILO conventions

Two ILO conventions directly deal with child labour: the ILO Convention No. 138 on the Minimum Age for Admission to Employment, and the ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.[36] It is apparent that both the conventions impose responsibility *vis-à-vis* child labour on member states rather than on companies.[37] One may argue though that an effective discharge of responsibility on the part of states will require them to ensure that corporations under their respective jurisdictions comply with the goal of eliminating child labour,[38] or that the 'business community is politically and morally obliged to implement' these conventions because of their participation in the drafting process.[39] However, this is different from saying that the ILO conventions impose a *direct* responsibility on corporations to eradicate child labour. As noted before, this practice was consistent with international law's treatment of corporations as its objects.

Nevertheless, it will be useful to compare Convention Nos. 138 and 182, which entered into force in 1976 and 2000 respectively, and analyse how the state responsibility in the area of child labour has evolved over the years. The ILO Convention No. 138 was underpinned by a desire to establish an overarching and general international instrument regarding a minimum age for employment or work. The convention required each member state 'to pursue a national policy designed to ensure the effective abolition of child labour'.[40] A review of various provisions of the convention indicates that the

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36 The ILO Declaration on Fundamental Principles and Rights at Work, 1998 is also relevant in that the declaration makes it clear that the four set of labour rights are universal and that they are binding on states irrespective of whether they have ratified the relevant core ILO conventions or not. This declaration, however, does not add much in terms of the focus of this paper.

37 'This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director General.' ILO Minimum Age Convention, 1976 (No. 138), art. 12. A similar provision is found in art. 10 of the ILO Worst Forms of Child Labour Convention (No. 182).

38 See, for the argument made in the context of human rights, International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* 46-52 (ICHRP, Versoix, 2002); August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors" in Philip Alston (ed.), *Non-State Actors and Human Rights* 37, 79-82 (OUP, Oxford, 2005); Jennifer A. Zerk, *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law* 83-91 (Cambridge University Press, Cambridge, 2006).

39 Gerard Oonk, 'Child Labour, Trade Relations and Corporate Social Responsibility: What the European Union should Do' (June 2008), 7. *Available at*: www.crin.org/docs/C.LABOUR.doc (last visited June 20, 2014).

40 ILO Worst Forms of Child Labour Convention (No. 138), art. 1.

focus or the strategy adopted to abolish child labour was the non-employment of children of a certain age in certain sectors. The convention did not outline what other measure states may need to take to achieve this goal. Nor did it address the root causes of child labour or respond adequately to the adverse consequences that may follow as a result of not employing children.

It also appears that Convention No. 138 adopted a conventional rights-based approach to child labour,[41] which entailed a narrow obligation framed in terms of not hiring child labour. Although references were made to the child labour adversely affecting the physical/mental development or health of children,[42] this is not how the development discourse is understood now.[43] In other words, the connection between child labour and disempowerment, discrimination or denial of freedoms was not explicitly acknowledged.[44]

In contrast, Convention No. 182 – which has 'recorded the fastest pace of ratification ever among ILO conventions'[45] – responded to some of these issues surrounding child labour. The convention acknowledges, for instance, that poverty is one of the root causes of child labour and that child labour issue impinges on an important right to basic education. It also took cognizance of the stark reality that the 'needs' of certain families might be adversely affected by prohibiting the employment of children. But most importantly, the convention requires states to take a range of 'effective and time-bound' measures to eliminate the worst forms of child labour. Rather then merely stopping at ensuring the non-employment of child labour, states are obliged to take steps for the 'rehabilitation and social integration' of these children.[46] States should also 'ensure access to free basic education, and … vocational training for all children removed from the worst forms of child labour'.[47]

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41 See, for a discussion on rights and development approaches to child labour, Alec Fyfe, *The Worldwide Movement against Child Labour: Progress and Future Directions* 76-79 (International Labour Office, 2007).

42 ILO Worst Forms of Child Labour Convention (No. 138), arts. 1 and 7.

43 See, for example, Amartya Sen, *Development as Freedom* (OUP, Oxford 1999).

44 'Child labour is work that is damaging to a child's physical, social, mental, psychological and spiritual development … Child labour deprives children of their childhood and their dignity. They are deprived of education and may be separated from their families. Children who do not complete their primary education are likely to remain illiterate and never acquire the skills needed to get a job and contribute to the development of a modern society.' 'Global Compact Principle Five', *available at*: http://www.unglobalcompact.org/aboutTheGC/TheTenPrinciples/principle5.html (last visited on June 9, 2014).

45 ILO, *Marking Progress against Child Labour*, *supra* note 1.

46 ILO Worst Forms of Child Labour Convention (No. 182), art. 7(2)(b).

47 *Id*., art. 7(2)(c).

One may then conclude that although the ILO Convention No. 182 did not impose any direct responsibility on companies, it dealt with the issue of child labour, albeit of the worst forms, in a more holistic manner. There was a tacit acknowledgment that the goal of eliminating (the worst forms of) child labour could not be achieved by simply prohibiting the employment of children.

Constitutional and legal framework in India

Domestic regulatory frameworks have an important role to play if the project of eliminating child labour has to succeed. A review of municipal frameworks can also indicate how the responsibility undertaken by states under international conventions is translated into domestic legal regimes. As noted above, Indian legal framework is taken as a case study here.

It is arguable that the Indian Constitution provides a robust framework to deal with the situation of child labour, despite the fact that India has not ratified ILO Convention Nos. 138 and 182.[48] Article 24 of the Constitution mandates that 'no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment'.[49] Taking the lead from Supreme Court judgments,[50] the Indian Parliament amended the Constitution in 2002 to make the right to primary education a fundamental right.[51] Furthermore, there are provisions in the directive principles of state policy which require the government to take measures to protect the exploitation of children. For instance, the government shall direct its policy towards securing that 'the tender age of children are not abused' and that 'children are given opportunities and facilities to develop in a healthy manner'.[52] Additionally, article 45 provides that the state shall endeavour 'to provide early childhood care and education for all children until they complete the age of six years.'

The Indian Supreme Court has invoked these directive principles and fundamental rights to issue elaborate guidelines or directions to the government to eliminate child labour.[53] Here, it may also be relevant to mention that the Constitution imposes a

48 The Indian government has, however, ratified several other ILO conventions (including Convention Nos. 5, 15 and 123 concerning minimum age). See ILO, Ratifications for India, *available at*: http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0: :NO: 11200: P11200_COUNTRY_ID:102691 (last visited on June 9, 2014).

49 Art. 23 of the Indian Constitution also prohibits the trafficking of human beings and forced labour.

50 *Unni Krishnan* v. *State of Andra Pradesh* (1993) 1 SCC 645.

