




**PRIVATE SECTOR  
ACCOUNTABILITY IN  
COMBATING THE COMMERCIAL  
SEXUAL EXPLOITATION OF  
CHILDREN**



**A contribution of ECPAT  
International to the World  
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Sexual Exploitation of  
Children and Adolescents  
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This thematic paper was written by Mark E. Hecht<sup>1</sup> on behalf of ECPAT International as a contribution to the World Congress III against Sexual Exploitation of Children and Adolescents.

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The views expressed are those of the author and do not necessarily reflect those of ECPAT International, Government of Brazil, NGO Group for the Convention on the Rights of the Child, or UNICEF nor endorsement by the Central Organizing Committee of the Congress.

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**Mark E. Hecht**

**Submitted by ECPAT International**

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# Executive Summary

Since the First and Second World Congresses against Commercial Sexual Exploitation of Children (CSEC), new methods for holding the private sector accountable for violations of children's rights in the context of sexual exploitation have emerged. Internal and external corporate social responsibility (CSR) tools have increased in popularity, in turn placing greater pressure upon intergovernmental organisations, international agencies and world states to acknowledge the abuses and develop regimes towards ensuring prevention, protection and punitive consequences for multinational corporations (MNCs) that harm children.

Although there are many best practice examples in the literature, global standards and norms (often referred to as international “soft” law) have been criticised as being ineffective due to their voluntary and self-policing nature. A new trend has been noted: attempting to hold the private sector accountable by treating alleged violations of international “hard” law (including the *Convention on the Rights of the Child* - CRC and its *Optional Protocols*) as actionable, in the same way that human rights violations committed by a state are actionable in some domestic courts of law. Legal mechanisms that offer a vehicle for domestic application of international “hard” law, such as the United States' *Alien Torts Claim Act*, may offer the possibility of successfully ensuring human rights accountability of multinational corporations, albeit in a narrow set of circumstances and with many obstacles to overcome, most notably jurisdictional issues.

Within the private sector, the travel and tourism sub-sector has clearly taken the lead towards eliminating CSEC. Codes of conduct have become the main instruments for regulating the travel and tourism industry in its interface with children's rights. The most comprehensive code of conduct for tour operators is the *Code of Conduct for the Protection of Children from Sexual Commercial Exploitation in Travel and Tourism*, which requires “compliance contracts” to be signed by participating companies. As of October 2008, there are 989 companies, from 34 countries, implementing the Code in 53 countries. Umbrella organisations such as the International Federation of Tour Operators, the International Hotel and Restaurant Association, and many others have also adopted industry-specific codes of conduct.

A UN Special Rapporteur on children's rights has recognised that, “media are the most powerful tool of mass communication nationally and internationally, and their potential to protect children from sexual abuse and exploitation should be explored thoroughly.” The

media may convey stories about commercial sexual exploitation of children in compassionate and ethical ways, increasing public understanding and involvement. Alternatively, the media can perpetuate exploitation through the inappropriate portrayal of children and child abuse, and may play a highly influential role in providing youth with distorted impressions of sex and sexuality, rendering them more vulnerable to exploitation. Although many problem areas still remain, some successes have occurred, reinforcing the capacity of media industries to play leading roles in private sector projects aimed at eliminating CSEC. Efforts include CSEC awareness campaigns conducted with major advertisers, codes of conduct from umbrella organisations, public compliance with intergovernmental protocols, and sex education campaigns which reach beyond the classroom through comic books, magazines and music aimed at youth.

In the past decade, the Internet has enjoyed an explosion of development, offering new and increasingly harmful methods for the violation of children's rights, such as commercial sexual exploitation, harassment and intimidation (including cyber-bullying), exposure to inappropriate and dangerous materials, and socialisation to violence. Because offenders need Internet service providers (ISPs) to access the Internet, ISPs are well positioned to assist in the fight against CSEC – but contend that the vast amounts of material passing through their networks render it almost impossible to monitor. Despite the challenges, there have been some positive steps towards protecting children online. The G8 countries have cooperated through initiatives such as the Virtual Global Summits and various Interpol activities that include 187 member countries. Several computerised databases which can be used by investigators, containing child abuse images and images of those involved in the abuse, have been developed with the assistance of private sector software manufacturers. The Internet, however, is evolving faster than it can be regulated or its effects on CSEC understood. For example, new online multiplayer interactive games draw in millions of people, notably in North and Southeast Asia. Social impact assessments from a child protection perspective appear not to be available.

Despite the financial sub-sector's longstanding association with CSEC activities, the vast majority of financial institutions have been relatively silent on their efforts to cease the use of their products in the course of CSEC activities. One positive development has been the Financial Coalition against Child Pornography (FCACP) in the US representing nearly 90 per cent of the US payments industry, its goal is to eradicate the profitability of commercial child pornography by following the flow of funds and shutting down the payments accounts that are being used by these illegal enterprises. Since the launch of FCACP, the purchase price for images of sexually exploited children has risen dramatically – an indication that FCACP efforts may be affecting the profitability of these sites. However, companies that receive a percentage of each merchant transaction retain profits

from the sale of child pornography even after the rogue merchant or criminal consumer is caught. This has yet to be publicly addressed by the Coalition or its members.

Given the pervasiveness of the private sector, its involvement in CSEC is unavoidable. Different sectors, however, have made varied attempts to combat CSEC. Most industry associations in the travel and tourism industry have adopted standards agreements, while the financial sector has only begun to acknowledge that a problem exists. A variety of efforts are needed to advance the protection of children. Government and industry cooperation, such as partnerships between software companies and law enforcement agencies to create databases to track CSEC offenders, has been effective. Efforts to fight CSEC have recently focused on the use of international “hard” law – a tactic which has developed out of criticism of the voluntary and self-monitoring nature of international global standards. Private corporations have partnered with non-governmental organisations (NGOs) to produce awareness-raising ad campaigns. A combination of all voluntary and involuntary corporate efforts, government-industry partnerships, and education and training programmes are needed to protect children globally and work with the private sector as it continues to develop its prominent place within our society.

# 1. An Introduction to the Private Sector, Commercial Sexual Exploitation of Children and the Primary Mechanisms Involved in Isolating the Two

The private sector is involved in commercial sexual exploitation of children. Whether the exploitation is the result of commission or omission on its part may be subject to debate, however, the private sector's connection to this fundamental violation of children's rights is undeniable.<sup>2</sup> At minimum, four sub-sectors within the realm of private enterprise have habitually been associated with CSEC: The first sub-sector involves the travel and tourism industries. This category has taken the lead in the last few years in confronting the problem and developing innovative strategies to combat the phenomena. A second sub-sector includes the media industries. These businesses comprise journalists, photographers, television and film producers, acting and modelling agencies, and advertising firms. Although some positive initiatives have been noted, there is consensus among child advocacy groups, and the industries themselves, that not enough has been done to protect children from the harms associated with these trades. The third sub-sector represents new technologies. This relatively young set of businesses has received a considerable amount of attention since the United Nations (UN) co-organised the First World Congress against Commercial Sexual Exploitation in Stockholm (First World Congress) in 1996. No doubt the Internet has assisted child advocates in getting their positive message across in an effective and efficient manner, but it has also helped those who violate the rights of children accomplish their abuse cloaked in complete anonymity. The fourth, and newest sub-sector within the private sector, is the financial alliance. Notably absent from the discourse until recently, financial partners have begun to organise and direct their technical knowledge and expertise to combating the commercial trade of child abuse image through credit card, bank draft and other monetary transactions.

This report will examine each of the sub-sectors of the private industry noted above, identifying the individuals and groups involved and their efforts in eliminating CSEC or, in some cases, perpetuating it. Although the obstacles or concerns of each project will be reviewed, the central focus of the study will remain on "best practices" and "lessons learned"; in particular, the use of corporate social responsibility tools to reduce the incidence of commercial sexual exploitation of children within the respective industries will be explored. The emphasis on positive outcomes will hopefully demonstrate that good work can indeed be accomplished through an acknowledgement of the problem, coupled with a determination to make a difference in the lives of children.

## 1.1 Defining Commercial Sexual Exploitation of Children

No common definition of commercial sexual exploitation exists. The literature on the subject constricts or expands usage of the term depending on the methodology, audience, and purpose of the report. Some research has taken a very strict interpretation of the word “commercial” so that monetary exchange must occur in order for it to be classified as CSEC, other academics have adopted a looser definition that includes any exchange, whether in cash or in-kind. Yet others have suggested that it is impossible to distinguish between commercial and non-commercial sexual exploitation since one invariably will lead to the other.

That being said, the most widely agreed upon definition used by academics, lawyers and child advocates is the one contained in the *Declaration and Agenda for Action* of the First World Congress:

The commercial sexual exploitation of children is a fundamental violation of children’s rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery.<sup>3</sup>

Commercial sexual exploitation of children consists of practices that are demeaning, degrading and many times life-threatening to children. There are three primary and interrelated forms of commercial sexual exploitation of children: Prostitution; pornography; and trafficking for sexual purposes. Although prostitution, pornography and trafficking are the most common forms of CSEC, other types of commercial sexual exploitation of children do exist, including child-sex tourism and early marriages.

Government representatives from 159 countries, together with NGOs, UNICEF and other UN agencies have committed themselves to a global partnership to fight CSEC. The *Agenda for Action* cited above calls for improved coordination and cooperation, prevention measures, increased protection, rehabilitation efforts and youth participation at the state level, bilaterally and internationally.<sup>4</sup>

The number of CSEC victims in the world today is unknown. According to End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes International (ECPAT International), the largest NGO in the world studying the issue,

“There is simply no reliable means of determining the number of children who are victims of commercial sexual exploitation in the world today.”<sup>5</sup>

The reasons for the lack of reliable statistics vary. For example, a common methodology of estimating the number of exploited children has not been developed and definitions of what constitutes exploitation are not universal.<sup>6</sup> In the case of child pornography, the child may not even be aware of his or her own exploitation, and the crime may go unreported.<sup>7</sup> Other forms of exploitation may go unreported due to sociological factors in the child’s community or family.

In some regions, such as Central Asia, Middle East and North Africa, the only evidence of CSEC is anecdotal. Until very recently, there has been no serious attempt to address the issue in these areas and very little research has been conducted. In the regions where investigations have taken place, the data collected is not disaggregated adequately enough to present a true picture.<sup>8</sup> This appears to be the case with trafficking research in particular. Reports seldom distinguish between persons who have been trafficked for sexual purposes and those who have been trafficked for economic or other purposes. Further, these reports seldom distinguish between trafficking in women and trafficking in children; those that do rarely distinguish between a child of 10 and a child of 17, or between a female child and a male child.

It is far easier to estimate the number of sexually exploited children in a specific country, but even that is not without difficulties. In many cases, the lack of resources, both human and financial, mean that sample sizes tend to be too small to provide any accuracy. There may be a wide variance in the numbers reported by different sources, often reflecting the vested interests of the source rather than the true nature of commercial sexual exploitation. For example, government sources may underestimate numbers, or completely deny the problem exists, in order to protect their international reputation.<sup>9</sup> Some journalistic reports may tend to overestimate numbers in an effort to sensationalise the problem.<sup>10</sup>

Research on child prostitution tends to focus on its most visible forms, and where information is most easily accessible, such as prostitution in the lower class brothels or the streets and other public areas, such as around bus stations or in parks. This research does not provide an accurate analysis of the nature or the extent of child prostitution. A great deal of the exploitation is clandestine. It occurs through contacts in nightclubs or bars, or through high-end escort services, where the abuse takes place in privately rented apartments. Information about this form of exploitation is more difficult to access. Furthermore, since CSEC is an illegal activity, researchers attempting to collect data have been harassed, intimidated or threatened verbally or physically.<sup>11</sup>

The issue of commercial sexual exploitation of children became widely known to the public as a result of the First World Congress. The event was co-organised by UNICEF, the NGO Group for the Convention on the Rights of the Child, and ECPAT International. It was preceded by six regional consultations in different parts of the globe that provided direct inputs for the World Congress. A Drafting Committee, chaired by Professor Vitit Muntarbhorn<sup>12</sup>, prepared and circulated a *Declaration and Agenda for Action* prior to the Congress so that governments in attendance could receive the necessary approval for its formal adoption at the Congress.

Altogether there were more than 1,300 participants from more than 130 countries in Stockholm. In attendance were 718 government officials representing 122 countries, 105 representatives from the UN and inter-governmental organisations, 471 NGO representatives and a delegation of 47 young people participating in a week-long conference studying the issue.

In the first two days of the Congress, there was a general exchange of views that led to the unanimous adoption of the *Declaration and Agenda for Action* in the fourth plenary session. One hundred and twenty-two states thus committed themselves to “a global partnership against commercial sexual exploitation of children.”<sup>13</sup> The three subsequent days were devoted to panels and workshops, which revolved around nine themes meant to cover the major forms of child prostitution, trafficking and child pornography: Sex Exploiters; Children in Pornography; Tourism and Sexual Exploitation; Health Matters; Legal Reform and Law Enforcement; Prevention and Psycho-social Rehabilitation; Education; the Media; and Human Values.

Five years later, the actors working to combat CSEC came together again at the Second World Congress against Commercial Sexual Exploitation of Children, hosted by the Government of Japan, in association with the Prefecture of Yokohama. The Conference took place in Yokohama in December 2001. The Ministry of Foreign Affairs Japan, ECPAT International, UNICEF and the NGO Group for the Convention on the Rights of the Child were the organising partners, echoing the partnership format of the First World Congress.

The objectives of the Second World Congress were to: enhance political commitment to the implementation of the *Agenda for Action* adopted at the First World Congress; review progress on the implementation of this Agenda; share expertise and good practices; identify main problem areas and/or gaps in the fight against commercial sexual exploitation of children; and strengthen the follow-up process of the World Congress.

One of the main outcomes of the Congress was the re-commitment to the *Stockholm Agenda for Action* in the *Yokohama Global Commitment 2001*.<sup>14</sup> By virtue of this re-commitment, coupled with the attendance of representatives of 35 states that did not participate in the First World Congress, the number of states committed under the *Agenda for Action* now totals 159. Through the Yokohama Congress, the follow-up to the first World Congress was strengthened, particularly with regard to the monitoring processes.

In addition, a number of regional consultations took place in the months leading up to the Congress. This consultative process enabled governments, non-governmental organisations and inter-governmental agencies to prepare for the Yokohama meeting. Each regional consultation produced a document outlining a common position that would guide future direction in their effort to eliminate CSEC. All outcome documents were submitted to the Chair at the Congress and are annexed to the final outcomes document of the Congress titled “*Yokohama Global Commitment*”. The *Yokohama Global Commitment 2001* was negotiated between governments during the week and adopted in consensus. A number of delegations chose to add explanatory statements to it, and while these additions develop certain viewpoints of countries and regions, they are all endorsing the *Yokohama Global Commitment*.

## 1.2 Defining the Private Sector

For the purposes of this research, the private sector has been confined to for-profit industries. Although many of the principles outlined herein are relevant for other members of the private sector, including civil society organisations and non-profit agencies (whose efforts are no doubt instrumental in protecting children from commercial sexual exploitation), the *motivations* for participation differ greatly when profit incentives are involved. While it may be true that profit-driven corporations share an interest in and a commitment to children’s rights, this focus is incidental rather than central to their business activities. This fact distinguishes their work from their non-profit counterparts. Further, there is a very real risk with for-profit businesses that children’s rights will be subordinated to profit incentives. For example, private industries may be interested in helping youth advance their future employability. If the expense of so doing is not recouped by the corporation then there may be temptation and pressure (i.e., by shareholders) to abandon such practices. Therefore this study will focus on ways in which child protections against commercial sexual exploitation are compatible with profit making industries only.



## 1.2.1 Transnational and multinational corporations

According to the UN, the term transnational corporation (TNC) refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.<sup>15</sup> The UN’s documents do not have a published definition of the term “multinational”. However, the International Labour Organisation (ILO), a UN specialised agency that seeks to promote human and labour rights, has defined multinational corporations (MNC) as “enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, size, in the nature and location of the operations of the enterprises concerned.”<sup>16</sup>

In contrast, the Organisation for Economic Cooperation and Development<sup>17</sup> (OECD) has stated, “[MNCs] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed.”<sup>18</sup>

Although often used interchangeably, the distinction between a transnational and a multinational corporation is an important one. As Korten explains in his book, *When Corporations Rule the World*:

During the transition phase from national to transnational, many corporations styled themselves as ‘multinational,’ which meant that they took on many national identities, maintaining relatively autonomous production and sales facilities in individual countries, establishing local roots and presenting themselves in each locality as a good local citizen. Globalized operations might be linked to one another, but they were deeply integrated into the individual local economies in which they operated. During this phase, many did function to some extent as local citizens.

As structural adjustment programs and free trade agreements rendered national economic borders increasingly irrelevant, most corporations that operate

internationally became self-consciously transnational. This commonly involved building their operations around globally integrated supplier networks... The goal was to eliminate considerations of nationality in an effort to maximize the economies of centralized global procurement.<sup>19</sup>

### **1.2.2 Organised crime syndicates**

There is an alternative private sector that is deeply implicated in CSEC, and which, if eliminated, would lead to a dramatic decrease in the abuse of children. This is the world of organised crime. According to law enforcement, sexual exploitation of women and children is one of the fastest growing organised criminal activities around the globe, and follows in frequency only the trade in narcotics and weapons. Organised criminal syndicates are estimated to earn billions of dollars annually through, for example, trafficking in human beings, management of brothels and production of pornography. Children are at particular risk of exploitation because these cartels are highly skilled in manipulation and deception. Lured through false promises of jobs, children and their parents are often tricked into, and trapped by, exploitative conditions.