51 Art. 21A of the Indian Constitution reads: 'The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.'

52 Constitution of India, Art.39(e)-(f).

53 *Bachpan Bachao Andolan* v. *Union of India* (2011) 5 SCC 1; *M C Mehta* v. *State of Tamil Nadu*, AIR 1997 SC 699; *Bandhua Mukti Morcha* v. *Union of India*, AIR 1997 SC 2218. See also Mahendra P. Singh, *Shukla's Constitution of India* 256-57 (Eastern Book Co., 12th edn., 2013).

fundamental duty on parents/guardians to provide educational opportunities to their children between the age of six and fourteen years.[54]

One remarkable feature of the Indian Constitution has been that it has not entirely adopted the state-centric notion of fundamental (human) rights. Although drafted way back in the late 1940s, it expressly guaranteed some rights against non-state actors[55] – an aspect that features in some more recent constitutions,[56] as well as in scholarly debates on the horizontal application of human rights.[57] There are a few rights in the Constitution (including the protection against child labour provided in article 24) which may arguably be invoked against private individuals.[58] The Indian Supreme Court has further expanded the protection of fundamental rights against private actors by interpreting the term 'other authorities' liberally,[59] as well as by not insisting on the state action requirement in appropriate cases when enforcing the right to life under article 21.[60]

In addition to the constitutional framework against child labour, the Child Labour (Prohibition and Regulation) Act of 1986 (Act) is the central piece of legislation dealing with child labour. The Act provides that no child (*i.e.*, any person below fourteen

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54 This duty can be found in a new clause (k) that was added to art. 51 of the Indian Constitution in 2002.

55 Austin cites three provisions, *i.e.,* arts. 15(2), 17 and 23 of the Constitution, which have been 'designed to protect the individual against the action of other private citizen'. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 51 (Clarendon Press, Oxford, 1966). See also Mahendra P Singh, "Fundamental Rights, State Action and Cricket in India" 13 *Asia Pacific Law Review* 203, 204 (2006).

56 For example, art. 8(2) of the Constitution of the Republic of South Africa 1996 provides: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

57 See M. Hunt, "The 'Horizontal Effect' of the Human Rights Act" *P.L.* 423 (1998); Gavin Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?" 62 *M.L.R.* 824 (1999); Ian Leigh, "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?" 48 *Int'l & Comp. L.Q.* 57 (1999); Mark Tushnet, "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law" 1 *ICON* 79 (2003); Dawn Oliver & Jorg Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge-Cavendish, 2007).

58 See also art. 29(1) of the Indian Constitution, and Vijayashri Sripati, "Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)" 14 *Am. U. Int'l L. Rev.* 413, 447-48 (1998).

59 See *Ajay Hasia* v. *Khalid Mujib*, AIR 1981 SC 487; *Som Prakash Rekhi* v. *Union of India*, AIR 1981 SC 212; *Pradeep Kumar* v. *Indian Institute of Chemical Biology* (2002) 5 SCC 111.

60 *Bodhisattwa Gautam* v. *Subhra Chakraborty*, AIR 1996 SC 922; *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011; *Apparel Export Promotion Council* v. *Chopra*, AIR 1999 SC 625 *Mr X* v. *Hospital Z* (1998) 8 SCC 296.

years of age)[61] shall be 'employed or permitted to work' in certain occupations and processes specified in the Schedule'.[62] Any contravention of this provision is made a punishable offence,[63] and a more severe punishment is prescribed for repeat offences. The government is empowered to appoint inspectors to carry our inspections and ensure compliance with the provisions of the Act.[64]

The Act also establishes a Child Labour Technical Advisory Committee, on the advice of which the government could add occupations and processes to the schedule.[65] Several occupations (such as transportation by railways, handling of toxic or inflammable substances or explosives, mines, and hand/power loom industry) and processes (such as carpet weaving, cloth painting, soap manufacture, wool cleaning, building and construction industry, brick kilns, gem cutting and polishing, potteries, tyre making, diamond cutting, food processing, and oil expelling) were included in the original schedule, meaning thereby that the employment of child labour was prohibited in these areas.

This list of the occupations and processes has been expanded over the years by the government. For example, the employment of children as domestic workers or in *dhabas* (roadside eateries), restaurants, tea shops, and hotels was prohibited by the government in 2006.[66] In 2008, more processes – such as process involving excessive heat and cold, food processing, beverage industry, timber handling and loading, warehousing, and processes involving exposure to free silica such as slate, pencil industry, stone grinding, slate stone mining, stone quarries as well as the agate industry – were added to the list of prohibited occupations and processes.[67] Most recently, 'circus' and 'caring of elephants' were added to the prohibited occupations in 2010.[68]

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61 Child Labour (Prohibition and Regulation) Act, 1986 (Act 61 of 1986), s. 2(ii).

62 *Id.*, s.3.

63 *Id.*, s. 14. The punishment is imprisonment for a term which shall not be less than three months but which may extend to one year, or a fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or both.

64 *Id.*, s.17.

65 *Id.*, s. 5.

66 ILO, 'Amendment to the Child Labour (Prohibition and Regulation) Act 1986'. *Available at*: http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=74553 (last visited on June 22, 2014).

67 ILO, 'National Legislation and Policies Against Child Labour in India'. *Available at*: http://www.ilo.org/legacy/english/regions/asro/newdelhi/ipec/responses/india/national.htm (last visited on June 22, 2014).

68 ILO, 'Ministry of Labour and Employment Notification No. S.O. 2469(E) amending the Schedule to the Child Labour (Prohibition and Regulation) Act 1986 (No. 61 of 1986)'. *Available at*: http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en& p_isn=93653 (last visited on June 22, 2014).

One positive aspect of the Act is that it imposes a direct duty on employers (including corporations) not to employ child labour if their occupation or process is one that is mentioned in the schedule to the Act. However, the Act, unfortunately, focuses almost entirely on prohibiting and criminalising the employment of child labour; it does not envisage the taking of any other measures, e.g., providing education for children or dealing with their rehabilitation. In this respect, the Act is closer to the approach taken in ILO Convention No. 138 rather than that in Convention No. 182. The Indian Supreme Court has, however, tried to bridge this gap in the Act by issuing directions, for instance, to set up a welfare fund into which the offending employer should contribute Rs. 20,000 (about US$350) for child they unlawfully employed.[69]

In December 2012, the Indian government introduced a bill in the Parliament to amend the 1986 Act.[70] The bill proposes to make several key changes to the Act. Unlike the Act which prohibits the employment of children only in specific occupations and processes, the bill proposes to prohibit the employment of children in all occupations except 'where the child helps his family after his school hours or helps his family in fields, home-based work, forest gathering or attends technical institutions during vacations for the purpose of learning'.[71] The bill also proposes that no 'adolescent' – a person between fourteen and eighteen years of age – shall be employed or permitted to work in any specified hazardous occupations or processes.[72] Moreover, the bill proposes to enhance punishments for employing children.[73]

The bill was referred to the Standing Committee on Labour of the Ministry of Labour and Employment Considering, which submitted its report in December 2013.[74] At the time of writing this paper, the bill had not been passed. It is reported that after taking into account the committee's report, the government may put forward a revised bill before the Parliament and also ratify the two ILO conventions.[75] At this stage it

69 *M C Mehta* v. *State of Tamil Nadu*, AIR 1997 SC 699. See Human Rights Info, 'Directions of Supreme Court'. *Available at*: http://www.hrinfo.in/2010/08/directions-of-supreme-court.html (last visited on June 9, 2014).