Although the specific details of organised crime are manifested differently in various countries or regions, it is clear that the rights of all children are consistently being threatened by this “alternative” private sector. It is very difficult to speculate as to ways in which crime groups can become participants in efforts to undermine CSEC. Because of the illegal and illicit nature of their activities, it is not plausible to consider lobbying such organisations to solicit socially responsible business. Furthermore, because CSEC is often central, rather than incidental, to their core activities and the profits from such exploitation are high, any intervention is unlikely unless it comes with real threats of punishment. Moral or ethical appeals would not force accountability, nor would consumer pressure, as is often the case in the “legitimate” private sector. However, other industries can become actively involved in undermining organised crime as it pertains to CSEC. For example, security guards, hotel employees, transportation services (i.e., airlines, bus companies, shipping firms, etc.) can play very important roles in identifying suspicious situations. Recognising that efforts to directly confront organised crime groups about their questionable activities would be done at great personal risk, these industries might be better suited to monitor and then report their findings to authorities.

The reporting of exploitation will only be successful if there are effective responses to the tips made by concerned corporate citizens. It is imperative that the international legal and judicial communities endorse tighter controls, greater accountability and harsher penalties for organised criminal activity. In light of this, a number of recent UN initiatives

offer stronger protections against, and responses to, organised crime. The adoption by the UN General Assembly of a new international agreement enhances the focus of world governments on organised crime as it applies to the exploitation of children, and represents important steps to mandate stronger sanctions of such activity. The UN *Convention against Transnational Organised Crime*<sup>20</sup> and its accompanying *Protocol to Prevent, Suppress and Punish Trafficking in Persons*<sup>21</sup> are the first legally binding UN instruments concerning such behaviours. Their adoption came just a few months after the creation of an *Optional Protocol to the Convention on the Rights of the Child* enhancing protections from CSEC.<sup>22</sup> All these measures are designed to strengthen international frameworks to undermine organised crime, and to aid in the protection of children from the many forms of exploitation that result from such activities.

### **1.2.3 Businesses not directly involved in CSEC**

Much of the discussion of the private sector in this study highlights activities that should be taken by industries that are, or may be, implicated in CSEC. However, there are many private industries that have no *apparent* link to exploitation but could nevertheless play an important role towards its elimination. For example, businesses that choose to offer young people in difficult circumstances realistic employment opportunities, with reasonable salaries and respectable working conditions will no doubt help prevent CSEC, as this would reduce the amount of children at risk in their own communities. Moreover, many industries can take active preventative measures such as coordinating institute job training programmes for young people, particularly for those at risk of commercial sexual exploitation. Furthermore, as indicated in a study by a UN Special Rapporteur on the sale of children, child prostitution and child pornography, organisations could provide mentoring programmes or ensure funding and scholarship opportunities for the education of young people.<sup>23</sup> Other measures that could easily be taken by the private sector are programmes for employees about CSEC, actively condemning the exploitation of children. “Zero-tolerance” policies could be created and enforced by the high-tech industry regarding, for example, online stalking of children or the possession of electronic child pornography.

It has been repeatedly noted that consumers are interested in corporate accountability and in the protection of children’s rights. Therefore, active protection and promotion of such rights may be represented as a means to enhance business. For example, a UN Special Rapporteur identified awareness raising regarding the possible monetary benefits of social responsibility within the corporate sector to be a successful initiative in promoting corporate accountability.<sup>24</sup> There is also great potential for preventative work and for the establishment of “exiting” strategies to be implemented by the private sector<sup>25</sup>. This potential is becoming increasingly realised internationally.

Organisations that employ or recruit adults to work with children could commit to actively screening workers to ensure that there has been no history or incident of inappropriate conduct. Experts have developed mechanisms for identifying or profiling, and for recognising signs of possible abuse. Screening programmes are particularly important for businesses such as summer camps, boarding schools and daycare facilities. There is a plethora of ways in which private sector industries that are in no way directly implicated in CSEC can still assist in its elimination that will be described later in this study.

A final group of businesses that may or may not be directly involved in CSEC activities are those associated with the “adult sex industry” (a.k.a “adult entertainment industry”). In this context, these actors are even more controversial than organised crime syndicates as many child advocates suggest that the very nature of the adult sex industry places youth at risk. Little has been written on the links between this industry and commercial sexual exploitation of children. Businesses that may have such a connection include publishers and producers of adult pornography, escort agencies, prostitution unions (where they are legal) and Internet sites containing graphic stories or images of adults engaged in sexual conduct.

In a recent interview, the Executive Director of the Association of Sites Advocating Child Protection (ASACP; formerly Adult Sites against Child Pornography) stated that she did not believe there was a link between adult pornography and child pornography. Specifically, she states, “There are almost no data that could ever show that the adult [sex] industry was involved with underage children in [pornographic] movies and, thus, child pornography. With our hotline, for the first time, we actually have empirical data that show no involvement.”<sup>26</sup>

The perspective of ASACP is not equally shared. In *Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age*, F.S. Lane articulates the use of young models in the adult pornography industry:

The legal prohibition most likely to be crossed by an unwary pornographer is the one that bars the sale or distribution of images of children under the age of 18. Images of teens at or near their 18th birthday have proven to be highly popular and lucrative subject for online pornography businesses[...] Given the volume of competition even within the relatively narrow category of teen sites... and the potential economic rewards, there is certainly a temptation for some Website operators to try and get around the age limit either by offering images of models who look younger than 18 or by offering images of under-18 models that are taken from a supposedly “safe” source (e.g., nudist magazines).<sup>27</sup>

### 1.3 Defining Corporate Social Responsibility

Corporate social responsibility can be traced back to the early evolutionary stages of business. As companies began to develop in the Commonwealth, there was a public understanding that large companies were to achieve societal objectives. During this period the “upper class” had the expectation that corporations would explore colonial territory and create settlements, develop banking and financial services for the public, as well as transportation services.<sup>28</sup> It is evident from this brief history lesson that the perception of business extending beyond the economic realm is not new, although it has transformed in several key respects.

CSR has adjusted over the course of time, as societies demands have shifted. During the nineteenth century, “Corporate America” began to rapidly grow. Public policy began to specifically address social domains that were affected by corporations. Most notably, these included the health and safety of workers, consumer protection, fair labour practices and environmental hazards.<sup>29</sup> Evidently, early CSR was a direct result of obligation rather than voluntary response to consumer demand. Further, early CSR was applied almost exclusively in instances where negative corporate behaviour could be traced directly back to the company that had caused the injury.

CSR has advanced alongside globalisation, specifically its popularity and the issues on which firms now focus. Globalisation has increased the number of stakeholders affected by the business process of today’s world. Currently, 94 per cent of FTSE-350<sup>30</sup> firms include a reference to CSR in their annual reports. On top of this, 84 per cent of these firms claim to have processes in place for monitoring CSR activity.<sup>31</sup> This is quite indicative of the fact that CSR is in the minds of most societies, as a whole. With such a large percentage of firms reporting on CSR to their shareholders, it is evident that the market is demanding a firm that values their effects on their local and global communities.

In a 2007 survey performed by the consulting firm McKinsey, 95 per cent of CEO respondents agreed that the public has greater expectations of business taking on public responsibilities than it did just five years ago. Only 16 per cent of those interviewed felt that a business sole focus should be high returns for investors.<sup>32</sup> With much of the North’s top industries taking a keen interest in CSR, the focus now shifts to the BRIC countries – Brazil, Russia, India and China – and the considerations for CSR in other emerging economies.

Brazil has quite a significant CSR outlook, as over 1,300 companies are members of Instituto Ethos, a network of businesses that are dedicated to CSR. India has had a history

of socially responsible businesses, specifically those family-owned firms such as Tata, but this perspective has been slow to spread across the rest of the country. China has also witnessed an increase in awareness for CSR. The Chinese Government is slowly increasing the standards at which businesses must abide and Chinese companies are beginning to release CSR reports. Of the BRIC countries, Russia remains the only one where companies seem unmotivated to explore CSR concepts.<sup>33</sup>

When defining CSR, many organisations and governments will have slightly varying definitions, but all encompass a generally similar belief. According to Harvard University business programme's Terms of Reference, CSR "encompasses not only what companies do with their profits, but also how they make them."<sup>34</sup> International organisations such as World Business Council for Sustainable Development (WBCSD), OECD, Business for Social Responsibility (BSR), along with many national governments outline the following elements that should be included in defining CSR: human rights; business ethics; employee rights; environmental protection; community involvement; full disclosure; and stakeholder rights.<sup>35</sup>

The UK government has dedicated a website to CSR. It defines CSR as, "...how business takes account of its economic, social and environmental impacts in the way it operates – maximising the benefits and minimising the downsides."<sup>36</sup> The Canadian federal government, through Industry Canada, defines CSR as, "...the way a company achieves a balance or integration of economic, environmental, and social imperatives while at the same time addressing shareholder and stakeholder expectations."<sup>37</sup> These definitions accent the fact that CSR has evolved from once being a financial donation by a firm into a complete reinvention of all business operations towards decreasing negative world impacts.

### **1.3.1 CSR "tools"**

As corporations have become more global, the standards and expectations placed on the firms have expanded as well. As previously stated, consumers place expectations on what they consider to be "reasonable" actions for a corporation. Since expectations vary between societies, multinational corporations must find a balanced approach to CSR. Governments and the labour industry are beginning to take on a collective approach to CSR. Along with the cooperative drafting of codes of conduct, governments are beginning to draft policies encouraging corporations to report on CSR issues. For example, the EU Commission has published much documentation that promotes CSR action as dictated by the standards authored by ILO and OECD. This means of regulation has become known as "informal law", a self-regulating means of social conduct and governance that is often reached through international standards or collective negotiations.<sup>38</sup> In February 2002, the French

Parliament passed a law requiring all French corporations to file an annual report on the sustainability of their social and environmental performances.<sup>39</sup> Despite this, there are still very few governments in the world that have gone to such lengths to regulate CSR.

Corporations must appeal to their clients and any negativity surrounding a corporation can ultimately result in that corporation losing market share and stakeholder investment. Corporations are developing codes of conduct now as a direct result of their stakeholders. OECD publishes some of the most well followed principles used in developing corporate codes of conduct. The Guidelines for Multinational Enterprises are strictly voluntary in nature but cover a variety of areas, such as industrial relations, human rights, environment, full disclosure and ethical behaviour, consumer interests, competition and employment. This will be discussed later in the study.

Another growing trend has been for MNC firms to join UN Global Compact. The Global Compact outlines 10 principles which focus on human rights, labour, the environment, and anti-corruption. If a corporation wishes to become a member of the Global Compact, the CEO must personally send its request to Secretary-General Ban Ki Moon of the UN. In the letter the CEO must express their full support of “The Ten Principles” as well as the Global Compact.<sup>40</sup> Although the UN does not police the membership, there are several expectations placed on participants, including public advocacy of the Global Compact and full implementation of the principles to the firm’s strategy, culture and operations. Lastly, firms are expected to publish annual reports outlining the ways in which they are supporting the Global Compact.<sup>41</sup> The Global Compact will also be discussed later in the study.

In January 2005, the International Organisation for Standardization (ISO) initiated a process for developing a standard for social responsibility. ISO 26000 is not intended to replace any existing agreements between governments, such as ILO declarations, rather it is meant to add value to the tools already in place. The objective of ISO 26000 is to have it be applicable for organisations of all sizes and in countries at every phase of growth.<sup>42</sup>

### **1.3.2 Historic human rights approaches to CSR**

According to ILO, there are more than 200 million children in the world involved in child labour. The work being performed is damaging to the child’s mental, physical and emotional development.<sup>43</sup> There are numerous motivations for a child to work but the most common one is economic in nature, as these children often utilise the money made to support their families. According to ILO, almost 75 per cent of employed children are engaged in the worst forms of labour, including trafficking, armed conflict, slavery, sexual exploitation and

hazardous work.<sup>44</sup> In some cases, a firm is unaware of their involvement of children in factories throughout the world. This can be evidenced through the 2007 exposure of a child in an Indian factory sewing a GAP label on a piece of clothing. The GAP, an American clothing company, publicly stated that they had no knowledge of children being employed by the factories they subcontract to perform work overseas. The GAP ultimately destroyed all clothing produced by children but the situation brought to light the serious issue of child labour, specifically overseas, where monitoring of factories is minimal.<sup>45</sup>

Human rights violations committed by MNC corporations throughout the world have been documented by many NGOs. The Centre for Constitutional Rights (CCR) is dedicated to the protection and advancement of the rights guaranteed by the *US Constitution* and the *Universal Declaration of Human Rights*. The CCR was a pioneer in bringing US MNC firms to justice for human rights violations committed overseas. One of the CCR's most notorious suits was initiated against Royal Dutch Petroleum and Shell Petroleum. The suit stemmed from the 1995 execution of nine Ogoni leaders whom were executed by the Nigerian Government. The nine leaders were falsely accused of murder as a direct result of the collaboration between the military government and the company now known as Royal Dutch Shell.<sup>46</sup>

Another circumstance which garnered international attention involved the Canadian oil giant Talisman Energy Inc. In 1998, Talisman purchased Arakis Energy, a Canadian company, which held large investments in the oil rich areas of Sudan. During this time however, Sudan was embroiled in the Second Sudanese Civil War. Consequently, the government in Sudan, run by the National Islamic Front (NIF), was completely reliant on the revenues generated by the country's oil industry to fund the war effort. At the time of purchase, the Sudanese Government was considered a terrorist group by the US Government and denounced as one of the worst human rights violators by the United Nations and several other international outfits.<sup>47</sup> Talisman was accused of directly funding war crimes and genocide through their oil investments in Sudan.



## 2. International Standards and the Private Sector

### 2.1 The Sources of International Law

CSR is by no means the only mechanism available to hold the private sector accountable for violations of children's rights. In order to canvas the other options it is first necessary to provide an overview of the composition and functionality of international law generally, and international human rights law in particular. The discussion that follows offers a synopsis of the sources of international law, while focusing on its relevance to commercial sexual exploitation of children.<sup>48</sup>

International human rights law comprises three main sources: treaties; customary law; and general principles of law. A treaty is a written document that states agree will govern their behaviour. An important feature of treaty law is that it has historically been applied only to states, and just to states that agree to have it applied to them. States indicate their agreement by ratifying the treaty and once ratified the state must seek to implement it in good faith. States that ratify a treaty may also file declarations and/or reservations to go along with their ratification. A declaration can have two purposes: it can indicate the state's position on how a certain right should be understood or interpreted in relation to itself; or it can serve as a comment on another states' obligations under a treaty. A reservation indicates a state's intent not to be bound by a certain part of the treaty. It creates an exception for that state in relation to a particular treaty provision and permits it to become a party to the treaty without accepting all of its terms. Reservations can only be made under certain conditions. A reservation cannot defeat the "object and purpose" of a treaty, for example. Moreover, certain provisions that constitute customary international law – such as the prohibition against discrimination – cannot be reserved against. Further, a treaty may set out certain provisions, which cannot be reserved against, or the committee charged with overseeing the treaty may do so.

Customary law refers to law that develops when states consistently follow norms of behaviour out of a conviction that they are required to conform to the norm. Over time, their consistent behaviour evolves into a type of international law. The traditional conception of customary law is that it cannot develop simply out of what states do; one has to demonstrate, not simply that the state has consistently taken a particular course of action, but that it did so out of a conviction that it was required to act in such a manner.

Custom has both a physical and psychological component. It is said to exist where states

act in a certain way and on the assumption that they are legally bound to do so. It refers to a general practice among states that is accepted as law, insofar as states evince their obligation through their prevalent behaviour and through a sense of recognition of this obligation. Slavery for example, can be said to contravene international customary law; states do not, as a general practice, sanction or engage in slavery, and it can be said that their conduct stems from a conviction that slavery is wrong. The challenge of applying customary international law is that its content is often difficult to define. One of the problems is determining when a state is acting in a certain manner out of a conviction that it must do so (the psychological element of customary law). The issue invites debate and has attracted a significant amount of legal scholarship. The main advantage to customary international law is that it applies to all states, unlike treaty law, which applies only to ratifying states.

*Jus cogens* norms are a category of customary international law that is considered so fundamental that they apply universally and cannot be modified by treaty. There is little agreement, with few exceptions, as to the specific content of *jus cogens* norms. Torture is the most often cited example of a *jus cogens* norm. There can be no justification whatsoever for the use of torture in any country.

The relationship between treaties and custom is important. It is possible for the standards set forth in a treaty to also exist as custom. This can happen in two ways. First, a treaty can codify norms that already exist in international customary law. Second, the norms of a treaty themselves can evolve into custom; widespread and representative participation in a treaty may create international customary law. Therefore, one should not assume that just because a certain right is contained in a treaty that it cannot have the status of customary international law and will therefore be binding, even on states that have not ratified the particular treaty. This point is particularly relevant to the discussion on international child law. Although the *Convention on the Right of the Child*<sup>9</sup> (CRC) has been ratified by all but two states<sup>50</sup> its Optional Protocols have not benefited from the same levels of state commitment. Despite this, an argument could be put forth that states have an obligation to meet the standards outlined in these instruments even though they have not been ratified.

General principles of law refer to the written and unwritten laws of states, including decisions of state courts. Although general principles of law have similar characteristics to customary international law, there are some differences. Custom requires an examination of how states apply out of a conviction that they were required to do it, whereas general principles of law require an examination of agreement or a pattern among the law of states.

In terms of international law, the focus of this study will be primarily on treaty law. Although there has been some literature exploring the possibility that CSEC can be interpreted as customary international law or general principles of law, due to the fact that treaty law expressly addresses the sexual exploitation of children in all its forms, greater emphasis will be placed on this one source.

## **2.2 International Law in the Domestic Context**

The protection of domestic human rights can take place at international or national levels. In order to have an impact on decisions that affect child rights, it is necessary for advocates to focus on both. The children's rights community has traditionally concentrated most of their efforts at the national level. The two key reasons for this are that national systems are considerably more straightforward than international systems and national systems tend to provide more effective remedies.

In addition, international systems generally require human rights violations to be first addressed within the available national system. Successful litigation of human rights within the domestic jurisdiction could have a tremendous impact on domestic law and policy, and also generate valuable jurisprudence. The remedies and responses to violations imposed by courts can assist governments in developing domestic strategies to ensure respect for, and promotion of, fundamental rights.

National constitutional or legislative human rights provisions and their enforcement mechanisms are often the first targeted in order to obtain domestic compliance with human rights obligations. This usually involves using the national legal system or an administrative mechanism to challenge a law or seek redress for an alleged violation.

It is important to note that even if priority is given to claiming human rights in national domestic mechanisms, international human rights instruments still have a significant role to play. In particular, it can be argued that those instruments must be considered when interpreting and implementing domestic human rights guarantees and in applying domestic statutory provisions that impact upon human rights. The precise role that ought to be given to international human rights instruments remains, however, a matter of significant controversy.

Although the influence of international law on domestic human rights issues is significant, a full understanding of the interplay between the various legal components – such as treaty law, constitutional law and conflicts of law – would require a review of the domestic legal

mechanisms of each state since domestic law differs from country to country. Alternatively, certain states could be chosen for the purposes of analysis and then an extrapolation of the results from local to global could take place. For the purposes of this research the emphasis will be placed on the application of international law directly to private sector operations inside a given state, thereby bypassing the domestic legislative scheme.

## 2.3 International Laws against CSEC

Currently there is no one piece of international law protecting children from CSEC in all its forms. Rather, there are a series of conventions, treaties and declarations of various judicial authorities that make reference to child protection and the criminalisation of sexual crimes against children.

The CRC was ratified in November 1989 and came into force in September 1990. Currently, there are 191 states that are party to the CRC. It is the first binding international instrument setting out the civil, political, economic, social and cultural rights of children, defined as individuals below the age of 18.<sup>51</sup>

The CRC covers all aspects of the child's wellbeing, recognising that children have an inherent right to life and survival, to an identity, to a nationality, to be heard, to freedom of thought, conscience and religion, to health, and to an education. In the context of commercial sexual exploitation, the CRC contains direct obligations by states to protect children from all forms of sexual exploitation, including child prostitution, child pornography and trafficking, pursuant to Articles 34 through 35.

The Committee on the Rights of the Child, established under Article 43(1), examines the progress made by State Parties in achieving the realisation of the obligations undertaken in the Convention, thereby determining which rights fall under the language of the Convention. Pursuant to Article 44, the Committee considers reports submitted by states and publishes concluding observations with general recommendations as to how states can improve the condition of children in their countries.

The *Optional Protocol on the sale of children, child prostitution and child pornography*<sup>52</sup> is the first of two Optional Protocols to the CRC to enter into force. It has been ratified by 43 countries, signed by 105 countries, and entered into force in January 2002. The Protocol expressly prohibits the sale of children, child prostitution and child pornography and is the first international instrument to define these terms.<sup>53</sup> Accordingly, the Protocol requires these offences to be treated as criminal acts. The Protocol requires states parties to, inter

alia: establish the grounds for criminalising the acts; ensure jurisdiction over the offences; provide for the extradition of offenders; encourage international cooperation between states to pursue offenders; and provide victim support.

The *Optional Protocol on the Involvement of Children in Armed Conflict*<sup>54</sup> was ratified by 45 countries and signed by 111 countries. It was also entered into force in February 2002. The Protocol prohibits conscription or compulsory recruitment of children under the age of 18 for military service, as well as prevents children from directly participating in a military conflict. The Protocol also requires states to set a minimum age for voluntary recruitment. If such recruitment is below the age of 18, the Protocol requires the state to ensure that such recruitment is truly voluntary. Although there is some evidence to suggest a connection between CSEC and children in armed conflict, the Protocol itself is silent on the issue of protecting children from sexual exploitation during war or other times of distress. It focuses solely on the issue of children being used as soldiers.

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children*<sup>55</sup> is a supplementary protocol added in 2001 to the United Nations' *Convention against Transnational Organised Crime*<sup>56</sup>. The Protocol was opened for signature in December 2000. The idea of a Protocol on trafficking grew out of an urgent need to combat transnational crime as tabled by the United Nations Centre for International Crime Prevention (CICP), the UN agency responsible for crime prevention, criminal justice and criminal law reform.<sup>57</sup> The Protocol itself provides the first international definition for trafficking and lays out a comprehensive law enforcement regime. The Protocol establishes a system that criminalises traffickers, and protects and assists trafficked persons, thus strengthening preventative trafficking measures particularly focusing on the most frequently targeted victims – women and children.

The *Convention on the Elimination of All Forms of Discrimination against Women*<sup>58</sup> (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines discrimination against women and sets up an agenda for national action to end such discrimination. CEDAW defines discrimination against women as “...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>59</sup>

CEDAW is the only human rights treaty that affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family

relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of trafficking in women and exploitation of women. Its application to CSEC is not so straightforward. Some academics<sup>60</sup> argue that since "women" is not defined in the Convention, its articles are equally applicable to the girl child as well. In this respect, the sections on trafficking and exploitation are germane to this discussion.

The *Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages*<sup>61</sup> was opened for signature and ratification by the General Assembly resolution 1763 A (XVII) in November 1962 and entered into force in December 1964. The Convention contains only 10 articles, few of which have implications for CSEC cases. Article 1 states, "No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law and Article 2 explains, "States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses." In the case of child marriage, the Convention may be applicable.

The *Declaration on the Elimination of Violence against Women*<sup>62</sup> brings to light the role of women in society by attempting to establish a global consensus on raising the status of women. In addition, it calls on states to take steps to promote social policies aimed at eliminating gender-based violence in which case girl children are particularly vulnerable. The declaration identifies violence typically experienced both within the family and within the general community, such as sexual abuse and assault, as well as trafficking in women and forced prostitution.

The ILO *Convention No. 182*<sup>63</sup> became the first International Labour Organisation convention to be unanimously adopted by the 174 member states of the ILO in June 1999. The Convention provides definitions of the worst forms of child labour<sup>64</sup> that include, *inter alia*: All forms of slavery, trafficking, child prostitution, child pornography; use of children for illicit activities, such as for the production and trafficking of drugs; and using children for any work, which, by its nature or the circumstances in which it is carried out, are likely to harm the health, safety and morals of children. The Convention represents the international communities' effort to define as law types of labour which children below the age of 18 should never be subjected to.

The ILO *Convention No. 138, Concerning Minimum Age for Admission to Employment, 1973*,<sup>65</sup> provides that signatories to the Convention pursue a national policy raising the minimum age of employment “consistent with the fullest physical and mental development of young persons”, thereby abolishing the very concept of “child labour”.<sup>66</sup> The two guiding principles of the Convention are, first, that the minimum age for employment not be less than 15, or the age for completing compulsory schooling, and second, that the highest minimum age set for hazardous work not be lower than 18. That being said, the Convention is also a flexible and dynamic instrument setting various minimum ages depending on the type of work. For example in limited cases, directed to countries with an insufficiently developed economy and education facilities, the minimum age for work may be less than 15 years. The Convention is relevant to a discussion on CSEC as it compliments *Convention No. 182* in placing an onus on state parties to ensure that persons below 18 years of age are never involved in hazardous “work” for remuneration.

As noted in section 2.0 of this report, ECPAT along with UNICEF and the NGO Group for the Convention on the Rights of the Child organised the First World Congress back in 1996. At the Congress, 122 countries adopted the *Stockholm Agenda for Action*. The *Stockholm Agenda for Action* calls for action from states, all sectors of society, and national, regional and international organisations against the commercial sexual exploitation of children. In particular, it calls countries to develop national plans of Action and to implement the *Agenda for Action* in the five areas: coordination; cooperation; prevention; protection; recovery; and reintegration and child participation. Essentially the national plans of action provide governmental and child-care agencies an opportunity to cooperate in devising strategies through national policy to eliminate the sexual exploitation of children and promote children’s rights in their country.

In December 2001, the Second World Congress was hosted by Japan in Yokohama. By adopting the outcome document, known as the *Yokohama Global Commitment*, 159 countries reaffirmed their commitment to the First World Congress’ Agenda for Action. Further, the Second World Congress participants recognised and welcomed the positive developments that had occurred since 1996, including better implementation of the CRC, an increased mobilisation of national governments and the international community to safeguard the rights of a child through the adoption of laws, regulations and programs aimed at protecting children from CSEC.

The *Standard Minimum Rules for the Administration of Juvenile Justice*, or Beijing Rules<sup>67</sup>, adopted by the UN General Assembly in November 1985, precedes the UN CRC by five years. The Rules provide guidance to the international community in its dealings with juvenile crime by establishing a set of minimum standards for the juvenile justice

system. Amongst other things, the Rules are concerned with: ensuring that criminal courts consider the best interest of the juvenile; guaranteeing procedural safeguards for all juveniles; requiring that juvenile offenders are dealt with differently from adult offenders; and that the age of criminal responsibility not be set too low, but rather properly reflect a child's emotional, mental and intellectual maturity.<sup>68</sup> The Beijing Rules apply in cases of CSEC when a state party arrests a child for an offence related to sexual exploitation (i.e., if a minor is the intermediary or “pimp” between another minor and an adult) or when the local justice system treats the victim as an offender and puts the child on trial for “prostitution” or a related crime. In either case, a state party must follow these rules.

Finally, the *Riyadh Guidelines*<sup>69</sup> adopted by the General Assembly in December 1990, complement the previously adopted Beijing Rules. The *Riyadh Guidelines* provide preventative measures in dealing with juvenile crime by providing a general social policy aimed at curbing “juvenile delinquency”. Considering juveniles as valuable participants in society, thereby engaging them “in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes”, does this.<sup>70</sup> Accordingly, the Rules call upon a socialisation process by which all of society (family, education, community, and mass media) provides the means necessary for juveniles to develop and mature both morally and mentally.

There have been a number of recent developments in international law that undertake to strengthen linkages between corporate responsibility and the protection of children's rights. Much of the basis for this framework is found in the *Universal Declaration of Human Rights* (UDHR).<sup>71</sup> Notably, the preamble of this declaration states “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights”.<sup>72</sup>

The wide reaching ambit of responsibility outlined in the UDHR encompasses individual and corporate bodies as well as states, thus suggesting that private sector industries are seized with the obligation of such protection. Furthermore, Article 30 indicates, “Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein”.<sup>73</sup> Enumerated rights specifically include non-exploitation and access to education. Although this document is non-binding, its provisions are implemented in the *International Covenant on Economic, Social and Cultural Rights*<sup>74</sup> and the *International Covenant on Civil and Political Rights*.<sup>75</sup>



## 2.4 Existing Legal Mechanisms to Ensure MNC Accountability for International Human Rights Violations

The emergence of MNCs in the international landscape has brought to light various forms of regulation to control their behaviours. This is particularly significant in the field of international human rights, where, on account of their economically powerful position, the ability of MNCs to make decisions that can directly and indirectly promote or hinder human rights is present. Accordingly, the potential for MNCs to abuse international human rights standards is greatly enhanced by the ability of the corporate directors to reach beyond borders and evade domestic regulations. As a result, there has been a dramatic shift in international law, which has traditionally focused strictly on human rights violations committed by states (as noted above), to recognise that MNCs are capable of similar violations.

The extent of MNCs' accountability for international human rights violations has yet to be settled. The scope of MNCs' obligations to respect international human rights remains limited to a handful of international human rights norms covered by customary international law and *jus cogens* norms. If violations are deemed to be beyond the scope of *jus cogens* norms, an MNC is then only likely to be found liable if there exists a link between it and the state which has permitted the violation to occur or has contributed an aspect of the violation. Otherwise, if a human rights violation falls in neither context, the MNC would be successful in escaping any obligation.

The abovementioned facts, coupled with the economic fragility of various developing states that may forgo their human rights obligations in order to cater to MNCs capable of injecting heavy foreign investment into their economies, makes the issue of MNC accountability for international human rights violations pressing and in need of resolution. Accordingly, volumes of scholarly work have been dedicated to analysing existing legal tools as well as proposing new methods to regulate MNCs' behaviour towards international human rights. For the most part, ensuring MNC accountability for international human rights violations is not guaranteed and continues to remain a challenge.

### 2.4.1 The emergence of human rights obligations of MNCs

Through the stabilisation of international trade initiated by the *Bretton Woods Agreement*, the global economy has been evolving through continuous interdependentness and globalisation.<sup>76</sup> As a result, globalisation has spawned a dominant actor in the international landscape, capable of challenging the role of the state in international law: the MNC.

MNCs have secured for themselves a powerful position in the international community by directing their influence from their headquarters in one state to subsidiaries and partners in others. MNCs are more mobile than states in the sense that the option to relocate or shift operations from one place to another with fewer regulatory obligations is always possible. This suggests that MNCs can evade state power and domestic regulatory schemes by becoming detached from their home state and thus manoeuvre outside state power. This is often explained by the nature of the MNC itself: MNCs are bound by their obligation to profit, unlike a state's obligations to its citizens, and therefore requires a more flexible arena for conducting its business activities.

MNCs are composed of the largest companies in the world with revenue that far exceeds those of most developing countries. They are viewed as a dominant force in the modern international system due to their size and economic influence, which provides them with a considerable amount of political and economic leverage. Examples of the power of MNCs include their involvement as a party in negotiating intergovernmental regimes, and involvement in certain domestic economies measured by their market control.

It has been suggested that MNCs provide relief to developing countries with regards to direct foreign investment and the potential wealth they may bring into the economy. However, at the same time, MNCs secure enough leverage whereby host governments in developing countries may set aside their human rights obligations to their citizens in return for a commitment of heavy investment into their economies. Thus, MNCs can be enticed with the benefit of cheap labour, police and military protection and support, and any other arrangements that may be necessary for a developing state to offer to prevent the loss of direct foreign investment – even if such services have the potential of infringing upon international human rights norms.

Allowing MNCs an avenue of escape from human rights obligations may undermine the primary purpose of international human rights law, which is to hold those accountable for violations responsible for their actions. With an increase in power should come an increase in accountability. To this end, the international community has developed a number of legal vehicles to ensure accountability, but their success has been quite varied. No doubt, MNCs' violations have provided an ample opportunity for the international community to sharpen their skills and provide more effective international rules. The following discussion provides an examination of this endeavour.

## 2.4.2 Existing mechanisms for regulating MNC behaviours

### 2.4.2.1 Regulating corporate behaviour via voluntary codes of conduct and global standard-setting

A code of conduct can most simply be defined as a voluntary and non-binding external and internal declaration of principles adopted as a guide for appropriate behaviour of management and employees. Codes of conduct offer a mechanism through which corporate social behaviours can internalise human rights standards by adopting voluntary, non-binding best practices. Drafting codes of conduct is a challenging exercise, as adherence often seems motivated more as a public relations exercise, where negative publicity could lead to lower profitability, than to a sincere interest in preventing human rights violations.<sup>77</sup> In some instances, MNCs have gone so far as to appeal to the public by advertising their adoption of an internal code of conduct. The Director of Communications for Nike, in a letter to the editor of a San Francisco newspaper, educated consumers to the fact that Nike established the “industry’s first external monitoring program to ensure that local government laws on wages and hours [were] being met.”<sup>78</sup> Arguably, in the absence of public pressure, there is often no direct incentive for MNCs to comply with its code of conduct.<sup>79</sup>

Another obstacle to the adherence to a code of conduct is that its success is dependant on its monitoring and compliance. A conflict of interest may arise if MNCs monitor themselves, or are monitored by their subcontractors, as in the case of Nike, which employed Ernst and Young as their compliance monitor in the 1990s, while at that time also employing the company as their auditor. Therefore, without an independent third party acting as a monitor, *who could publicly expose any code violation*, there may be little incentive for an MNC to observe its own code, especially if the act places the MNC at a competitive disadvantage.

Lastly, because codes of conduct are voluntary, lack independent enforcement, and rely on self-established standards, MNCs that do not act in accordance with human rights norms would most likely not adopt a code of conduct. Those ‘bad actors’ may then reap the profits of the business activities that signatory companies have pledged to avoid.

Some external industry codes of conduct have achieved minor success. The *Sullivan Code of Conduct*, which was a voluntary code adopted by United States (US) and United Kingdom (U.K.) oil and mining companies operating in apartheid South Africa in the 1970s and 1980s, was designed to halt human rights abuses, and it was celebrated as an achievement in corporate social responsibility.<sup>80</sup> Although the Sullivan Principles had limited influence in bringing an end to apartheid, the code had significant positive effects for non-white South Africans and set a new standard for investment decisions by institutional investors.