70 Child Labour (Prohibition and Regulation) Amendment Act, 2012, Bill No. LXII of 2012. *Available at*: http://www.prsindia.org/uploads/media/Child%20Labour/Child%20Labour%20%28Prohibition%20and%20Regulation%29%20%28A%29%20Bill,%202012.pdf (last visited on June 22, 2014).

71 *Id*., cl.5 (proposing the substitution of existing s.3).

72 *Id*., cl. 6 (proposing the insertion of a new s. 3A).

73 *Id*., cl. 9.

74 Standing Committee on Labour (2013-2014), Fifteenth Lok Sabha, Ministry of Labour and Employment, 'The Child Labour (Prohibition and Regulation) Amendment Bill, 2012, Fortieth Report' (December 2013). *Available at*: http://www.prsindia.org/uploads/media/Child%20Labour/SCR-child%20labour%20bill.pdf (last visited on June 22, 2014).

75 See Apoorva Mandhani, 'Suggestions Invited on the Proposed Amendments to the Child Labour (Prohibition and Regulation) Act, 1986', *Live Law* (June 22, 2014). *Available at*: http://www.livelaw.in/suggestions-invited-on-the-proposed-amendments-to-the-child-labour-prohibition-and-regulation-act-1986/ (last visited on June 22, 2014).

may be noted that while bill tries to make the 1986 Act consistent with the ILO conventions, the bill still focuses mostly on a negative responsibility, that is, the non-employment of children. As the standing committee pointed out,[76] there is not much focus on rescue, rehabilitation and reintegration of trapped children.

However, on a positive note, the 2013 National Policy for Children outlines a number of *responsive* measures aimed at protecting rights of children.[77] For example, it provides that the state shall take all necessary measures to ensure that 'all out of school children such as child labourers, migrant children, trafficked children, children of migrant labour, street children, child victims of alcohol and substance abuse, children in areas of civil unrest, orphans, children with disability (mental and physical), children with chronic ailments, married children, children of manual scavengers, children of sex workers, children of prisoners, etc. are tracked, rescued, rehabilitated and have access to their right to education'.[78] The policy also commits the state 'to taking special protection measures to secure the rights and entitlements of children in need of special protection, characterised by their specific social, economic and geo-political situations, including their need for rehabilitation and reintegration'.[79]

It is hoped that the bill will be revised in conformity with the commitment of enacting 'progressive legislation' and building 'a preventive and responsive child protection system', as reflected in the National Policy for Children.[80]

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

The ILO released the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO Declaration) in 1977.[81] The revision of the ILO Declaration in 2000[82] resulted in several improvements.[83] The declaration, the result of extensive research and consultation with all interested parties, was an attempt to reach an *'agreed solution in a highly complex and controversial area of social policy* through

76 Standing Committee on Labour (2013-2014), *supra* note 74, paras 4.5 and 4.6.

77 Ministry of Women and Child Development, Government of India, The National Policy for Children 2013. *Available at*: http://www.childlineindia.org.in/pdf/The-National-Policy-for-Children-2013.pdf (last visited on June 12, 2014).

78 *Id*., para 4.6(v).

79 *Id*., para 4.11.

80 *Id*., para 4.12.

81 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO 204th Session, Nov. 16, 1977, reprinted in 17 *ILM* 422 (1978)

82 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2000, reprinted in 41 *ILM* 186 (2002) (hereinafter ILO Declaration of 2000). In March 2006, the ILO Declaration was revised again to include references to relevant ILO instruments that have been adopted since the 2000 revision.

83 See Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* 90 (London: Routledge, 2012).

dialogue and negotiations between governments, employers and workers.'[84] Keeping in mind its 'tripartite' character, the ILO Declaration invited 'governments of state members of the ILO, the employers' and workers' organisations concerned and the multinational enterprises operating in their territories to observe the principles embodied therein.'[85]

For the purpose of this paper, it is useful to note that the ILO 1977 Declaration did not contain any specific provision concerning minimum age for work or employment. It was a bit surprising because the declaration contained several provisions as to various other labour rights and ILO Convention No. 138 had already come into force in June 1976. This serious gap was, however, filled in by the 2000 revision of the ILO Declaration. The newly inserted paragraph provides: 'Multinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour.'[86]

This is a welcome step for at least two reasons. First, unlike the ILO conventions, the declaration imposes a responsibility on MNCs directly. Second, the responsibility *vis-à-vis* child labour is deduced with reference to the ILO Convention Nos. 138 and 182, thus relying on the existing international standards. Nevertheless, even the ILO Declaration does not go as far as requiring MNCs to take measures other than not employing children below the minimum age. This narrow responsibility might not prove adequate in eliminating child labour, especially in a scenario where most of the MNCs rely on their contractors and supply chains for manufacturing goods or providing services. Rather, companies should be expected to take proactive measures not only to ensure that their products and services are child labour free but also to contribute in building the future of destitute children. It is arguable that the ILO Declaration entails such wider responsibilities in relation to the worst forms of child labour.[87]

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multination Enterprises (OECD Guidelines), which are part of the OECD Declaration on International Investment and Multinational Enterprises,[88] came into effect on 21 June 1976. The guidelines were revised in June

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84 ILO Declaration of 1977, *supra* note 81 at 422 (emphasis added).

85 *Id*., Preamble, at 423.

86 ILO Declaration of 2000, *supra* note 82 at 193 (para 36).

87 MNCs 'should take immediate and effective measures within their own competence to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.' *Id*., at 193 (para 36).

88 OECD, Declaration on International Investment and Multinational Enterprises, June 21, 1976, reprinted in 15 *ILM* 967 (1976).