#### 2.4.2.1.1 United Nations initiatives

There are currently two major UN initiatives relevant to the discourse on business and human rights: Global Compact (Compact) and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises<sup>81</sup> (Norms). While the Compact and the Norms articulate some similar human rights obligations, the two instruments are significantly different. Interestingly, these are not the UN's first attempt to address the human rights responsibilities of corporations. The United Nations Centre on Transnational Corporations (UNCTC), established in 1975, began negotiating a *Draft Code of Conduct on Transnational Corporations* in 1977. The Code set out general, economic, financial and social rules regarding the activities of MNCs and rules on disclosure of information. The Code also described rights of MNCs in the host state, urged intergovernmental cooperation and asked states to disseminate the code and report on implementation. The Code was neither finalised nor adopted by the UN General Assembly. The commission and centre were both terminated in 1994.

Over the past decade there has been a renewed interest in regulating the activities of private corporations through international law. In 2004, the Commission on Human Rights effectively stalled further development of the Norms; however, in the same document, the Commission recognised the importance of studying the impact of transnational corporations on human rights. In 2005, the Office of the High Commissioner for Human Rights requested that the Secretary-General appoint a special representative to study the issue of human rights and transnational corporations and other business enterprises.<sup>82</sup> The Special Representative's mandate is extensive and spans two years.<sup>83</sup>

##### 2.4.2.1.1.1 Global Compact

The Global Compact is not born out of a UN resolution, nor is it a formal declaration; rather, it is a voluntary initiative launched by the former Secretary-General.<sup>84</sup> The Compact is designed to promote “responsible corporate citizenship.” Several commentators discuss the meaning of this term, but essentially, it signals corporations are subject to obligations, born out of their desire to reduce the negative impact of their operations. Once a company signs onto the Compact, it is expected to change its business operations and public communications. Furthermore, companies are encouraged to enter into partnership projects with the UN and other stakeholders to support the Compact's principles.

The Compact is principally characterised as a network. It is a network among different stakeholders and UN agencies.<sup>85</sup> Additionally, as participation increased, country networks have developed. Finally, the Compact operates as a ‘learning network’ for business. The Global Compact Office and UN agencies form the nucleus of the network, with academia, business, labour and civil society organisations surrounding them on the periphery.

Governments play an auxiliary role through outreach support, advocacy and funding, but do not participate directly in the network. The Global Compact Office maintains primary responsibility for the facilitation of the network, but depends heavily on the collaboration of the six UN agencies and defers to the authoritative guidance of the UN Secretary-General and his Global Compact Advisory Council.

The Compact asks companies to “... embrace, support and enact, within their sphere of influence...” ten principles, divided into 4 categories (human rights, labour, environment and anti-corruption).<sup>86</sup> As the present discussion explores international human rights obligations as they relate to CSEC, the analysis will focus only on the first two categories.

The human rights provisions state businesses should: Support and respect the protection of internationally proclaimed human rights; and, make sure they are not complicit in human rights abuses. The language, “support” and “respect”, means that corporations must refrain from any action or omission that violates human rights or encourages or assists in the commission of such violations. “Internationally proclaimed human rights” refer to rights contained in the UDHR. To support and respect these rights, several general avenues are suggested, including: Developing company policies; performing human rights impact assessments; and consulting with workers and their representatives. More specifically, businesses are encouraged to provide safe and healthy working conditions, ensure they do not use forced or child labour, or provide access to basic health care, education and housing for workers and their families.

The complicity principle compliments the support and respect principle. Complicity suggests facilitating someone else’s violations of human rights. Complicity occurs in several forms: direct, beneficial and silent. Commentators note that what constitutes indirect (beneficial and silent) complicity is more difficult to determine than direct complicity. To ensure non-complicity, it is suggested that corporations make a human rights assessment of host countries, consider if the company has human rights policies protecting workers, or implement a company monitoring system to ensure implementation.

The labour provisions state businesses should: uphold the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labour; the effective abolition of child labour; and eliminate discrimination in respect of employment and occupation. This discussion will focus on forced labour and child labour as they are directly relevant to the discussion of CSEC.<sup>87</sup>

Forced and compulsory labour occurs in different forms, including slavery or bonded labour, the work or service of prisoners, or child labour where the child has no choice but

to work. Forced labour affects the lives of children in that it hinders their preparation for future labour markets, and, more immediately, families are prevented from maximising their income, so that they often find themselves without adequate food, shelter and health care. Consequently, children may be forced to supplement family income. It is suggested that business has a role designing and implementing community education programmes, providing vocational training and offering counselling programmes for children.

Although child labour is a kind of forced labour, it is also the subject of principle five. Child labour includes economic exploitation and work that may be dangerous to a child's health or morals and that may hinder a child's development. The Compact recognises different standards of acceptable and unacceptable work for different age groups in both the developing and developed worlds. It is suggested that while business should not use child labour in ways that are socially unacceptable or that lead to a child losing his or her educational opportunities, business must be careful not to take action which may force working children into more exploitative forms of work. Business is encouraged to: abide by international standards when national labour laws are insufficient; develop and implement detection mechanisms; and ensure adult workers are provided with decent wages, secure employment and safe working conditions.

Since the Compact is not a regulatory instrument, neither the UN agencies, nor the Global Compact Office, has the authority to monitor or enforce adherence to the ten principles. Early on, this attracted criticism, so the Secretary-General adopted several integrity measures. Two such measures are particularly worth noting. The first concerns a participant's annual communication on progress. If a company fails to complete this component for two consecutive years, it will be labelled "inactive," meaning the company will be barred from participating in events or using the Compact name and logo until the company complies. The second measure concerns the allegation of systemic or egregious abuse. In such cases, the Global Compact Office plays a role, but will not involve itself in legal claims brought against a participating company. The Office will forward non-frivolous complaints to participating companies and if asked, will help the company remedy the situation. Companies are asked to make written comments addressed to the complaining party; if a company refuses to respond it is regarded as "inactive" and will be so identified on the Global Compact website. Aside from these roles, the Global Compact Office has the discretion to take other smaller actions. The "integrity measures" do not include direct sanctions against companies that violate the ten principles, but there is some discussion about using Compact participant-status to launch domestic lawsuits against corporations.

Criticisms of the Global Compact can be broken down into five categories: language and terminology; voluntary vs. regulatory nature; "network model" characterisation; weak (or

lack of) monitoring and enforcement procedures; and decision-maker accountability.

As a voluntary initiative designed to encourage responsible corporate citizenship, the Global Compact states that corporations *should* adhere to specific principles, rather than using stronger language, such as *shall*. This permissive language may not necessarily give rise to a positive obligation on business to prevent human rights violations. The generality of terms may also prove problematic; specifically, corporations can *embrace, support* and *enact* without taking concrete action to promote human rights. Furthermore, principle one refers to rights in the UDHR, but the Compact does not highlight specific rights to *embrace, support* and *enact*. Another concern may exist with the *phrase sphere of influence*; in particular, assuming one of its subsidiaries does not support and respect human rights, a corporation may simply claim the particular subsidiary is not within its *sphere of influence* and escape responsibility.<sup>88</sup> Not only is the choice of language problematic, but so is the meaning given to particular terms. For example, even though many participating firms are not from the US, there is concern that the Compact promotes a Western version of *corporate social responsibility*. This is problematic because sometimes the western view is not congruent with national values of non-western states.

As a voluntary initiative, only those companies who choose to participate in the Compact are expected to embrace, support and enact the ten principles. Although the Compact reports that over 2,500 businesses participate, this represents only a fraction of global corporations. A regulatory model binding on all companies would theoretically hold more corporations liable. With this in mind, business may use the Compact to avoid the introduction of international and domestic regulatory instruments. Of the participating companies, there is also concern about the 'kinds' of firms that participate.<sup>89</sup> A corporation's motivations may play a factor in the extent to which they participate. Furthermore, there are those who believe that the corporations most likely to volunteer are those that least need to change.

An essential ingredient of the network model is partnership between corporations, civil society, governments and other stakeholders. Some are of the view that the UN should not allow corporations with poor human rights records to participate in the Compact. A related criticism is that the network model gives corporations too much influence over the initiative, its principles and direction.

The importance of an effective monitoring and enforcement procedure cannot be overstated. Although the Compact is not an endorsement for participating companies, for UN agencies (as well as other stakeholders) participation is an indication that the company is suitable for partnership projects. The argument might be made that other sectors and stakeholders

have filled the monitoring gap; however this is not satisfactory as corporations are not subject to regular monitoring and even when regularly monitored, the legitimacy of the process is questionable. While this concern is important, the most persistent argument is that the Compact is a “blue-wash” for corporations.<sup>90</sup> The fear is, corporations, either due to immoral leadership or ‘market forces’ will not change their behaviour without legal sanctions. While some may argue that the integrity measures take positive steps to address this concern, the more persuasive argument is that the absence of tangible sanctions allows companies to continue to violate human rights while retaining signatory status.

While much criticism is directed towards corporations and corporate behaviour, others direct criticism to the caretakers of the initiative; specifically that decisions are not subject to an intergovernmental board. This causes concern for some about the ‘unaccountable power’ of international civil servants.

#### **2.4.2.1.1.2 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises**

In August of 2003, the Sub-Commission for the Promotion and Protection of Human Rights adopted the Norms.<sup>91</sup> There is significant commentary surrounding the current legal status of the Norms. Yet, while it is clear that the Norms do not have the same status as a UN treaty, there is hope they may one day develop into a binding, legal instrument.<sup>92</sup> For now, several TNCs are ‘road testing’ the Norms.

It is important to note that the Norms do not create new legal obligations, nor do they replace existing mechanisms; they simply gather and codify existing international obligations as they apply to TNCs. States remain the primary duty-bearers for the promotion, fulfillment and protection of human rights, but the Norms recognise that TNCs also have a responsibility “... as organs of society, [...] for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.”<sup>93</sup>

The Norms were adopted by the Sub-Commission in two separate documents: the Norms<sup>94</sup>; and the Commentary on the Norms (Commentary).<sup>95</sup> The Norms are divided into nine sections: preamble; general obligations; right to equal opportunity and non-discriminatory treatment; right to security of persons; rights of workers; respect for national sovereignty and human rights; obligations with regard to consumer protection; obligations with regard to environmental protection; general provisions of implementation; and definitions. These provisions will only be explored in so far as they relate to CSEC, therefore, the right to equal opportunity and non-discriminatory treatment and obligations with regard to consumer protection and the environment will not be explored; rights of workers and national sovereignty will only be discussed in so far as they relate to children.<sup>96</sup>



In the Norms, three sections give meaning to the substantive sections: definitions; the preamble; and general obligations. Although articulated last, the definitions section is important when defining the scope of four terms: transnational corporation,<sup>97</sup> other business enterprise,<sup>98</sup> stakeholder,<sup>99</sup> human rights and international human rights.<sup>100</sup> The scope of entities bound by the Norms is considerable: large, transnational or multinational corporations, their supply chains and other associated businesses are bound to respect human rights in both their home and host countries. It seems, however, that the Norms do not bind purely local business enterprises. Similarly, ‘stakeholders’ are also large in scope, including those affected both directly and indirectly by an entity’s activities. Finally, the scope of ‘human rights’ is broad. The Norms articulate specific rights and instruments, but include the ‘catch-all’ rights: “other human rights treaties” and “other relevant instruments adopted within the UN system.”

As with the definitions section, the preamble gives meaning to the Norms. The preamble primarily does two things. First, as stated above, it recognises that while states are primarily responsible for human rights, TNCs are not absolved of responsibility. TNCs must ‘promote and secure’ rights in the UDHR and ‘respect’ norms contained in UN treaties<sup>101</sup> and international instruments.<sup>102</sup> Second, the preamble clarifies the status of the Commentary, calling it “... a useful interpretation and elaboration of the standards contained in the Norms[.]”<sup>103</sup>

The “general obligations” section provides further meaning, by articulating a framework through which to interpret the Norms and outlining basic obligations. The roles of TNCs and states are re-stated and the concept of ‘sphere of influence’ is introduced. The Commentary makes clear that “... the remainder of the Norms shall be read in the light of this paragraph” and that the Norms apply in both home and host countries.<sup>104</sup> Furthermore, the meaning of ‘promote, secure fulfilment of, respect, ensure respect of and protect human rights’ is elaborated; and includes an obligation to self-inform about the impact of corporate activity on human rights so as to avoid complicity.<sup>105</sup>

The substantive provisions touch on many aspects of human rights. The first relevant provision falls under the heading “right to security of persons”, whereby TNCs are prohibited from engaging in or benefiting from specific human rights abuses.<sup>106</sup> Under this provision, the commentary refers only to the production and trade of weapons, and other enforcement products or services.<sup>107</sup> Also under this heading, TNCs that make use of security provision must do so in observance of international human rights norms, national laws and professional standards of their host country.<sup>108</sup> Under the Commentary, security arrangements are only to be used for “... preventative or defensive services [...]” and TNCs are obligated to use ‘due diligence’ and ensure they employ only adequately trained guards

who follow relevant international limitations.<sup>109</sup>

The following section, “rights of workers,” contains provisions that are more directly relevant to the discussion.<sup>110</sup> This section references compulsory labour,<sup>111</sup> children’s rights,<sup>112</sup> working environment,<sup>113</sup> remuneration and freedom of association.<sup>115</sup> Directly on point is the obligation to respect a child’s right to be protected from economic exploitation.<sup>116</sup> The term economic exploitation is elaborated upon in the Commentary,<sup>117</sup> and, similar to the Global Compact, acceptable types of work is outlined for certain age groups.<sup>118</sup> The Commentary also references national action programmes designed to eliminate the worst forms of child labour and creates an obligation on TNCs to consult with Governments on the design and implementation of such programmes.<sup>119</sup> An important element of the consultation is an assessment of the impact of removing children from employment; therefore, the Commentary suggests introducing measures for withdrawing children from the workplace along with measures to address the child’s future.<sup>120</sup>

While security of person and labour rights provisions are important elements, they are not unique to the Norms. Unlike other international instruments, the Norms, under the heading “respect for national sovereignty and human rights,” address the influence TNCs have on the decision-makers of host countries.<sup>121</sup> TNCs are required to ‘recognise and respect’ various legal and non-legal components of the host country.<sup>122</sup> The Commentary envisages obligations related to social, cultural, economic and technological development.<sup>123</sup> The Norms also create a broad duty related to economic, social and cultural rights and civil and political rights.<sup>124</sup> The commentary does not require TNCs to provide for these rights, however, it does require the observance of standards that promote various related rights.<sup>125</sup>

To support the substantive provisions above, the Norms include a section entitled, “general provisions of implementation.”<sup>126</sup> These provisions can be divided into three parts: internal implementation, monitoring and enforcement. Internal implementation is expressed in the Norms as an ‘initial step,’ requiring TNCs to incorporate the Norms into internal rules of operation, contracts and other agreements, then periodically report on implementation.<sup>127</sup> The Commentary sets out specific steps that TNCs are required to undertake in terms of internal implementation.<sup>128</sup>

Compared to the internal implementation provision, the monitoring provision is slightly less detailed. Monitoring requires that the UN and other mechanisms ‘already in existence or yet to be created’ periodically monitor the activities of TNCs.<sup>129</sup> The Commentary offers some substance to this obligation, but it is still lacking in detail.<sup>130</sup> The Commentary also refers to reporting mechanisms; TNCs are required to provide workers with a mechanism

by which they may file complaints in case the Norms are violated.<sup>131</sup> The Commentary also addresses both a means of preventing human rights violations<sup>132</sup> and a means of correcting negative behaviours.<sup>133</sup>

Regarding the final category, enforcement, the Norms refer both to proactive and retroactive mechanisms. Proactively, it is suggested that states establish and reinforce the legal and administrative framework for ensuring implementation of the Norms.<sup>134</sup> Retroactively, in case a TNC violates human rights through non-compliance, the TNC is required to provide ‘prompt, effective and adequate’ reparation to those affected by non-compliance.<sup>135</sup>

There are several qualities about the Norms which differentiate them from other initiatives. Unlike other international or multi-stakeholder initiatives, the Norms are non-voluntary and direct that corporations shall do or refrain from doing certain activities. Secondly, the Norms address a wide range of ‘enterprise’, not just parent companies, but also supply chains, boards and other companies with whom they do business. Third, the Norms create a comprehensive list of obligations. Fourth, compared to the Global Compact, which suggests corporations support and respect internationally proclaimed human rights, the preamble to the Norms gives more certainty to which human rights corporations are required to address. Fifth, and most importantly, the Norms contain a section on implementation and reparations when a corporation’s non-compliance negatively affects persons and communities. However, as with the Global Compact, the Norms are the subject of criticism, which can be divided into four categories: Non-voluntary and ambiguous language; over-reaching scope; inappropriate and uncertain obligations; and under-articulated implementation, monitoring and enforcement mechanisms.

It could be argued, and quite persuasively, that the language of obligation employed in the Norms is a positive step towards creating enforceable obligations for TNCs regarding human rights. However there is some debate about whether it is appropriate to create binding obligations on non-state actors under international law. Assuming TNCs may be bound by international law, the argument has been raised that the mandatory language of the Norms is problematic when obligations are incompatible with national laws. If the Norms were voluntary, TNCs may choose to violate obligations inconsistent with national laws.

The language of the Norms has been further criticized as ambiguous, in that TNCs’ precise obligations are difficult to discern. The concept, sphere of influence, has received much attention. The major concern is with the lack of precise definition of what falls within a corporation’s sphere of influence. The Commentary does attempt to elaborate on the duties entailed under sphere of influence; however, even this is problematic. For instance,

the Commentary references the rule of law and directs a company to use its influence. It is not always clear what activities undermine the rule of law nor how a TNC must use its influence to aid government.

As a consequence of ambiguous language, the Norms create an overreaching scope; or, perhaps, the ambiguous language is a symptom of the overreaching scope. Either way, critics take issue with various scopes contained in the Norms. First, there is some discussion on the scope of interested parties: the stakeholders. The inclusion of those impacted by TNCs economically and socio-politically stretches the constituencies of corporate operations beyond recognition. Furthermore, the stretching is done without considering the effect on domestic corporate law.

Secondly, there is discussion on the scope of applicable obligations: human rights. As noted above, the scope of included rights is broad and includes civil, cultural, economic, political and social rights, along with the right to development. However, it is not solely the breadth of category, but also the kind of rights that has raised concern amongst critics; specifically, norms with universal legal effect, norms with limited legal effect among nations ratifying provisions of particular agreements, and norms with no legal effect. Finally, the scope of specific treaties and other instruments is large and non-exhaustive.

The obligations established by the Norms have been described, by some, as both inappropriate and uncertain. The Norms extend obligations in existing international human rights instruments to TNCs, however the instruments referred to, and accompanying human rights discourse, are applicable to state actors, and do not always translate to business. Although some commentators may not be opposed, in principle, to extending human rights obligations to TNCs, some argue the method in the Norms is inappropriate. Perhaps, however, it is the kind of rights extended that cause many commentators concern. Ultimately, socio-economic, political, cultural and development obligations impose inappropriate obligations with the potential to conflict with a TNCs' duty to shareholders. Backer argues, when domestic legislation does not reflect Norms, this may conflict with a board's fiduciary duty to maximise shareholder wealth.

Others feel the universality of the Norms is inappropriate. It has been suggested that the Norms are written to develop an overarching framework so that standards are consistent and comprehensive and prevent companies from following the lowest possible standard. While this is admirable, it is also problematic. First, there are obvious operational difficulties associated with universal human rights. Secondly, universal application does not take into account local difference. Furthermore, there is the argument that human rights obligations of TNCs, parallel to the obligations of states, may inappropriately break down the state's

monopoly on human rights. Ultimately, the fear is that the Norms will end-run state's legislation and essentially deputises TNCs as private legislators in non-complying states. Compounding the situation is the lack of certainty of what is meant by a state's "primary responsibility."<sup>136</sup>

Although many take issue with the appropriateness of the Norms' obligations, there are some who challenge the obligations as uncertain. This uncertainty is, in part, the product of a broad scope, over-inclusive language and an attempt at universality; and in part, structural. Since the Norms are a restatement of existing obligations, international human rights instruments are necessarily referenced. Some have criticised the Norms, however, of over-referencing such instruments. Others have called the Norms duplicative; in that they merely restate human rights obligations enumerated elsewhere. Businesses fear the duplicative Norms may cause TNCs following other, similar measures to react negatively, or divert attention and resources from similar instruments. The argument could also be made that TNCs when implementing, NGOs when monitoring, or stakeholders when enforcing obligations under the Norms may be uncertain as to what these obligations are, where to find them and which mechanisms to invoke.

Although the implementation section helps distinguish the Norms from the Global Compact, the section itself has been labelled as weak. This weakness is partly due to the fact that directives contained in the section are merely preliminary. Perhaps the drafters deliberately left the door open to innovation and experimentation to see which of the multiplicity of methods offered proves the most effective. Even so, critics have seized on the implementation section's weakness. Concern has also been raised regarding monitoring structures that are specified. For instance, it has been argued that the monitoring structure lacks transparency and accountability, as NGOs and other elements of civil society asked to monitor corporations are only accountable to their members.

The reparations clause, as part of the implementation section, is also a novel, and arguably powerful tool. However, many have criticised its lack of certainty and guidance.

#### 2.4.2.1.2 International Labour Organisation initiatives

At ILO there are two related instruments addressing corporations: the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* and the *Declaration on Fundamental Principles and Rights at Work*.<sup>137</sup> Both address employment, training, working conditions and industrial relations; both contain some form of follow-up mechanism; and both refer to ILO conventions. They differ in that the *Tripartite Declaration* addresses MNEs, while the *Fundamental Principles* address states. The *Fundamental Principles* are relevant to MNEs in so far as they are incorporated into the *Tripartite Declaration*.

#### 2.4.2.1.2.1 Tripartite Declaration

The *Tripartite Declaration* is a voluntary instrument in which member state governments, employer and employee organisations (“labour organisations”) and corporations are ‘invited’ to observe its principles and asked to respect the UDHR, ICCPR and ICESCR. The *Tripartite Declaration* opens with a kind of preamble and then articulates several principles in five sections: General Policies, Employment; Training; Conditions of Work and Life; and Industrial Relations. Some principles have been interpreted by the International Labor Office, thereby providing more clarity to the *Tripartite Declaration*’s obligations.

The numbered paragraphs begin with a sort of preamble (although not so titled). The preamble recognises that MNEs are important to the economics of “most countries”; and, as such, can potentially contribute to, or abuse, human rights and development.<sup>138</sup> An exact definition of MNE is not provided, but elements are outlined to assist in understanding the *Tripartite Declaration*.<sup>139</sup>

The preamble also recognises the voluntary nature of the instrument. By recommending voluntary observance,<sup>140</sup> the *Tripartite Declaration* aims to encourage MNEs to positively contribute to economic and social progress; and minimise and resolve difficulties arising from MNE operations. With this in mind, the *Tripartite Declaration* operates as a guide for MNEs, governments and labour organisations in furthering social progress.<sup>141</sup>

The General Policies section builds upon the preamble by providing some basic obligations for all parties. Specifically, all parties are asked to respect state sovereignty, obey national laws, consider local practices and respect international standards.<sup>142</sup> Aside from general, all-party obligations, governments and MNEs are each given individual direction. Governments are given obligations in respect of particular ILO conventions and recommendations.<sup>143</sup> Furthermore, both home and host governments are expected to follow the *Tripartite Declaration* and international standards.<sup>144</sup> Multinational and national enterprise (where relevant) is expected to take policy objectives of the host countries into account in general conduct and social practice.<sup>145</sup>

The substantive provisions of the *Tripartite Declaration* set out more specific obligations and standards and are supported by reference to specific ILO Conventions and Recommendations. The first substantive provision, employment, is divided into three sub-categories: employment promotion; equal opportunity and treatment; and security of employment. None of these provisions are directly relevant to CSEC; however, the employment promotion provisions are worth exploring in so far as MNEs indirectly protect children.

The aim of employment promotion is to “...stimulat[e] economic growth and development, rais[e] living standards, [meet] manpower requirements and overcome[e] unemployment and underemployment[.]”<sup>146</sup> To meet these goals governments are asked to “... declare and pursue [...] an active policy designed to promote full, productive and freely chosen employment[.]”<sup>147</sup> and all parties are directed to consult specific instruments.<sup>148</sup> Unlike the Global Compact, MNEs are not simply asked to refrain from particular labour practices, but are asked to play a more active role in improving local labour situations.<sup>149</sup> The argument could be made that by progressively improving employment MNEs will not only provide adult workers with a better capacity to provide for their families, but also provide children with a better quality of life.

Unique to the *Tripartite Declaration* is the provision on training. Governments are asked to develop policies for vocational training<sup>150</sup> while MNEs are asked to provide relevant training for employees, which meet development needs of the host country.<sup>151</sup> Multinational and national enterprises have special obligations when operating in developing countries.<sup>152</sup> The training provisions are relevant in so far as they allow adult workers to improve skills. In this sense they will be able to continue to support their families. More importantly, however, the training provisions are relevant for what is missing: unlike the Norms, the *Tripartite Declaration* is silent on the role MNEs play in training youth and assisting with, or participating in, government training programmes.

Whereas the above provisions focus on development and progressive improvement, the condition of work and life section focuses on preventing exploitative practice. The section is divided into three sub-sections: wages; benefits and conditions of work; minimum age; safety and health. The minimum age section is directly relevant to the discussion of CSEC, and will therefore be the focus of this discussion.<sup>153</sup>

The minimum age provision, included in the *Tripartite Declaration* is not as onerous as the provision included in the Norms. Both multinational and national enterprises are asked to “... respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour[.]”<sup>154</sup> Unlike the Norms, the *Tripartite Declaration* does not address the need to ensure children are provided with alternatives so as to protect them from worse situations. However, enterprises are expected to “... 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.”<sup>155</sup> It is difficult to say whether this obligation sufficiently protects children from the worst forms of child labour without addressing obligations post-removal from the workplace.

Unlike the preceding sections, which govern the obligations that MNEs owe directly to their workers, the final section, industrial relations, focuses on the interaction between MNEs and labour organisations. The industrial relations section is divided into five sub-categories: freedom of association and right to organise;<sup>156</sup> collective bargaining;<sup>157</sup> consultation;<sup>158</sup> examination of grievances;<sup>159</sup> and settlement of disputes.<sup>160</sup> While these sections are important, they are not directly relevant to the discussion and will therefore not be explored in-depth. It is perhaps worth noting, however, that before breaking into sub-categories, MNEs are asked to “... observe standards of industrial relations not less favourable than those observed by comparable employers in the country concerned.”<sup>161</sup> While this provision is likely intended to protect workers who may be limited in employment options, it seems inconsistent with the ‘progressive improvement’ ethos of other provisions. Furthermore, it could potentially allow groups of companies to provide lower standards than companies operating in other host countries or other industries.

As a voluntary instrument, the *Tripartite Declaration* does not contain strong supervisory or enforcement mechanisms. However, there are two major components to the *Tripartite Declaration’s* Follow-up procedure. First, the Governing Body conducts a “quadrennial survey,”<sup>162</sup> although these surveys do not determine compliance or judge measures undertaken by or within member-states. The Governing Body then recommends actions based on these findings. Secondly, the *Tripartite Declaration* includes an interpretation mechanism in which governments of member-states may request the International Labor Office to interpret the meaning of specific provisions when disputes arise.<sup>163</sup>

As with the other instruments, there is some discussion of the *Tripartite Declaration’s* relevance outside of the ILO procedures themselves. For instance, ILO standards have become the touchstone in domestic litigation challenging corporate labour practices around the world, giving them effectiveness beyond the ILO mechanisms themselves. It has been noted that standards are ‘intrinsically entwined’ with trade negotiations.

#### 2.4.2.1.2.2 Fundamental Principles

In 1998, the International Labour Organization adopted the Fundamental Principles.<sup>164</sup> The Fundamental Principles are based upon the presumption that “... economic growth is essential but not sufficient to ensure equality, social progress and the eradication of poverty [...]”<sup>165</sup> This document is particularly important because in it, “[m]embers renewed their commitment to respect, promote and realise [four] fundamental principles and rights at work [...]”<sup>166</sup> Member states, regardless of whether they have ratified the relevant Conventions, are bound by the Fundamental Principles. Although they are addressed to member states, the Fundamental Principles<sup>167</sup> are relevant to MNEs; in 2000, the ILO Governing Body incorporated them into the *Tripartite Declaration*.<sup>168</sup>



The preamble makes the focus and objective of the Fundamental Principles clear: the social aspects of employment.<sup>169</sup> Those with special social needs should be given extra attention and the ILO should “... mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation [...]”<sup>170</sup> The preamble closes by recognising the urgency “... to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application [...]”<sup>171</sup>

The Fundamental Principles themselves are not extensive and address only four principles: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.<sup>172</sup> Unlike other mechanisms, the Fundamental Principles do not elaborate specific obligations for Members. However, the ILO is obligated to assist Members to attain these objectives.<sup>173</sup>

Although the follow-up does not create a new mechanism, nor is it a substitute for existing supervisory mechanisms, it is still an important aspect of the Fundamental Principles.<sup>174</sup> Ultimately, the follow-up is intended to encourage members to promote and identify areas in which the ILO may assist in the implementation of, the fundamental principles and rights in the *ILO's Constitution and Declaration of Philadelphia*.<sup>175</sup>

The follow-up is based on existing ILO procedures: the annual follow-up concerning non-ratified fundamental Conventions (“annual follow-up”) and the Global Report.<sup>176</sup> The annual follow-up is included to annually review efforts made by Members that have not yet ratified all the fundamental Conventions.<sup>177</sup> Essentially, the Governing Body reviews reports submitted by these members on any changes in their law and practice.<sup>178</sup> The Global Report complements the annual follow-up.<sup>179</sup> Each year, the report covers one of the four categories.<sup>180</sup> The purpose for including the Global Report is three-fold: first, to report globally on each principle; second, to assess the effectiveness of ILO actions; and third, to set priorities and form action plans for the future.<sup>181</sup> The Director-General is responsible for drawing up the report, which is then submitted to the International Labor Conference ‘for tripartite discussion.’<sup>182</sup> The Governing Body will use the discussion to craft priorities and action plans to be implemented in the future.<sup>183</sup>

Both the *Tripartite Declaration* and the Fundamental Principles have given rise to criticisms that can be divided into three categories: accountability; legal impact; and tripartite structure.

A major criticism of the *Tripartite Declaration* concerns the confidential interpretation procedure. The interpretation procedure has the potential to clarify the *Tripartite Declaration* as situations arise, taking into account perspectives of three sectors; however, in practice the procedure is ineffective. Furthermore, the procedure provides limited relief to affected parties, in that the procedure is limited to interpreting the *Tripartite Declaration*. Perhaps the most important observation concerns the confidentiality of the procedure. As the *Tripartite Declaration* is a voluntary instrument, the only available sanction involves public perception, boycotting and shaming. The identities of corporations involved in the process are kept confidential and are therefore shielded from public scrutiny and potential embarrassment.

The *Tripartite Declaration* refers to a long list of ILO Conventions; for member-states that have ratified them, these conventions are non-voluntary. However, as the *Tripartite Declaration* is not drafted in compulsory language, the obligations it creates are not legally binding on MNEs. This language, combined with a lack of monitoring and implementation mechanisms, and limited dispute resolution creates a mere aspirational declaration without any legal mandate. Implementation of the *Tripartite Declaration* depends on states to incorporate the instrument domestically, NGOs to promote the instrument and campaign for its incorporation and MNEs to adhere to the obligations. The legal impact is further lessened by the Declaration's declaration of the primacy of national laws. Accordingly, it can be argued that the ILO is unable to prevent host states from adopting lax labour and environmental standards, and TNCs cannot be condemned for taking advantage of such standards.

While the argument could be made that the tripartite structure of the *Tripartite Declaration* is its strongest attribute, in that it articulates a role for all three parties; an argument can be made that it is also a weakness. For example, in the context of the interpretation procedure, only two of the four receivable requests passed unanimously and concludes this demonstrates how difficult it is for the three officers representing the three different parties within the ILO to reach an agreement. It is perhaps over-reaching to state commentators have criticised the Tripartite Structure as ineffective; however, in the context of decision-making, it is fair to argue that the tripartite structure creates some obstacles.

#### **2.4.2.1.3 Organization for Economic Co-operation and Development initiatives**

In 1976, the OECD published its *Guidelines for Multinational Enterprises*<sup>184</sup> as an annex to its *Declaration on International Investment and Multinational Enterprises*.<sup>185</sup> It is a set of recommendations addressed to MNEs to provide standards for 'responsible business conduct'.<sup>186</sup> The Guidelines aim to encourage MNEs to make positive contributions to the social, economic and environmental welfare in territories in which they operate.<sup>187</sup>

Originally addressing only multinationals, the 2000 review extended the scope to also cover domestic enterprises. The Guidelines are not legally binding on MNEs, however adhering states have agreed to implement and encourage corporations operating in, or from their states, to observe the Guidelines.

The Guidelines develop through principles separated by ten headings. The Guidelines are then divided into ten sections: Concepts and Principles; General Policies; Disclosure; Employment and Industrial Relations; Environment; Combating Bribery; Consumer Interests; Science and Technology; Competition; and Taxation.<sup>188</sup> Similar to the *Tripartite Declaration*, some principles have been clarified by the Committee on International Investments and Multinational Enterprises (CIIME), meaning, CIIME has interpreted how certain provisions should be understood. Unlike the *Tripartite Declaration*, clarifications “... do not modify the authoritative texts [...]”.<sup>189</sup> For this reason, the Clarifications will not be explored. The Guidelines are also supplemented by a commentary, agreed to during the 2000 Review. The Commentary explains the Guidelines and Implementation procedure but is not part of the Declaration.<sup>190</sup> The Commentary will be explored to the extent that it clarifies MNEs obligations under the Guidelines.