2000[89] and substantially updated in May 2011.[90] The guidelines are the result of the OECD engaging in a 'constructive dialogue with the business community, labour representatives, and non-government organisations' (NGOs).[91] They are recommendations jointly addressed by governments to MNCs,[92] encouraging MNCs to observe the principles and standards laid down in the guidelines in areas such as human rights, disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, and taxation.[93]

Similar to the ILO Declaration of 1977, the original text of the OECD Guidelines did not prescribe any responsibility regarding child labour. But this omission was cured in the 2000 revision. A newly inserted provision provided: 'Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices: … contribute to the effective abolition of child labour'.[94] The post-2011 Guidelines provide that companies should also 'take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency'.[95] The relevant commentary further acknowledges 'the role of multinational enterprises in contributing to the search for a lasting solution to the problem of child labour', including by 'raising the standards of education of children living in host countries'.[96]

Both the ILO Declaration and the OECD Guidelines have used the softer language of 'should' in defining the responsibility of corporations in relation to child labour. Two textual differences should, however, be noted. First, the use of word 'contribute' in the OECD Guidelines is wider in scope than the term 'respect' in the ILO Declaration. In other words, whereas the ILO Declaration stops at requesting corporations to respect the minimum age for employment, the OECD Guidelines expect corporations to make contributions (arguably implying the taking of a range

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89 OECD Declaration on International Investment and Multinational Enterprises 2000, reprinted in 40 *ILM* 237 (2001).

90 OECD Guidelines for Multinational Enterprises, (2011 Edn.) *Available at*: http://www.oecd.org/daf/inv/mne/48004323.pdf (last visited on June 20, 2014). For analysis, see Deva, *Humanizing Business*, *supra* note 83 at 80-88.

91 OECD, *Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*, Foreword, 2-3, DAFE/IME(2000)20, 8 Nov. 2000.

92 OECD Guidelines, *supra* note 89 at 237 (Preface, para 1), 239 (para I.1).

93 *Id*., 240-46 (para II-X). See also OECD Guidelines 2011, *supra* note 90.

94 *Id*., at 241 (para IV.1.b). Para V.1(c) of the 2011 OECD Guidelines retains this provision.

95 OECD Guidelines 2011, *supra* note 90, para V.1(c). Prior to the 2011 update, the corresponding provision of the 2000 OECD Guidelines had not used such a strong language: it had merely provided for a corporate responsibility to 'contribute to the elimination of all forms of forced or compulsory labour'. OECD Guidelines, *supra* note 89 at 242 (para IV.1.c).

96 OECD Guidelines 2011, *supra* note 90 at 37.

of measures) to achieve the goal of effective abolition of child labour. Second, unlike the ILO Declaration, the responsibility under the OECD Guidelines is qualified, among others, by the 'prevailing labour relations and employment practices'. This may result in a dilution of responsibility because prevailing labour/employment practices in many developing countries might fall short of the aspirational goals set in international labour conventions.

Nevertheless, it is clear that the 2011 update has enhanced the potential of the OECD Guidelines in encouraging companies to conduct business in a socially responsible manner. The most critical aspect of the update perhaps is recommending companies to conduct risk-based due diligence.[97] Companies, for example, should seek 'to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship'.[98] They should also 'encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*'.[99] Taking appropriate due diligence measures – which are bound to be flexible based on given circumstances – as part of responsible supply chain management could be critical in dealing the problem of child labour, especially because on many occasions under-age children are employed by the suppliers or contractors of MNCs, rather than by MNCs directly.

UN Global Compact

While addressing the World Economic Forum in Davos on January 31, 1999, the former UN Secretary General Kofi Annan proposed the idea of a Global Compact consisting of nine principles in the areas of human rights, labour, and the environment.[100] On June 24, 2004, during the Global Compact Leaders Summit, a tenth principle on 'anti-corruption'[101] was added after extensive consultation with all the participants.[102] It is claimed that the ten principles of the Global Compact enjoy

97 This is part of general policies. *Id.*, at 18 (paras II.A.10-13).

98 *Id.*, para II.A.12.

99 *Id.*, para II.A.13.

100 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Form in Davos', Press Release SG/SM/6881, Feb. 1, 1999. *Available at*: http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html (last visited on June 9, 2014).

101 Principle 10 reads: 'Businesses should work against all forms of corruption, including extortion and bribery.' See Global Compact, 'The Ten Principles'. *Available at*: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited on June 9, 2014).

102 Global Compact Office, *Preliminary Report on the Global Compact Leaders Summit* (2 July 2004). *Available at*: http://appreciativeinquiry.case.edu/uploads/UN_June2004.pdf (last visited on June 9, 2014).

'universal consensus' and 'are derived from' the UDHR, the ILO Declaration of Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations' Convention against Corruption.[103]

The Global Compact is a multi-stakeholder initiative involving diverse actors such as governments, corporations, labour and civil society organisations, and the UN.[104] It calls upon business enterprises to 'embrace, support and enact, within their sphere of influence, a set of core values' in four areas: human rights, labour, environment and anti-corruption.[105] To participate in the compact, the chief executive officer of the organisation must send a letter 'to the UN Secretary General expressing support for the Global Compact and its principles.'[106] The participant is also expected to set in motion changes to its business operations, publicly advocate the compact and its principles, and publish an annual sustainability report regarding the steps taken to implement the principles.[107]

The Global Compact 'in its simple[st] form is the dissemination of and adherence to good business practices.'[108] At a wider level, the vision of the Global Compact is 'to promote responsible corporate citizenship so that business can be part of the solution to the challenges of globalisation,' that is, the idea that good corporate citizenship could contribute to establishing a 'more sustainable and inclusive global economy'.[109]

Principle five of the compact provides that businesses 'should uphold the effective abolition of child labour' in consonance with ILO Convention Nos. 138 and 182.[110] Like other principles, this principle also does not give any clear indication of the responsibility of corporations in implementing it. Upholding the principle may simply

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103 'The Ten Principles', *supra* note 101.

104 Georg Kell, "The Global Compact: Origins, Operations, Progress, Challenges" 11 *J. of Corp. Citizenship* 35, 37-39 (2003).

105 'The Ten Principles', *supra* note 101.

106 Ministry of Foreign Affairs of Denmark & UNDP, *Implementing the UN Global Compact: A Booklet for Inspiration* 7 (Royal Danish Ministry of Foreign Affairs, Copenhagen, June 2005). A*vailable at*: http://www.unglobalcompact.org/docs/news_events/8.1/dk_book_e.pdf (last visited on June 9, 2014).

107 *Ibid.*

108 Betty King, "The UN Global Compact: Responsibility for Human Rights, Labour Relations, and the Environment in Developing Nations" 34 *Cornell Int'l L.J.* 481, 482 (2001). Ruggie also thinks that the Compact 'is intended to identify, disseminate and promote good practices based on universal principles.' John Ruggie, "'Trade, Sustainability and Global Governance': Keynote Address" 27 *Colum. J. Envtl. L.* 297, 301 (2002).