The Guidelines contain two foundational sections, through which the substantive sections are to be read: Concepts and Principles<sup>191</sup> and General Policies.<sup>192</sup> In neither section is MNE defined; however, like the *Tripartite Declaration*, elements of MNEs are provided.<sup>193</sup> Importantly, the primacy of national law and policy of host countries is established.<sup>194</sup> Within this framework, MNEs are given a role in economic, social and local development.<sup>195</sup> Notably, MNEs are asked to “[c]ontribute to economic, social and environmental progress with a view to achieving sustainable development[,]”<sup>196</sup> “[r]espect the human rights of those affected by their activities [...]”<sup>197</sup> and “[e]ncourage local capacity building [...]”.<sup>198</sup> Finally, MNEs and host governments are encouraged to cooperate when resolving conflicts in obligations.<sup>199</sup> The Commentary extends co-operation to a partnership in the development and implementation of policies and laws.<sup>200</sup>

The principles established in the foundational sections inform, and are further developed by, the substantive principles. The first relevant and substantive section, employment and industrial relations, focuses on worker’s rights regarding collective bargaining and representation; occupational health and safety; employee training; and reasonable notice of major changes. Although significantly less detailed, it is the human rights provision, added in 2000, which is more relevant to the discussion.<sup>201</sup>

The human rights provision consists of four short principles, prefaced by a “chapeau” referencing ‘applicable law, regulations and prevailing relations and employment practices.’<sup>202</sup>

MNEs are asked to respect worker’s rights to representation and constructive negotiation; “[c]ontribute to the effective abolition of child labour”; “[c]ontribute to the elimination of all forms of forced or compulsory labour”; and to not discriminate in employment on particular grounds, unless doing so follows government policies to promote greater equality and opportunity.<sup>203</sup>

The Guidelines do not outline more specific obligations regarding the abolition of child labour, compulsory labour or non-discrimination, nor do they direct MNEs to relevant international standards.<sup>204</sup> The Commentary to the Guidelines, however, attempts to give some meaning to the provisions and specifically directs MNEs to relevant ILO instruments.<sup>205</sup>

The remaining substantive sections establish principles primarily addressing a MNEs obligation to their own employees. Although only indirectly relevant to CSEC, the Science and Technology section is noteworthy in so far as obligations extend past enterprise employees. Like the Norms, under this section, MNEs are given a role in contributing to technological development in host countries.<sup>206</sup> Importantly, MNEs are not simply asked to share technology or use local industry in their operations, but to do so through partnerships with local universities and public research institutions and with a view to long-term development goals of the host country.<sup>207</sup> In so far as MNE activities promote educational and occupational opportunities for children and families, these obligations are relevant to preventing CSEC.

The Guidelines are supported by two follow-up mechanisms: National Contact Points (NCPs) and the Committee on International Investments and Multinational Enterprises (CIIME), and make provision for national and enterprise reporting. Adhering governments are obligated to establish NCPs<sup>208</sup> that are usually, but not always, part of a government office. NCPs promote and encourage observance of the Guidelines within the member state and ensure they are understood by domestic businesses.<sup>209</sup> Importantly, NCPs play a role in dispute settlement: they receive complaints against MNEs; make an ‘initial assessment’ and decide whether further consideration is necessary.<sup>210</sup> If an NCP decides to consider the complaint further, it will offer non-adversarial assistance to resolve the issue.<sup>211</sup> In all these duties, NCPs are required to “... operate in accordance with core criteria of visibility, accessibility, transparency and accountability.”<sup>212</sup>

Whereas there are multiple NCPs, each operating in an adhering state, there is only one CIIME, operated by the OECD. Although CIIME oversees the NCPs and may consider cases referred to it by NCPs,<sup>213</sup> it is not an appellant body, nor are NCPs and

CIIME operating in a hierarchy of authority. Unlike NCPs, CIIME has the authority to issue clarifications, not just recommendations if parties fail to resolve their dispute.<sup>214</sup> Clarifications are not judicial decisions.<sup>215</sup> Furthermore, CIIME decisions are neither retrospective in application, in that CIIME does not ‘enforce’ the Guidelines; nor are they prospective in application, in that decisions are not binding on future cases. Similar to the International Labor Office’s interpretations of the *Tripartite Declaration*, neither CIIME, nor NCPs publicly identify corporations involved in the interpretation process.<sup>216</sup>

Although the focus of the Guideline’s follow-up is dispute resolution through NCPs and CIIME, there is some provision for reporting. While the Guidelines do not articulate a specific reporting mechanism, governments and corporations are not exempt from disclosing information on their activities. NCPs report on behalf of government’s annually on their state’s progress.<sup>217</sup> For their part, corporations are asked to provide “... timely, regular, reliable and relevant information [...] regarding their activities, structure, financial situation and performance.”<sup>218</sup> MNEs are given a significant degree of flexibility, but the Guidelines outline specific information all MNEs should disclose.<sup>219</sup>

While the Guidelines were significantly improved by the 2000 Review, many weaknesses still exist. Weaknesses observed in the Guidelines have caused them to fall somewhat into disuse and have opened them up to criticisms. The majority of critics seem to focus on the Guideline’s follow-up procedures, while others focus on aspects of the Guidelines themselves. Criticisms can be broken down into three headings: voluntary vs. binding obligations; permissive and vague language; and weak follow-up procedures.

First and foremost, critics focus on the voluntary nature of the Guidelines. As with the *Tripartite Declaration* and Global Compact, corporations are not required to follow the Guidelines, as they are merely recommendations addressed to MNEs. While their voluntary nature ‘facilitated their adoption,’ the non-binding nature of the Guidelines detracts from its effectiveness. As a non-binding instrument, corporations and governments are not obligated to adhere to the guidelines; or, if they choose to observe the instrument, they may choose to adhere only to some provisions. In this way, the OECD’s goal of creating a set of recommendations for responsible business conduct is undermined; adherents may choose to observe some standards while ignoring those that pose a greater challenge.

Compounding this weakness is the fact that, like the Global Compact, the Guidelines are not universally applicable; it only addresses the global activities of MNEs based in ‘adhering states.’ Most adhering states are developed countries with fairly effective domestic laws to regulate TNC activity within their jurisdiction. In this sense, not only are the

Guidelines voluntary, but non-OECD states are not even targeted. Furthermore, adoption and adherence by a broader political, economic and social spectrum would go further to change the behaviour of MNEs.

Symptomatic of voluntary instruments is permissive language; the Guidelines are no exception. Particularly, the human rights provision where MNEs are 'encouraged' to 'respect' human rights. Not only is this provision drafted in permissive language, but the actual content of the provision is 'ill-defined.' This criticism is not limited to the human rights provision; the Guidelines, generally, "... [are] particularly vague in their enunciation of corporate [...]." For instance, enterprises are asked to take adequate steps to ensure occupational health and safety, but the Guidelines do not say what qualifies as adequate. Similarly, the child labour provision asks enterprises to contribute to the effective abolition of child labour, but does not say what activities qualify as contributing. Finally, the General Policies section uses the phrase good corporate governance without further clarifying what kinds of principles and practices this may include.

Assuming all parties do understand their duties, weak follow-up procedures undercut any value the Guidelines may contain. A 2003 report, states the OECD has "... noted sixty-four instances of alleged non-observance of the guidelines by MNCs that had been filed with NCP. This is because, according to critics, the OECD created no enforcement mechanism to go along with its Guidelines. As a result, implementation of the Guidelines depends on individual adhering states and their NCPs.

While, in general, the follow-up mechanisms have attracted some criticism, so too have the dispute and review processes in particular. In terms of the NCP dispute process, there are procedural weaknesses that have led some to be critical of the mechanism. Major concerns centre around inconsistency; there is no consistent NCP procedure providing information to third parties, making public the fact that a case has been filed, issuing statements while a matter is still under consideration, or making public reasons for not proceeding with consideration of a case. Others are concerned that a central registry of NCP complaints does not exist, there is no timeframe for dealing with complaints, transparency in decision-making is not ensured, there is no appeal of an NCP's initial decision and decisions are not enforced. Furthermore, complaints are first assessed by state representatives.

Perceived weaknesses in CIIME's dispute process have caused the process to fall into disuse. For example, the Trade Union Advisory Committee (TUAC), created in 1948 by the OECD's predecessor to provide feedback from the international labour community, has stopped bringing cases to CIIME. This may be because CIIME decisions require

consensus and/or, as they are not binding, they have little influence on corporate behaviour. In both NCP and CIIME dispute resolution, a company's identity is 'often not disclosed.' Without public disclosure, the complaints procedure has little immediate impact on the behaviour of specific companies.

While some critics focus on weak dispute resolution processes, others focus on ineffective reporting mechanisms. The Guidelines, however, do not provide any guidance as to the ways in which MNCs can measure or report their behaviour. Another criticism is that monitoring of compliance is not independent. It is true the guidelines make provision for 'disclosure of information' but this can hardly be called an effective reporting mechanism.

#### **2.4.2.2 Regulating corporate behaviour via public international law**

As the above points illustrate, there have been a number of developments in the international arena considering the role played by private industry in the protection of children's rights. Although the resulting documents are not binding, they do offer important guidelines of the possible role to be played by private sector in both protecting and promoting such rights. Clearly, CSEC falls within the ambit of all of these documents, and any involvement of children in the making or viewing of harmful material is prohibited by international law or by international policy guidelines.

Codes of conduct and global standard-setting cannot be solely relied on to ensure that MNCs behave appropriately if faced with international human rights violations, on account of the difficulty in enforcing compliance due to their voluntary nature. Perhaps the obvious solution, as implicitly implied above, hinges on the existence of an international legal regime to ensure enforcement of the voluntary codes. Mary Robinson, the former High Commissioner for Human Rights, has stated "that there is still a need for...a legal regime [to] help to underpin the values of ethical globalization." She then called for the "next phase" to be less inspirational, less theoretical and abstract, and more about keeping solemn promises made."<sup>220</sup>

In contrast to the UN Global Compact and the OECD Guidelines, whose major weakness is its voluntary nature, treaties are binding international agreements operating between states that are party to them. What makes human rights treaties particularly unique is that party states assume the obligation to protect the rights of individuals, not party to the agreement, within their respective territories or subject to the jurisdiction of the state. To the extent that international human rights law does embrace non-state actors, it does so very largely by way of holding states indirectly liable for the direct infringement of others, including corporations.

An alternative to the above is to rely upon international law for relief. Some legal commentators have argued that MNCs are caught by the reach of international law because they have international legal personality, which can be defined as an entity capable of possessing international rights and duties and has the capacity to maintain its rights by bringing international claims even though they lack state status. International jurisprudence has traditionally favoured associating the personality of an MNC more closely with that of an individual than with that of a state. This link stems, for the most part, on the presumption that there exists certain state duties that are unique and cannot be fulfilled by an MNC, such as the maintenance of public order, for example.

Transplanting human rights duties of a state onto an MNC is problematic because in so doing one must assume that MNCs are similar to states, and that is conceptually difficult to construct. For example, a state's duty under international treaty law is theoretically difficult to transplant to an MNC because economic, social, and cultural rights are not within the province of corporate activity. For example, in the criminal process, only states can ensure a person's rights through fairness of trial. Further, states and MNCs have different interests in light of human rights. States are concerned with balancing its interests versus the liberty its citizens. In contrast, for MNCs, the balance is between liberty of its individuals and business interests (profit). Thus, it is argued that it is far too simplistic to think that a transfer of human rights obligations from a state to an MNC can ever be realised. A more appropriate link would be for an MNC to assume the same responsibilities under international law as a private individual, where an MNC's responsibility need not extend beyond individual responsibility.

The difficulty with a model whereby MNCs are held to an individual rather than state standard is that MNCs possess far greater resources, and, as a result, are in a position to have a greater impact on the liberty and rights of private individuals. By way of conclusion, the duties of a private individual as applied to an MNC are too narrow while those of a state are too broad. In the absence of an alternative an attempt has been made to create a hybrid type of treaty to hold MNCs accountable for fundamental human rights obligations.



## 2.5 Transitions in the Accountability of Human Rights Norms: The shift from state responsibility to MNC obligation

### 2.5.1 Theoretical origins of human rights

In order to understand why an MNC may, in fact, have duties surrounding the human rights of the people and communities in which they operate and market their product or service, it is first necessary to briefly review the theoretical origins of human rights. Although it may seem intuitive that the human rights obligations of a population should exist only at the state level, upon further analysis it becomes clear that the existence of human rights norms and standards and their application may indeed circumvent the unilateral and rigid formulations that have been espoused within the last century.

The natural rights theory, based on the writings of Locks and Hobbes, holds that the rights of an individual are “inalienable” and “unalterable”, originating from a metaphysical source either through God or human nature. Hobbes introduced the term “right” into political philosophy as a “right of nature” stating that the right of nature is the liberty each man has to use his own power as he will himself, for the preservation of his own nature, that is to say, of his own life, and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto. Essentially for Hobbes, the state of nature presented a war of all against all, where arguably, one person has the right to take something, and the other person has the right to defend his property. In other words, everyone had the right and liberty to protect him from attack however he could.

Locke had greater faith in the civility of man and argued that natural rights stem from God’s creation of people as free and equal in the state of nature, and that, in this condition, no one is naturally sovereign over anyone else. As such, no person should harm another person’s life, liberty or possessions. “The state of Nature,” Locke wrote, “has a law of Nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”<sup>221</sup> The defender of these natural rights would be government, and any infringement of this duty would lead to its removal whereby the government has threatened the life, liberty and property of the individual.

The idea that human beings are egotistical and competitive presented itself as the foundation to many philosophical arguments in favour of securing order via political governance. This required a social contract by which members of society had to pledge allegiance to a state in return reinforcing the duty of the state to protect the rights of its citizens, as well as

freedom from state interference in their personal affairs and enjoyment of property. Thus, natural rights theory on state responsibility of human rights has been interwoven into international human rights doctrine; examples include the *English Bill of Rights* (1689), the *American Declaration of Independence* (1776), the French *Declaration of the Rights of Man and the Citizen* (1789), the first 10 amendments to the *Constitution of the US* (known as the *Bill of Rights*, 1791).

## 2.5.2 Protection from state abuses

In essence, the principles of natural rights noted above have penetrated human rights doctrine as a means of ensuring that individual rights and dignity are supported by the building of powerful defences around the private individual from state intervention. However, the natural rights doctrine is limited in so far that states and state agents are the primary focus of all international human rights law. Accordingly, violations by modern day non-state actors such as MNCs are virtually ignored. In this approach, the natural law conception of human rights operated to shield non-state actors from liability for egregious violations of human rights.

A major failing of natural rights theory, according to academics, is its inability to forgo the proposition that rights are inextricably linked to the protection of a natural person from a sovereign.<sup>222</sup> The international human rights, according to the modern social democratic approach, have evolved into a macro perspective, premised on the idea that natural persons are vulnerable in the 'social world'; meaning that individuals require protection from the "social context in which they find themselves" whether or not it is state controlled. Therefore, this theory suggests that the ability to enjoy human rights is not solely dependant on the conscious actions of the state, but is also vulnerable to systemic discrimination or structural features of social processes.

This paradigm shift from the notion that human rights is based on social realities, rather than originating from the concept that human rights only applies to protection for the individual from the state, provides greater flexibility to the international community in recognising that human rights obligations may also apply also to non-state actors and private individuals. Thus, the social democratic approach makes sense today since states are no longer considered to be the sole threat to human rights. Globalisation and the rising power of non-state actors have introduced a shift in influence and, arguably a new source of control over the lives of many private individuals by widening the disparity between rich and poor, and the haves and have-nots. To prioritise circumscription of state power and leave the individual defenceless to the vicious non-state actor would render the very concept of human rights superfluous and virtually nugatory.

Therefore, the theoretical issue is whether social groups, corporations and other commercial entities could be held accountable for human rights abuses. Perhaps it is not surprising that prior to globalisation this question escaped the critical minds of natural rights philosophers. However, today, given the modern social democratic approach, it is understandable that the international community is shifting its attention away from the strict traditional approach to the enforcement of human rights obligations to other entities capable of similar violations.

Perhaps the best example to illustrate this move is the UDHR itself, the primary international articulation of the fundamental and inalienable rights of all natural persons, which places an obligation on “every individual and every organ of society”. The Declaration has assumed the status of customary international law since many of the rights included therein are fundamental rights that states are obligated to follow in accordance with the UN Charter. The Declaration ultimately suggests a movement within the international human rights system towards the recognition of private party accountability.

The wording of the Declaration and other UN texts provide a catching mechanism for non-state actors that prevent them from escaping the purview of international law, and therefore infers direct responsibility for human rights violations. The question is, to what extent are non-state actors accountable for human rights violations which are traditionally considered under the ambit of the state, and therefore only enforceable against the state in international law?

### **2.5.3 Abuses by individuals of the state – Post World War II**

Traditionally, only states were held accountable for violations of international law, regardless of whether the condoned act was prohibited through an international agreement or through customary international law.<sup>223</sup> This includes accountability for acts of genocide, summary execution, slavery, and torture.

This evolution can be traced back to the Nuremberg War Crimes Tribunal at the end of the World War II, where the Court articulated that violations of international law need not be confined to the exclusive realm of the state. Rather accountability extends to private individuals; “[I]nternational law imposes duties and liabilities upon individuals as well as upon states has long been recognised....[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced...”<sup>224</sup>

During the Nuremberg Tribunals, German soldiers were held accountable for their participation in the genocide of Jewish prisoners. Their claim that they were acting under orders and in the interest of the German state was given little weight in light of egregious violations they had committed on the Jewish population. Accordingly, the events leading out of the Nuremberg trials incorporated non-state actors into the international legal system. It led to the recognition that states, as well as private individuals, had an obligation to international human rights law and could not escape liability for certain acts considered repugnant to human nature.

The proclamation made at the Nuremberg Tribunals was certainly encouraging for human rights activists seeking private individual accountability for violations of international human rights. However, as noted below, domestic courts for a period were reluctant to adjudicate international human rights cases involving strictly private individuals, unless it was found that some degree of state involvement existed. This approach changed somewhat more recently, where a US federal court found that in limited circumstances a strictly private individual could be held liable for international human rights violations.

#### **2.5.4 Abuses by “citizens”**

In the US, courts are permitted to litigate civil claims for violations of international human rights norms through a two-century-old piece of legislation called the *Alien Tort Claims Act* (ATCA).<sup>225</sup> This legal vehicle is designed to hold private parties accountable for international human rights violations, and has been a useful tool for private individuals wronged in tort (or civil wrong) by the conduct of MNCs.<sup>226</sup> ATCA provides that federal subject matter jurisdiction exists when three conditions are satisfied: first, an alien must sue, second, the matter involves a tort and third, the tort was committed in violation of international law or a treaty of the US. Moreover, what makes ATCA particularly significant is that other common law countries have attempted to enact similar statutes, yet none have been successful.

If the test is examined, the following points can be noted. A violation of a US treaty is self-explanatory. Defining a tort violation in the realm of international law is more complicated. A tort claim arising out of international law would not necessarily arise out of an expressed agreement between states. Rather it may develop pursuant to “the evolution of state behaviour and attitude”, or what is more commonly referred to as customary international law. Moreover, whereas customary international law permits derogation of a norm by treaty, a *jus cogens* norm, on the contrary, does not permit such derogation of a norm to occur. Though *jus cogens* norms appear limited, they include the more egregious crimes

of genocide, torture, crimes against humanity, slave trading, and piracy. Therefore, ATCA will adjudicate violations of *jus cogens* norms, or more broadly, violations of customary international law.

ATCA, which only saw use 21 times prior to 1980, was revived by the CCR in New York in *Filartiga v. Pena-Irala*.<sup>227</sup> The *Filartiga* case is significant for not only dusting off ATCA and giving it renewed significance but also for establishing that the United State's federal courts have jurisdiction to hear civil actions in tort for violation of the law of nations occurring outside of the US by non-US citizens. The case also recognised that through various international sources, such as the UDHR, the UN Charter and several of other UN resolutions, torture offends customary international law.<sup>228</sup> Finally, *Filartiga* declared that customary international law and *jus cogens* norms are constantly evolving in sync with the ever-changing social context. In this regard, the judges noted, “[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today”.<sup>229</sup>

*Filartiga* involved the kidnapping, torture and wrongful death of Joelito Filartiga, the seventeen-year-old son of Dr. Joel Filartiga in Paraguay, by Americo Norberto Pena-Irala (Pena), who was at the time of the incident Inspector General of Police in Asuncion, Paraguay. Dr. Filartiga was an active opponent of the government of President Alfredo Stroessner, which had held power in Paraguay since 1954. The Filartigas claimed that Joelito was tortured and killed in retaliation for his father's political activities and beliefs.<sup>230</sup>

The sister of the deceased, Dolly Filartiga, brought an action before the US district court for the torture and death of her brother against Pena while both were resident in the US and both were Paraguayan citizens at the time. On appeal the US Court of Appeals for the Second Circuit found that the defendant Pena, while acting under the authority of a state agent as Inspector General of Police, had violated customary international law against state-sponsored torture and was liable under the ATCA.<sup>231</sup>

Since *Filartiga*, the application of ACTA to various international human rights cases brought before the US federal courts by foreign nationals is a tremendous breakthrough in international human rights law, as the US has provided a forum through which such violations can be heard before a federal court. Moreover, since *Filartiga*, courts through ATCA, have recognised and articulated a broad range of categories of violations of international law. Courts have recognised torture, forced abduction, summary execution, and genocide, as violations of customary international law when acted upon by a state actor.

ATCA expanded liability for international human rights violations once again in the case of *Kadic v. Karadzic*<sup>232</sup> by building upon the court's decision in *Filartiga*. *Kadic* marked the first time that private individuals need not act under colour of law to be held liable for violations of international law. In *Kadic*, the plaintiffs, Croats and Muslims, brought suit against Radovan Karadzic, President of a self-proclaimed and internationally non-recognised Bosnian-Serb Republic known as Srpska, located in Bosnia-Herzegovina. The action was for carrying out various human rights atrocities as part of a genocidal campaign while commander over the Bosnian-Serb military forces during the Bosnian civil war. The plaintiffs argued that Karadzic operated in an official capacity as the head of Srpska or in collaboration with a recognised government.

The District Court held that it lacked jurisdiction to apply ATCA on the grounds that private actors are not liable for certain violations in international law and that Srpska was a non-recognised state. However, on appeal, the Second Circuit reversed the lower court decision declaring that certain international violations of human rights law embedded in *jus cogens* did not require state action. The Court examined the allegations by the plaintiffs of genocide, war crimes, and other instances of inflicting death, torture, and degrading treatment, to determine if these violations fell under the sphere of *jus cogens* norms, and were thus subject to ATCA against non-state actors. The Court of Appeals found that, in particular, genocide and war crimes were recognised as *jus cogens* norms under international law and thus may be violated by both state and non-state actors. The court held that, “[We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”<sup>233</sup>

### **2.5.5 Abuses by MNCs**

Following advancements in *Filartiga* and *Kadic*, the seminal case of *Doe v. Unocal Corp.*<sup>234</sup> marked the first time that an MNC was to defend itself under the ATCA for human rights violations committed overseas by foreign government business partners. Unocal was involved in gas extraction and construction of a pipeline destined to Thailand that passed through a small farming community in Myanmar despite the opposition of its inhabitants. The project was coordinated via a joint venture between the governments of Thailand and Myanmar, a French oil company, Total S.A., and the California based energy company Unocal. In 1996, a class action suit was filed by fourteen Myanmar farmers on behalf of a class of thousands of Myanmar residents affected by the gas development project in the Federal District Court for the Central District of California against the joint venture, through the ATCA.

The plaintiffs alleged various violations of *jus cogens* norms including: crimes against humanity, forced labour, torture; violence against women; arbitrary arrest and detention; cruel, inhuman or degrading treatment; wrongful death; battery; false imprisonment; and assault, all perpetrated by the Myanmar military. The California District Court granted Unocal's motion for summary judgment against all of the plaintiffs' claims because it did not find that the plaintiffs had "successfully shown that Unocal had 'actively participated' in the forced labour." Following dismissal on summary judgment, the plaintiffs appealed to the US Court of Appeals for the Ninth Circuit.

A three-judge panel of the Ninth Circuit reversed the District Court's decision and found that Unocal could indeed be held directly liable for aiding and abetting the Myanmar military in committing violations of international law through forced labour and other abuses. The Court further defined forced labour as constituting a violation of customary international law and therefore sufficient to confer jurisdiction under the ATCA. The Court then proceeded to cite *Kadic* to explain that under the ATCA, proof of state action is not required in specific situations where private actors could be found liable for violations of *jus cogens* norms.

[The Ninth Circuit] determined forced labor was the modern day equivalent of slavery and, therefore, a violation of a *jus cogens* norm ... the court did not find proof of state action was required in proving acts of murder and rape because these acts were committed in furtherance of forced labour, a *jus cogens* norm ... Thus the international norm of individual responsibility was held to extend to MNCs.<sup>235</sup>

Accordingly, this marks the first case to provide guidance in regards to approaching violations committed by MNCs. In *Unocal*, Judge Lew, speaking for the majority, suggested that, "assuming a corporation is subject to personal jurisdiction in the US, it may be liable for (1) its own violation of international law, and (2) those violations committed by its partners in a joint venture, including foreign governments." For this case Judge Lew ruled that Unocal's actions did not rise to the level of liability, however Judge Lew's ruling did not foreclose the possibility that ATCA could successfully be used against corporations in future lawsuits.

The *Unocal* decision was viewed as a major advancement for human rights activists who have long desired to advocate against MNCs but who were frustrated by the lack of legal avenues available for adjudicating MNC human rights violations. Accordingly this case provides a warning to MNCs for their actions in foreign jurisdictions that result in human rights violations in which they or their subsidiaries commit.

Pursuant to the holding in *Kadic* regarding private party liability of violations of international law, it is most likely that success of any action brought against an MNC will depend on whether a violation would offend a *jus cogens* norm, such as piracy, war crimes, genocide, crime against humanity, and slavery, which also includes forced labour.<sup>236</sup>

On December 2004, Unocal announced that it would settle, in principle, the alien tort litigation alleging complicity in human rights abuses over the building of the pipeline. Although welcomed by the international human rights community, the settlement does not provide an opportunity for the high courts to explore MNCs' liability under ATCA, and thus falls short of resolving any uncertainties that remain especially with regards to ATCA's position on corporate aiding and abetting.

## 2.6 Future Claims

Norms embedded in the international legal landscape are also binding on private individuals and MNCs alike. Accordingly, the international legal system has gone through an evolution, *per se*, by conferring certain rights and duties on supranational institutions insurgent rebel groups, individuals and corporations.

Despite the advancements that have been made in law to hold individuals and other entities accountable for violations of human rights standards, the current mechanisms for applying the law have limitations that have not yet been resolved either by court judgments or by policy decisions. As a result, the success of any future claims is unpredictable.

### 2.6.1 MNC violations in concert with the state

Although successes under the ATCA can be noted, there remain limitations in its application to hold MNCs liable for international human rights violations. First, the likelihood that the ATCA will apply to MNCs seems more probable in cases where the plaintiff can prove that the MNC was working in concert with an offending state with assistance, for example via military or police support as a source of security. For example, *Kadic* articulated that private individuals are more likely to be found liable under the ATCA if they act together with the state or state official, or if the private individual offends a *jus cogens* norm.

In terms of enforcement of the law of nations, the most facile means of avoiding the state actor requirement imposed by federal courts in ATCA litigation is to allege a violation of the *jus cogens*. Actions brought against private individuals before a US federal court



must be a recognised violation of the “law of nations”. It is false to assume that the ATCA catches MNCs for violations of human rights abuses which are outside the realm of *jus cogens* norms or customary international law.

## 2.6.2 Laws of Nations

A violation characterised as a *jus cogens* norm is far more limited on account of the narrow scope of international human rights violations that are caught within its meaning. Accordingly, courts have yet to accept certain human rights violations as *jus cogens* norms, such as terrorism, restrictions on freedom of expression, forced prison, environmental damage, cultural genocide, and labour violations. The US Supreme Court in *Sosa v. Alvarez-Machain*<sup>237</sup> recently addressed this challenge faced by practitioners and victims alike. The Court affirmed that the ATCA will only entertain violations of international law covered under the ambit of customary international law and that Congress had not intended to confer upon the ATCA power to designate *jus cogens* status to flagrant abuses of human rights beyond those already accepted as norms under customary international law.<sup>238</sup>

[The ATCA], pursuant to which the district courts “have cognizance...of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States,” is [a] jurisdictional statute, in [the] sense that it only addresses power of courts to entertain certain claims and does not create statutory cause of action for aliens.<sup>239</sup>

In light of this, MNCs operating separately from a state could indeed use the limits of *jus cogens* as a shield against accusations of international human rights violations not recognised by international law.

## 2.6.3 Forum Non-Conveniens

The common law principle of *forum non conveniens* can be considered as another limitation of the ATCA. The successful application of the ATCA relies on the premise that a US federal court has legal authority over the defending MNC (e.g. “personal jurisdiction”). Borrowed from the principles of private international law, the issue of appropriate jurisdiction gives a court discretion to refuse to hear a case where it may be more appropriately tried in some other forum, in the interests of all the parties and of justice. Immediately a plaintiff is faced with its first obstacle: proper jurisdiction is determined on the contacts the defendant has with the state that seeks to exercise the jurisdiction.

The Court could establish jurisdiction where the contacts exist between where the action is being litigated and the place of incorporation of the MNC. However, by virtue of the nature of an MNC, establishing jurisdiction is problematic, given the likelihood that an MNC is composed of subsidiaries that are incorporated in various other states. Thus, the defending parent company could argue *forum non conveniens* that parents and the subsidiaries are not subject to the jurisdiction of the other's home state.

The common law principle of *forum non conveniens* is historically well established and the standard test was set out in the House of Lords decision of *Spiliada Maritime Corporation v Cansulex Ltd.*<sup>240</sup>

In order to justify a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.<sup>241</sup>

For example in *Doe v. Unocal*, in answering the question of jurisdiction over Total S.A., the French oil and gas company and member of the joint venture with Unocal in Myanmar, argued *forum non conveniens* in favour of French jurisdiction, and the US District Court agreed. In other words, Total S.A. was successful in convincing the Court that some other forum was more convenient in the sense that it was more suitable or appropriate for the ends of justice.

The decision of the District Court was made despite Total's subsidiary holding companies in California, or Total's subsidiary holding companies in the US with substantial California contacts. Therefore, to be effective, domestic regulation must recognise the 'reality of economic interdependence' or MNCs will continue to avoid regulation in domestic legal systems.

As stated in *Spiliada*, *forum non conveniens* is premised on two overarching themes: One, determining the more appropriate forum; and two, the most likely forum that would yield a just result. However, arguably, the principle affords the courts a considerable amount of discretion in the application that by no means is predictable. Rather, some test cases have resulted in some puzzling conclusions.

For example, *Jota et al. and Aguinda et. al. v. Texaco*, was a consolidated appeal of two dismissed class actions filed against Texaco under the ATCA for the negligent operation

of its oil and gas operations in Ecuador, which appeared before the New York Court of Appeals.<sup>242</sup> The Court dismissed the case based on *forum non conveniens*, this despite Texaco's headquarters being in New York, and the Court found that a decision by the Ecuadorian Court would be more appropriate. This decision was made despite a submission by the US Department of State suggesting "the legal and judicial systems in Ecuador as 'politicized, inefficient, and sometimes corrupt' with regard to human rights practices".<sup>243</sup>

The application of the ATCA against MNCs like Unocal is no doubt inspirational to the human rights community. However, in light of the obstacles a plaintiff may face, predictability and certainty in the application of the ATCA to MNCs is by no means a guarantee. Actions brought under the ATCA against MNCs for human rights violations appears to be hinged on proving direct negligence of the parent company, instead of establishing its responsibility for the torts committed by its subsidiaries.

## 2.6.4 Jurisdiction beyond the United States

In the absence of the ATCA, or some other domestic piece of legislation that closely resembles it, violations of international human rights norms are more commonly dealt with through conflict of laws rules. This branch of private international law requires courts adjudicating on issues involving a foreign element, to first satisfy the condition that it possesses jurisdiction over the parties and the subject matter of the action. Once a court has satisfied itself of this, the next step is to ascertain the legal nature of the question which requires adjudication, also referred to as choice of law, in order to apply to the appropriate conflict of laws rule to it.

### 2.6.4.1 Jurisdiction – choice of venue

Judicial jurisdiction in the context of conflicts litigation is the power and authority of a court to hear and determine an issue upon which its decision is sought in any case involving a foreign element. Therefore, common law courts have adopted the approach where jurisdiction is found when the defendant either submits to the jurisdiction, or is personally served within the forum. The latter requires the court to successfully establish a connection (e.g. "minimum contacts") between the defendant and the forum state hearing the action. A major consideration is whether the court is the convenient forum, whereby a court can refuse jurisdiction on the grounds of *forum non conveniens* where there exists a more appropriate jurisdiction to hear the case than the one chosen by the plaintiff.

If a defending MNC in an action in tort for an international human rights violation raises the *forum non conveniens* argument, victims of human rights abuses pursuing the action via international rules of jurisdiction, instead of domestic tort laws such as the ATCA, will

likely come across similar obstacles as case law demonstrated above. However, there is still hope for victims or survivors of violations. Case law in England suggests that courts may be willing to set aside the issue of contacts and assume jurisdiction based on achieving a “just result” for the plaintiff.

In the House of Lords decision of *Lubbe & Others v. Cape Plc*, the Court denied the defendant’s claim of a stay of proceedings on grounds of *forum non conveniens* in England.<sup>244</sup> The case involved an action against an English parent company on behalf of a class of South Africans, alleging that the defendant was negligent in causing injuries resulting from asbestos poisoning by a South African subsidiary. Accordingly, the House of Lords maintained personal jurisdiction over the defendant despite stronger contacts between the defendant and the South African courts. The House of Lords argued that pursuant to public interest, the post-apartheid government was at that moment incapable of properly hearing the case, and thus granting a stay of proceedings would lead to a denial of justice to the plaintiffs.

The House of Lords reached a similar conclusion in *Connelly v. RTZ Corp Plc* where the plaintiff brought an action before an English court for injuries caused by the negligence of an MNC.<sup>245</sup> The defendant MNC argued that the proceedings should be stayed on grounds of *forum non conveniens*. In this case the plaintiff, a Scottish engineer, brought a suit in the English Courts alleging that he had contracted cancer of the larynx because of the negligence of the defending parent company while working in a uranium mine in Namibia.<sup>246</sup> The case hinged on the issue of whether the plaintiff was able to secure appropriate financial assistance where he would be covered in the UK since in Namibia there exists no source of legal aid. The House of Lords rejected the defendants’ application to have the action dismissed on basis of *forum non conveniens*, on the grounds that acquiring financial assistance in Namibia would be too onerous on the plaintiff, and the case could potentially not be heard. Lord Geoff for the majority stated,

The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.<sup>247</sup>

The examples above illustrate there has been a trend, at least in England, on the liberalisation of finding jurisdiction where the application appears split between determining the most appropriate forum and determining which forum would yield a just result.

#### 2.6.4.2 Choice of law

Assuming the question of jurisdiction is answered in favour of the plaintiff, answering the next question on choice of law presents itself as less of a burden. If a private individual wishes to bring an action in tort against an MNC, case law suggests that the law to apply is the “the law of the place where the tort was committed”, or more commonly referred to as *lex loci delicti*.

Phillips in *Eyre* provided the traditional common law rule where a plaintiff could bring a tort in a foreign jurisdiction granted that it is recognised as a tort by the court, as well as a tort in the place where it has occurred. Referred to as the ‘double-actionability rule’, it was particularly difficult for the plaintiff having to satisfy two jurisdictional requirements.<sup>248</sup> This would be problematic in jurisdictions that fail to legally recognise the specific tort at issue, and vice versa. Accordingly, common law jurisdictions were quick to abandon this rule. For example in Canada, the law was changed in 1994 in *Tolofson v. Jensen*, the court adopts the *lex loci delicti* rule that states that, as a general rule, “the law to be applied in torts is the law of the place where the activity occurred”.<sup>249</sup>

## 2.7 Conclusion

The legal community has taken great strides in ensuring MNC accountability for international human rights violations through the use of various legal vehicles, ranging from internal and external corporate codes of conduct to domestic and international human rights regulations. However, while the legal mechanisms discussed in this paper may suggest the possibility of successfully ensuring human rights accountability of MNCs, their effectiveness is limited on the basis that an MNC violation must satisfy certain specific conditions in international law.