109 'Overview of the UN Global Compact'. A*vailable at*: http://www.unglobalcompact.org/AboutTheGC/index.html (last visited on June 9, 2014).

110 'Global Compact Principle Five', *supra* note 44.

mean complying with the minimum age for employment by not hiring any child labourer. It seems, however, that the Global Compact Office expects more than this from its business participants. The following advice given as part of a recommended strategy for companies is quite telling:[111]

> If an occurrence of child labour is identified, the children need to be removed from the workplace and *provided with viable alternatives*. These measures often include enrolling the children in schools and offering income-generating alternatives for the parents or above-working age members of the family. Companies need to be aware that, without support, children may be forced into worse circumstances such as prostitution, and that, in some instances where children are the sole providers of income, their immediate removal from work may exacerbate rather than relieve the hardship.

It is apparent from the above advice that merely removing children from employment would not be sufficient; it might, in fact, prove counter-productive in some cases. Therefore, if corporations which are party to the Global Compact have to play an important role in abolishing child labour, their responsibility should not primarily be negative in nature. The Global Compact Office identifies a number of due diligence and proactive steps that companies may take to assist in the goal of abolishing child labour. Corporations, for example, may '[u]se adequate and verifiable mechanisms for age verification in recruitment procedures', '[e]xercise influence on and provide positive incentives for subcontractors, suppliers and other business affiliates to combat child labour' and '[s]upport and help design educational/vocational training, and counseling programmes for working children, and skills training for parents of working children'.[112] They may also '[e]ncourage and assist in launching supplementary health and nutrition programmes for children removed from dangerous work, and provide medical care to cure children of occupational diseases and malnutrition'.[113]

UN human rights norms

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), which were drafted by the five-member UN Working Group on the Working Methods and Activities of TNCs over a period of four years,[114] sought to formulate the human rights

111 *Ibid*. (Emphasis added).

112 *Ibid*.

113 *Ibid*.

114 David Weissbrodt and Muria Kruger, "Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" 97 *Am. J. Int'l L.* 901, 903-07 (2003).

responsibilities of corporations.[115] The UN Norms, coupled with the commentary appended to them,[116] not only provided the most comprehensive and detailed statement of MNCs' human rights (including labour and environmental rights) obligations, but also outlined the procedure for their implementation.[117] Although the Sub-Commission on the Promotion and Protection of Human Rights approved the norms,[118] the Commission on Human Rights declared that they lack any 'legal standing'.[119] In the light of stiff opposition from the business sector and an antagonistic position adopted by John Ruggie, the former UN Secretary General's Special Representative on Human Rights and Transnational Corporations (SRSG),[120] their journey was cut short prematurely.

Nevertheless, as argued elsewhere,[121] the UN Norms presented a promising framework for establishing MNCs' accountability for human rights violations.[122] First of all, instead of being limited to labour and/or environmental rights, the UN Norms provided a comprehensive list of human rights obligations. Second, in terms of the nature of obligations, the norms clearly made an encouraging advancement *vis-à-vis* prior regulatory initiatives. As MNCs could violate human rights in several ways (including by failing to act), it is insufficient to draft obligations in conventional 'negative'

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115 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003).

116 Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev.2 (hereinafter 'Commentary on the Norms').

117 UN Norms, *supra* note 115, paras 1-18. See David Kinley and Rachel Chambers, "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law" 6 *Hum. Rts. L. Rev.* 447 (2006); Justine Nolan, "With Power Comes Responsibility: Human Rights and Corporate Accountability" 28 *UNSW Law Journal* 581 (2005); and Surya Deva, "UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction?" 10 *ILSA Journal of Int. & Com. Law* 493 (2004).

118 United Nations Commissioner on Human Rights, *Sub-Commission on the Promotion and Protection of Human Rights Resolution 2003/16*, E/CN.4/Sub.2/2003/L.11, 52-55 (13 Aug. 2003).

119 Commission on Human Rights, 60th Session, Agenda Item 16, E/CN.4/2004/L.73/Rev.1 (Apr. 16, 2004), para. (c).

120 Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4/2006/97 (Feb. 22, 2006), paras 56–69.

121 Deva, "UN's Human Rights Norms", *supra* note 117 at 497-501.

122 Rule suggests that 'they may be the first major stepping stone towards the adoption of an international, enforceable set of legal obligations binding' on MNCs. Troy Rule, "Using 'Norms' to Change International Law: UN Human Rights Laws Sneaking in through the Back Door?" 5 *Chi. J. Int'l L.* 326, 326 (2004).

terms, *i.e.*, that MNCs should or shall not violate human rights. The UN Norms tried to overcome this problem by imposing 'positive' obligations on MNCs.[123] MNCs shall not only refrain from directly or indirectly contributing to, and benefiting from, human rights violations, but also 'use their influence in order to promote and ensure respect for human rights.'[124]

Third, the UN Norms proposed specific provisions for the implementation of human rights norms.[125] Besides asking corporations to adopt, disseminate and internally implement the obligations laid down therein,[126] the UN Norms urged states to 'establish and reinforce the necessary legal and administrative framework for ensuring that the Norms' are implemented by MNCs.[127] The norms also proposed independent and transparent periodic monitoring as well as verification by national and international (including the UN) mechanisms.[128] This, again, was a departure from the existing *indirect* mode of implementation, under which the responsibility of enforcing corporate human rights responsibilities lies mostly with states. A reference should be made to another significant provision of the UN Norms which provides for prompt, adequate and effective reparation to persons and communities adversely affected by the failure of MNCs (or other business enterprises) to comply with their responsibilities outlined in the norms.[129]

Turning the attention now to the nature of responsibility contemplated by the UN Norms regarding child labour. Two provisions of the norms are relevant for that purpose. Whereas para 5 provided that corporations 'shall not use forced or compulsory labour', para 6 required corporations 'to respect the rights of children to be protected from economic exploitation' as forbidden by various international instruments and national legislation. It is worth noting the UN Norms did not even use the term 'child labour' – they rather conceived responsibility in terms of 'economic exploitation of children', a term which was defined to mean employment or work in any occupation

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123 This is clear from the use of terms obligation to 'promote' and 'protect' human rights in para 1. See also para 12 where an obligation is constructed in terms of not only respecting but also contributing to the realization of human rights. UN Norms, *supra* note 115.

124 *Supra* note 116, Commentary (b) to para 1.

125 UN Norms, *supra* note 115, para 15-19. See Weissbrodt and Kruger, *supra* note 114 at 915-21.

126 *Id.*,UN Norms, para 15.

127 *Id.*, para 17.

128 *Id.*, para 16. One of the suggestions was that the existing human rights treaty bodies could take the responsibility of monitoring the compliance with the UN Norms. Commentary (b) to para 16, *supra* note 116. Trade unions are also encouraged to use the UN Norms as a basis of negotiating agreements with MNCs, commentary (c) to para 16.

129 *Id.*, UN Norms, para 18.

130 *Supra* note116, commentary (a) to para 6.

before a child completes compulsory schooling, or the employment of children in a manner that is harmful to their health or development.[130] The norms, thus, viewed child labour as an obstacle to development.

Similar to the strategies outlined by the Global Compact Office, the commentary to the norms contemplated that participating corporations shall create and implement a plan to eliminate child labour.[131] Such a plan may include provisions for the provision of suitable education or vocational training to the children removed from the workforce and the employment of parents or older siblings of such children.[132]

Guiding Principles on Business and Human Rights

The GPs are perhaps the most significant – though not without contestation[133] – regulatory development till date at the international level to ensure that companies comply with their human rights responsibilities. This section reviews the GPs, which were unanimously endorsed by the Human Rights Council in June 2011, as well as the Special Representable of the Secretary General's SRSG's 'Protect, Respect and Remedy' Framework which underpins the GPs.

As way of background, it may pertinent to note that in July 2005, Kofi Annan appointed John Ruggie as the SRSG for an initial period of two years. Later on, the term of the SRSG was extended for one more year and in June 2008, the Human Rights Council extended the mandate further for another three years.[134] So, the SRSG led the business and human rights agenda at the UN level for six years (2005-2011) and spearheaded the evolution of the framework and the GPs. The SRSG was requested, among other things, to 'identify and clarify standards of corporate responsibility and accountability' for MNCs with regard to human rights and also elaborate on the role of states in effectively regulating MNCs. The SRSG considered his mandate to be 'highly politicised' in that it was 'devised as a means to move beyond the stalemated debate' over the UN Norms.[135]

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131 *Id.*, Commentary (d) to para 6.

132 *Ibid.*

133 For a critique, see Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013)

134 Human Rights Council, *Mandate of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Resolution 8/7, para 4 (18 June 2008).

135 John Ruggie, Special Representative of the Secretary-General for Business and Human Rights, "Opening Statement to United Nations Human Rights Council", Sep. 25, 2006. *Available at*: http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf (last visited on June 9, 2014). Kinley *et al*, however, argue that the polarization of the debate about the UN Norms into two camps (pro-Norms and anti-Norms) was 'a largely artificial division'. David Kinley, Justine Nolan *et.al.* (eds.), "The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations" 25 *C&SLJ* 30, 34 (2007).

In his April 2008 Report to the Human Rights Council, the SRSG outlined the 'conceptual and policy framework to anchor the business and human rights debate'.[136] The central feature of the report was the overarching concept of 'differentiated but complementary responsibilities', which has the following three pillars: the state duty to protect human rights; the corporate responsibility to respect human rights; and access to effective remedies. Keeping in mind the focus of this paper, the author will focus here only on the second pillar of the framework and the relevant GPs to explore the nature of corporate responsibility envisaged therein.

The nature of MNCs' human rights responsibilities need not, and should not, be identical to or as extensive as those of states.[137] The SRSG rightly pointed out that the human rights responsibilities of states and corporations should not be identical because 'as economic actors, companies have unique responsibilities'.[138] In order to differentiate between the responsibilities of states and MNCs, the 2008 Report proposed that unlike states, MNCs have merely a responsibility to 'respect' human rights: 'To respect rights essentially means not to infringe on the rights of others – put simply, to do no harm.'[139] However, this 'baseline responsibility',[140] which exists independently of the states' duties,[141] has an exception – that is, in situations where corporations 'perform certain public functions'.[142]

In order to satisfy their responsibility to respect human rights, corporations should apply the 'due diligence' yardstick, that is, take steps 'to become aware of, prevent and address adverse human rights impacts'.[143] Corporations should consider, among other things, the context of the country in which their business activities take place and if they are contributing to abuse through their relationships with business partners, suppliers or state agencies.[144]

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136 Special Representative of the Secretary General, Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5 (Apr. 7, 2008) (hereinafter SRSG, "The 2008 Report").

137 Shue writes: '… for every basic right – and many more other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honoured *but not all of which must necessarily be performed by the same individuals or institutions*.' Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* 52 (Princeton University Press, Princeton, 2nd edn., 1996). (Emphasis added).

138 SRSG, "The 2008 Report", *supra* note 136, para 6.

139 *Id.*, para 24.

140 *Id.*, para 54.

141 *Id.*, para 55.

142 *Id.*, para 24.

143 *Id.*, para 56.

144 *Id.*, para 57.

The GPs try to operationalise the above formulation of the second pillar and in that process also made some slight modifications to the framework ideas outlined in the 2008 report. The 'do no harm' proposition was expanded in which principle 11 now provides that business enterprises should respect human rights, meaning thereby that 'they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[145] Thus, in addition to avoid causing or contributing to adverse human rights impacts through their own activities, and addressing such impacts when they occur, companies should 'seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.[146] The GPs prescribe human rights due diligence as the key tool to discharge the corporate responsibility to respect human rights.[147] The due diligence process 'should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[148]

In terms of the content of responsibilities, the GPs elaborate that the term 'human rights' refers to 'internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work'.[149] This minimum responsibility of companies could change, as they 'may need to consider additional standards' depending on circumstances.[150]

Since the GPs adopt a referential approach – rather than a codifying approach – to outline corporate responsibilities, there is no specific principle dealing with child labour (or other human/labour rights for that matter). Nor is there any explicit reference to the Convention of the Rights of the Child. Nevertheless, a reference to the ILO's Declaration on Fundamental Principles and Rights at Work in principle 12 will capture the problem of child labour because this declaration sets out, among others, the Convention Nos. 138 and 182 as laying down core labour obligations.

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145 GPs, *supra* note 20, principle 11.

146 *Id.,* principle 13.

147 *Id.*, principle 15. Companies are also expected to make a policy commitment to meet their responsibility and put in place remediation processes.

148 *Id.*, principle 17. See also principles 18-21.

149 *Id.*, principle 12.

150 *Id.*, Commentary on Principle 12. This is a deviation from the 'public functions' test proposed in the 2008 report to go beyond the baseline responsibility.

Considering that corporate responsibility to respect human rights and consequently due diligence measures under the GPs extend to the supply chain linked to a company's operations, products or services, it is arguable that companies should ensure that their suppliers and contractors do not use child labour. They should also use their 'leverage' – the ability to affect change in the wrongful practice of an entity that causes a harm – to prevent or mitigate the adverse impact arising out of the activities of their business partners.

The due diligence measures proposed by the GPs are definitely dynamic – they fit well with the idea of companies being responsive to ensuring that their business activities do not (in)directly cause any negative societal impact. It seems, however, that the responsive due diligence measures envisaged by the GPs are directed at discharging a *negative* responsibility: the responsibility to avoid infringing the human rights of others and to address adverse human rights impacts with which they are involved. In other words, the GPs do not necessarily expect companies to contribute to overcoming the root causes of child labour: as long as a company as well as its business partners do not employ child labourers, they will satisfy the GPs, even though there are poor children being exploited in the community in the vicinity of their operations. This narrow formulation of corporate responsibilities is a backward step,[151] especially considering that instruments such as the OECD Guidelines go beyond the corporate responsibility to respect human rights.[152]

Moreover, it is problematic that the GPs consciously state that companies merely have a 'responsibility' to respect rather than the 'duty' or 'obligation' to respect human/labour rights.[153] If states have legally binding obligations to fight the problem of child labour, why should corporations only have a voluntary responsibility to respect international norms concerning child labour? From the standpoint of children as bearer of rights, it matters little whether they are exploited and their rights infringed by states or non-state actors.

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151 As Shue argues, human rights cannot be fully realised unless 'multiple kinds of duties' are imposed on all those actors which could abridge such rights. Even regarding those rights which are labeled as 'negative', positive duties must be fulfilled: 'It is impossible for any basic right – however "negative" it has come to seem – to be fully guaranteed unless all three types of duties are fulfilled.'Shue, *supra* note 137 at 52-53.

152 The OECD Guidelines provide that enterprises should '[c]ontribute to the effective abolition of child labour'. OECD Guidelines, *supra* note 90, para IV.1(b).

153 This is a conscious decision given the distinction that Ruggie has previously maintained between corporate *responsibility* and corporate *accountability*. Human Rights Council, *Report of the SRSG – Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/35 (Feb. 19, 2007).

Children's Rights and Business Principles

The Children's Rights and Business Principles (CRBPs), developed by the joint efforts of the UNICEF, the Global Compact and Save the Children, aim to provide concrete guidance to companies to *respect* and *support* children's rights outlined in the Convention on the Rights of the Child and ILO Convention Nos. 138 and 182.[154] Business is expected to take a range of measures in the workplace, marketplace and community.[155] While the CRBPs embrace GPs' notions of 'responsibility to respect' and human rights due diligence, they go further in that principle 1 provides that companies should 'commit to supporting the human rights of children'.[156] Principle 1 recognises that businesses can play 'a significant role in supporting children's rights throughout their activities and *business relationships* … through core business activities, strategic social investments and philanthropy, advocacy and public policy engagement, and working in partnership or other collective action.'[157]

Principle 2 deals specifically with the issue of child labour. It provides that companies should 'contribute to the elimination of child labour, including in all business activities and business relationships'.[158] The responsibility of eliminating child labour entails, among other things, establishing robust age-verification mechanisms as part of recruitment processes and ensuring that these mechanisms are also used in the supply chain; being aware of the presence of all children in the workplace; providing decent work, where appropriate, for adult household members when removing children from the workplace; and not putting pressure on suppliers, contractors and subcontractors that are likely to result in abuses of children's rights.[159] As part of their commitment to support the human rights of children, companies are expected to work 'with governments, social partners and others to promote education and sustainable solutions to the root causes of child labour'.[160] Businesses, for example, can 'participate in programmes to promote youth employment, skills development and job training opportunities for young workers above the minimum age for employment' and seek to concentrate production in the formal economy and avoid informal working arrangements that may contribute to child labour'.[161]

154 Children's Rights and Business Principles, 'Overview'. *Available at*: http://childrenandbusiness.org/?page_id=12 (last visited on June 25, 2014).

155 *Ibid.*

156 'Principle 1'. *Available at*: http://childrenandbusiness.org/?page_id=102 (last visited on June 25, 2014).

157 *Ibid.*

158 'Principle 2'. *Available at*: http://childrenandbusiness.org/?page_id=281 (last visited on June 25, 2014).

159 *Ibid.*

160 *Ibid.*

161 *Ibid.*

A brief review of the CRBPs indicates that this collaborative formulation of corporate responsibilities is not confined to a static negative duty of not employing child labourers. Rather companies are expected to take a number of responsive measures in the workplace, marketplace and the wider community, thus the focus being on doing everything necessary to protect human rights of children.[162] Furthermore, the scope of responsibilities is not limited to one's operations: companies are also expected to ensure that their supply chain is free from child labour.

III Moving towards responsive responsibility?

On the basis of the review of existing regulatory initiatives in part II above, a number of broad conclusions could be drawn regarding the responsibility of corporations *vis-à-vis* child labour. First, although the ILO Convention No. 138 was in place when the OECD Guidelines and the ILO Declaration were being drafted in the mid-1970s, it is surprising that these two regulatory instruments did not have any specific provision relating to child labour. This defect was, however, cured during the 2000 revision of both the OECD Guidelines and the ILO Declaration.

Second, the predominant state-centric nature of human/labour rights frameworks is beginning to change as some recent regulatory initiatives do impose a *direct* responsibility on corporations in relation to child labour. This is a welcome development because excessive or sole reliance on states in enforcing labour rights falters on the face of certain states' incapacity or unwillingness in enforcing their 'protect' category of obligation against corporations.

Third, the review undertaken in this paper reveals that most of the current regulatory initiatives do not clearly outline the specific *legal* responsibility, if any, of a corporation towards the child labourers being hired by its suppliers or contractors. As noted above, the GPs seek to trigger a change in this situation by prescribing due diligence measures as part of the corporate responsibility to respect human rights. But the responsibility still remains moral or ethical rooted in the business case for complying with international human/labour rights norms. If human rights law could obligate states to ensure that their agents as well as private actors within their respective territory and/or jurisdictions do not violate human rights,[163] why should not an obligation be imposed on parent

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162 This is consistent with the approach taken by a few companies to adopt anti-poverty and educational programmes in the local community to engage with the root causes of child labour. Diana Winstanley, Joanna Clark & Helena Leeson, "Approaches to Child Labour in the Supply Chain" 11:3 *Business Ethics: A European Review* 210, 212 (2002).

163 '[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant

companies to ensure that their *de facto* agents (subsidiaries, affiliates, contractors and suppliers) respect human rights obligations?

Fourth, if one leaves aside municipal frameworks (both constitutional and legal), there is still hardly any international instrument that imposes legally binding obligations on corporations on the issue of child labour. This is problematic because interconnected global operations of MNCs are not matched by legally binding global norms concerning human/labour rights. While transnational voluntary measures do exist and are useful, they are far from adequate in ensuring that companies neither benefit from the practice of child labour nor remain spectator to this socio-economic situation.

Fifth, the implementation and enforcement of labour rights through the entire supply chain remain a concern for a number of reasons. Verification and monitoring by independent agencies is critical in enhancing the efficacy of voluntary or semi-voluntary norms. However, there are still not many institutionalised mechanisms which allow NGOs to perform the role of watchdogs. Even in situations where NGOs have a role to play, their role is limited. The NCP complaint process under the OECD Guidelines is a case in point: the role of NGOs is mostly limited to filing complaints against MNCs, rather than extending, for instance, to investigation and enforcement stages. Institutionalised collaboration and partnership with NGOs could play a vital role in strengthening the enforcement of social norms against companies.

Last but not least, whereas the regulatory initiatives drafted earlier (say, during the 20th century) conceived the responsibility of corporations in terms of 'non-employment', some of the initiatives drafted in the last one decade or so go much beyond this and envisage that corporations should take additional measures to contribute towards the effective abolition of child labour. In terms of human rights duty typology, one can then say that companies are now expected to go beyond 'respecting' the prohibition against child labour: they should also assume some responsibilities which belong to the 'protect' and 'fulfil' categories of human rights realisation.

It is encouraging to note that at least some of the recent regulatory initiatives are beginning to formulate corporate responsibilities in a wider sense because the responsibility of corporations (as well of states) regarding child labour should be responsive to the needs of fulfilling the goal of abolishing child labour. The

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rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.' United Nations Human Rights Committee, *General Comment No. 31 on Article 2: The Nature of General legal Obligation Imposed on States Parties to the Covenant*, 26/05/2004, para 8.

responsibility should entail corporations taking *static* and *responsive* measures.[164] The static measures could be pre-defined and common to all corporations. The prohibition on the employment of children in hazardous industries or the elimination of all practices designated as the worst forms of child labour are straight forward instances that will fall into static measures.

But the problem is how to deal with a large pool of poor children below the age of 14/15 years? A mere prohibition on their employment might not be beneficial for such children, as it might either lead to a denial of access to basic necessities or open the door for their exploitation by others.[165] The author, therefore, suggest that the static measures should be supported by other dynamic responsive measures that would address the root causes of child labour. Instead of not hiring child labourers, companies may, for instance, 'adopt' a certain number of children: they may either offer employment to adult members of the children or provide such children elementary education, vocational training and basic health facilities.[166] Companies could form collaborative partnerships with state agencies and NGOs to devise and deliver these measures aimed addressing the root causes of child labour.

The exact nature and extent of responsive measures canvassed here will depend upon a number of variables such as the capacity and size of a corporation, the nature of its business operations, and the specific needs of a particular sector and the nearby community. It is critical that that both static and responsive measures concerning child labour proposed here are extended to subsidiaries, business partners, contractors and suppliers of corporations.

One may ask why should companies take responsive measures in relation to child labour? One could make a moral and ethical case to justify responsive measures that go beyond the negative legal obligations: offering help to those in need is not only satisfying but also mutually beneficial deed. It is often the right thing to do. So, companies, as important social organs, will be fulfilling their social responsibilities by behaving in a responsive manner. Taking responsive measures may also be regarded as an investment in nurturing future employees, investors or customers. In other words,

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164 Archie Carroll has proposed the following four strategies of social responsiveness: reaction, defence, accommodation, and proaction. Crane and Matten, *supra* note 8. The model of responsive responsibility proposed here focuses only on the accommodation and proaction elements.

165 See Ans Kolk and Rob van Tulder, 'Child Labor and Multinational Conduct: A Comparison of International Business and Stakeholder Codes' 36 *Journal of Business Ethics* 291, 297 (2002).

166 Some companies are already adopting such measures. See, for example, the full/part time education programme initiated by Adidas in its factory in Vietnam for girl children. Winstanley *et al*, *supra* note 162 at 219.

there may be a business case in corporations taking responsive measures to address the root causes of child labour. Furthermore, from a normative point of view, duties corresponding to human/labour rights should be appropriate to secure the realisation of given rights. A narrow negative responsibility not to hire child labour could not fully protect the human rights of children. Companies should, therefore, have responsive responsibilities. While the responsibility of corporations concerning child labour need not be equivalent to that of states, it must also not be insignificant or illusory

More and more regulatory initiatives – especially those drafted in the last few years – envisage corporate responsibility *vis-à-vis* child labour in terms of companies taking a range of responsive measures. It seems that the deficit found in older regulatory initiatives is being cured, as the problem of child labour is now being dealt with in a more holistic manner and companies are being expected to assume a range of static and responsive responsibilities. However, a few further improvements are needed. One of the most critical aspects is to ensure that companies take ownership of child labour (and other human/labour rights abuses) within their supply chain. Rather than ignoring or avoiding their responsibility, companies should be required to take proactive measures and held accountable for the exploitation of children for commercial gains. If a company can assume responsibility for the manufacturing defect found in a pair of shoes sold by it but manufactured by its contractors, why can/should it not assume the responsibility for labour rights abuses committed by its contractors? Companies should internalise the cost associated with conducing due diligence and monitoring the conduct of their supply chain partners.

Developing an international instrument which *directly* imposes *legally binding* obligations on companies is also vital. This will reduce dependence on reluctant states and plug the limitation of voluntary measures. Equally important is involving NGOs in not only enforcing labour rights norms against companies but also fostering multi-stakeholder partnerships with business to deal with the problem of child labour.

IV Conclusion

Child labour is a socio-economic-cultural reality in many parts of the world. An effective elimination of child labour will require joint efforts on the part of states, civil society and corporations. It has been increasingly realised, as reflected in some of the regulatory initiatives surveyed above, that the goal of abolishing child labour cannot be accomplished by merely prohibiting the employment of children below a certain age limit. Non-employment of child labour – a negative static responsibility – has to be complemented with other responsive measures aimed at drying up the supply of child labour. At the same time, (dis)incentives might have to be created to reduce the demand for child labour.

In this paper, it is proposed that corporations have a responsibility beyond not hiring child labour. The effective elimination of the problem of child labour cannot be achieved unless companies (and other actors) have both static and responsive responsibilities. This responsive approach, which requires parties to ascertain the contents of responsibility, may be criticised for giving too much say to public opinion and other actors external to corporations,[167] or for expecting too much from corporations. However, corporations are already responsive actors – they respond to various market variables or conditions all the time while taking business decisions. They should similarly be responsive to the social environment they operate in, in accordance with the nature of their business, their extent of operations, availability of resources and socio-economic conditions. As to the rising expectations argument, one may say that the societal expectations of corporations are proportional to their current power, influence

167 Jan Tullberg, "Reflections upon the Responsive Approach to Corporate Social Responsibility" 14:3 *Business Ethics: A European Review* 261 (2005).