Moreover, regulating the actions of an MNC has proven to be a challenge because as the name “multinational” suggest, they are capable of outgrowing the legal systems that govern them. Thus, MNCs continue to have a high degree of flexibility in terms of their international conduct, and have arguably been successful for the most part in manoeuvring beyond the reach of existing legal vehicles responsible for controlling human rights behaviour.

A new paradigm must therefore be created. This new model must overcome the various obstacles discussed throughout this section. Namely, the inadequacy of corporate codes of conduct in controlling the behaviour of MNCs, due to ineffective means of monitoring and enforcement; the limited scope of actionable human rights claims against MNCs

recognised by customary international law and *jus cogens* norms; and finally the challenges before the court in establishing personal jurisdiction over an MNC defendant in light of *forum non conveniens*. This will be revisited at the conclusion of the paper.

### 3. Travel and Tourism Sub-Sector

Within the private sector the travel and tourism sub-sector has clearly taken the lead towards eliminating CSEC. At the First World Congress, the travel and tourism industries were well represented and their delegates introduced several high profile agreements and resolutions. In the years since, many new initiatives have been further developed. Despite this trend there is still concern among child advocacy groups and law enforcement agencies that not enough is being done by this group to monitor and report instances of child abuse.

In 2001, the first comprehensive report on the issue of sex tourism was completed by a research firm based in France called Groupe Developpement. The report provides an overview of the state of the global campaign against child-sex tourism.<sup>250</sup> ECPAT International commissioned the report called *Child Sex Tourism Action Survey* in response to concerns that activities on the issue following the First World Congress demonstrated a lack of progress in the area. Worldwide surveys were conducted on child-sex tourism with the objective of using this information to develop a strategy to further promote its elimination. Analytical studies were conducted both on the outputs of the tourism industries, identifying “best practice models”, and on the implementation of non-government initiatives.

A number of tasks are articulated in the report, including, *inter alia*: development of a tool to quantify the volume of child-sex tourists; design of a methodology to monitor child-sex tourism arrests and convictions; assembly and circulation of best practices; creation of support or assistance programmes for partners in Asia, Latin America and the Caribbean working to end sex tourism in their regions; and establishment of an information and training programme in cooperation with the North American tourism industry.

The report identifies sectors involved in child-sex tourism and highlights some of the work that remains to be tackled. The report notes that children are procured for sex through various means. Implicated industries and individuals include hotel staff, taxi drivers, transport terminals, panderers, brothels and escort agencies, and sidewalk agents. It is further noted that CSEC takes place in many locales, including hotels, guest houses, holiday flats, parents’ homes, brothels and public places; hotels however are the prime scene of CSEC, accounting for 93.3 per cent of incidences.<sup>251</sup> The report states that there is a division between formal and informal sectors in this area, and that further research is needed to distinguish between the two and to identify the unique areas of each needing to be addressed.

The report draws together a number of important observations. Following the worldwide study, the authors were able to enumerate a number of effective actions against CSEC within the travel and tourism sub-sector. In identifying strengths and shortcomings of these various initiatives, and recognising gaps where no CSEC projects have been undertaken, the report investigates further areas to promote protections. The report concludes that, while a great deal of important work has been done, there is much remaining, particularly in the areas of education and training. Guidelines are proposed to enhance awareness, and the creation of an international database is recommended. The report also recommends that organisations working against CSEC advance their understandings of, and participation in, technological developments.<sup>252</sup>

### 3.1 The Trade

The term “travel and tourism” has been widely used in discussions surrounding CSEC, yet no one definition outlines the entire scope of the trade. The sub-sector decisively includes travel agents, tour operators, airlines and hotels, but it may also involve travel wholesalers, excursion companies, bars and nightclubs, restaurants, bus companies, train carriers, local security officers, etc. While some of the industries are easier to identify than others, and therefore easier to control using traditional legal models, all individuals within the sub-sector have at minimum a moral obligation to protect children from possible harm caused by their services. Recently, some MNCs have admitted such. Accor<sup>253</sup> implemented a “best practice” model in which it works with child advocacy organisations such as ECPAT International. Since Accor is not required by legislation or by their shareholders to enter into this agreement, this corporation is a good example of business acting upon its moral obligation. Recognising that they are working in an industry that facilitates the commercial sexual exploitation of children, senior management have taken it upon them to aid in combating the phenomena even if it means turning away dollars from potential sex tourists.<sup>254</sup>

It must be remembered that the travel and tourism sub-sector is merely a large group of employees. One study suggests that one of every 16 workers worldwide is employed in the feeding, lodging, entertaining or transporting of guests.<sup>255</sup> In 2003, there were 38.7 million workers in Asia and the Pacific alone who worked directly in the industry and 76.1 million who worked indirectly.<sup>256</sup> As such, more than the businesses, the individuals themselves must play a role in helping eliminate the exploitation of children. Any response or measure developed by an organisation or association will only be effective if the people who work within the structure know about the programmes and believe in their objectives.



Often the travel and tourism industries take advantage of an uneducated work force by paying low wages, giving them unfavourable hours and offering no benefits. Further, the seasonal aspect of tourism and political unrest often results in lay-offs for many employees in a cyclical manner, resulting in a high rate of turnovers. The problem is compounded by the fact that there is a labour surplus for low-skilled jobs and a shortage of personnel for mid- to high-skilled jobs, which explains why management jobs are reserved for outsiders. These factors, along with a lack of education and training, result in low job satisfaction by employees and frustration with “management”. As well, employees will not have a genuine interest in their jobs and will not take initiatives to learn about the field they are working in because their job is unstable and the probability of upgrading their position is low.

In order to improve this trend in the travel and tourism industry one obvious solution is for employees to be better trained. There is a lack of educational initiatives however, due to various factors, such as inadequate language proficiency. Another challenge with training is that there are no standards or enforcement provisions.

The rights of employment within the tourism industry were recognised in a tripartite regional meeting held by ILO on Employment in the Tourism Industry for Asia and the Pacific in 2003. Government delegates, employers and workers exchanged opinions on social and employment trends within the industry. The meeting not only reviewed working conditions, human resource development and employment creation, but it also touched upon sexual exploitation of young persons in the context of tourism and standard training and qualifications. One conclusion from the meeting was that supporting the rights of the travel and tourism work force may actually contribute to the protection of the rights of children with whom their employees may come into contact.

## **3.2 Cross-Border Initiatives**

The World Tourism Organization (UNWTO) is the only intergovernmental organization that serves as a global forum for tourism policy and issues. Its members include 154 countries, seven territories, as well as more than 300 affiliate members from the public and private sectors. Established in 1947, UNWTO’s predecessor was the International Union of Official Travel Organizations (IUOTO), which was based in Geneva. IUOTO was transformed in 1975 in an intergovernmental organization, which took the name of World Tourism Organization (WTO). In 2003, the WTO became UNWTO, a specialized agency of the UN. The structure of the UNWTO contains a General Assembly, an Executive Council, six Regional Commissions, numerous technical Committees and a Secretariat. The UNWTO’s mission is to promote and develop tourism as a significant

means of fostering international peace and understanding, economic development and international trade. Encompassed in its mandate, the UNWTO aids developing countries with fundamental tasks pertaining to tourism by creating development projects. The UNWTO acts as a liaison between authorities and organizations, it collects international statistics on tourism arrivals and receipts, develops tourism education programmes, carries out studies and research on market competitiveness and sustainable tourism development, organizes conferences, seminars and workshops, and its resource centre is a reliable source of information with its publications. As well, the UNWTO provides the industry workers with education, training and knowledge about tourism and related issues. In October 1999, the UNWTO General Assembly adopted a new *Global Code of Ethics for Tourism*.<sup>257</sup> Article 2, paragraph 3 of the documents outlines:

The exploitation of human beings in any form, particularly sexual, especially when applied to children, conflicts with the fundamental aims of tourism and is the negation of tourism, as such....it should be energetically combated....and penalised without concession by the national legislation of both the countries visited and the countries of the perpetrators.<sup>258</sup>

Governments representing the countries that support the *Global Code of Ethics* have agreed to pass stricter laws and controls over the private sector to ensure that children within their borders are protected from harm that can occur as a result of abetting or ignoring violations. Private members of the UNWTO who back the initiative have agreed to meet the demands of the Code imposed on them and their particular industries. In 2004 and 2005, the Secretariat of the UNWTO carried out an extensive survey among its membership in order to assess the degree of implementation of the *Global Code of Ethics*. By July of 2005, 94 member states responded to the survey. Overall, 68 countries, 72% of the respondents, had indicated that they had either incorporated the principles of the Code into their legislative texts or have used them as a basis when establishing national laws and regulations. However, the responses did not include any information regarding which provisions had been used or which legal instruments had included the principles of the Code.<sup>259</sup> A new Global Survey on the implementation of the *Global Code of Ethics* was launched by the UNWTO in September 2008, whose findings are not yet available.

In cooperation with ECPAT International, and inter-governmental organizations such as UNICEF, Interpol, UNESCO and the ILO, the UNWTO has also launched an International task Force for the Protection of Children against Sexual Exploitation in Tourism, an action platform initiated in 1997 after the First World Congress. The aims of the Task Force are to prevent, uncover, isolate and eradicate the exploitation of children in sex tourism. The Task Force holds two annual consultative meetings with governments, the

tourism industry, NGOs and the media. Each of these two annual meetings, is organised around a specific thematic issue related to the prevention of the sexual exploitation of children in tourism: for example, in 2005, the Task Force held a meeting on the role of the hospitality industry in the prevention of sexual exploitation of children in tourism. In 2004 a meeting was convened on the role of the travel media in the prevention of sexual exploitation of children in tourism, and in 2003 the meeting examined legislation and law enforcement initiatives for prevention of sexual exploitation of children in tourism. The Task Force programme has also designed and implemented an international logo campaign, “Protect Children from Sexual exploitation in Tourism”, to create awareness and sensitivity to the issue of child sex exploitation and for use by businesses to demonstrate their commitment to eliminate CSEC. The Task Force’s on-line service, the “Child Prostitution in Tourism Watch”, is a website which provides information on current projects and activities, partners’ tourism policy documents, national and regional actions, numbers of emergency hotlines, national legislation against sexual exploitation of children in tourism, a network of focal points in national tourism administrations, related facts and figures and other measures to help prevent exploitation of children in and through tourism networks. The Website is hosted by the UNWTO itself.

Many international private sector “umbrella organizations” have developed charters and passed motions at Directors’ meetings to control or regulate their membership. The Universal Federation of Travel Agents’ Associations (UFTAA) has developed a Child and Travel Agents’ Charter and over 100 member countries have adopted it. A unique feature of this is the follow-up mechanism that requires its members to assist organizations that restore the dignity, physical and mental health of the victims of CSEC.<sup>260</sup> Similarly, the International Federation of Tour Operators (IFTO) has developed a *Code of Operation against the Sexual Exploitation of Children*.<sup>261</sup> In 2003, the Federation of Tour Operators (FTO) formed a Responsible Tourism Committee, which signed a “Statement of Commitment” to initiate responsible tourism practices and to support and help ECPAT in developing guidelines for tour operators.<sup>262</sup> The Federation of International Youth Travel Organisations (FIYTO) has passed a resolution to combat child-sex tourism,<sup>263</sup> as has the International Federation of Women’s Travel Organizations (IFWTO).<sup>264</sup>

Travel agents and tour operators are not the only industries to hold meetings and draft protocols related to CSEC. Immediately prior to the First World Congress, the International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF/UITA/IUL) adopted a “Resolution on Prostitution Tourism”<sup>265</sup> and following the Stockholm meeting the International Air Transportation Association (IATA) drafted “Resolution Condemning Commercial Sexual Exploitation of Children”.<sup>266</sup> The International Hotel and Restaurant Association (IH&RA) adopted

a resolution, as well, in which it “recommends that all members....consider measures to prevent the use of their premises for the commercial sexual exploitation of children [and] prevent ease of access to child prostitution or child pornography”.<sup>267</sup>

Although all charters and resolutions should be considered positive steps in the effort to combat CSEC, they are voluntary in nature. If a member chooses to ignore the resolution, at worst it will be disassociated. Further, the language in these texts is often drafted after intense negotiations with multiple partners, including both trade unions and management. As a result, many of the words chosen are not as forceful as they could be. For example, terms such as “encouraged” and “recommended” permeate the literature distributed by these international networks, rather than phrases such as “must” or “required”. As well, these charters and resolutions can only target very precise forms of CSEC, such as those perpetrated by members of large organisations or networks. Finally, it is important to note that these obligations are very difficult to monitor.

### 3.3 Regional and National Programmes

As outlined above, the international travel and tourism industry has concentrated its efforts to combat CSEC in its own environment by educating its regional and national members and offering them guidance as to how they can contribute to the fight. In turn, there have been many projects undertaken at the local level that have met with positive results.

A series of successful initiatives have been generated by European travel organisations. The Group of National Travel Agents and Tour Operators Association within the European Union (ECTAA) passed a “Declaration against Child Sex Tourism” in which groups committed themselves to excluding “without delay” any member proven to be engaged in sex tourism.<sup>268</sup> In 1997, the Confederation of the National Associations of Hotels, Restaurants, Cafés and Similar Establishments (Hotrec), based in Brussels, voted positively on a “Declaration against the Sexual Exploitation of Children”.<sup>269</sup> The Hotrec declaration is unusual as it states “regret” for the use of the term “child–sex tourism”: “[The expression] is highly damaging to the image of the tourism industry. Such crimes occur because of child sex abusers and, unfortunately, they occur in all sorts of circumstances which are not related to tourism activities”.<sup>270</sup>

National governments have also been instrumental in assisting or mandating private enterprises in the tourism industry to address the issue of CSEC. In 1999, the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions issued a “Communication on the Implementation of Measures to Combat

Child Sex Tourism”. Apart from the practical interest of identifying concrete elements in response to the problem of CSEC, the main purpose of the Communication is to “provide a reference framework for community action on combating child-sex tourism”.<sup>271</sup> The Communication outlines many successful partnerships between European private companies and the non-profit sector, including a video campaign by Terre des Hommes and Lufthansa, and a luggage tag initiative with European tour operators. The Department for International Development and the Foreign and Commonwealth Office of Britain has also undertaken several joint initiatives with local travel agents and travel training companies, as well as recommending the introduction of a tourism industry code of conduct.<sup>272</sup>

The European Commission has conducted several important studies on regional measures taken to combat child-sex tourism. In the Communication noted above, the Commission provides the results of a survey it conducted on Europeans’ views on the phenomena of sex tourism. The report provides many statistical outcomes from the research it had undertaken, including the fact that 63 per cent of Europeans think the problem is “widespread”. The report concludes that there is one obvious consequence to these results, the need to step up efforts to find tangible responses to the concerns clearly expressed by European citizens regarding the perversion of tourism which child-sex tourism represents. Organisations working in the EU have found this “Eurobarometer” on child-sex tourism to be useful as a reference tool in various situations, such as negotiating with tour operators and other representatives of the travel and tourism industry for tighter regulation of their businesses.

Several countries have independently adopted national codes or programmes for their travel and tourism industries. The most comprehensive code of conduct for tour operators was first developed in 1998 by ECPAT Sweden. ECPAT Sweden had requested input from a number of organisations that would be affected by such a code. These included UFTAA, ECTAA, UNWTO, ECPAT national groups and Scandinavian tour operators. Following a collaborative process in finalising the document, a number of “compliance contracts” were then signed with the travel industry. Such contracts represent 95 per cent of the Swedish travel market, and 75 per cent of the Nordic market. In November 1999, Germany and Austria joined the coalition. In January 2001, Italy, the Netherlands and the United Kingdom also agreed to participate. By 2005, a total of 241 companies from 21 countries had signed the Code.<sup>273</sup> Funding over the period 1999-2004 was provided by countries’ respective governments and from the European Commission. As of October 2008, there are 989 companies, from 34 countries, implementing the Code in 53 countries in Europe, North and Latin America, Asia and Africa. Although, since August 2004, UNICEF also joined the project as a co-funder, there is strong support for the view that financing should come from the tour operators as well.

The Swedish document was originally designed only for tour operators in Scandinavia but has since been accepted and renamed the *Code of Conduct for the Protection of Children from Sexual Commercial Exploitation in Travel and Tourism* (the Code). The Code contains an in-depth review of the issues and is connected with other instruments such as the CRC. Further, signatories adopt and implement six criteria provided within the Code: establishment of an ethical policy regarding child-sex tourism; training of personnel in the country of origin and the travel destination; clause in contracts with suppliers that provides a common repudiation of child sex; provision of information to travelers by means of catalogues, brochures, in-flight films, ticket slips, home pages, etc.; information to local key persons; and annual reporting on the implementation of the Code.<sup>274</sup>

The Code provides for monitoring and reporting mechanisms to be implemented and conducted by independent bodies at an international, national and local level. This is a particularly important element outlining an accountability process that ensures there are strong incentives to adhere to the Code. Initial implementation had been conducted in Thailand, Sri Lanka, India, Brazil, the Dominican Republic and Cuba, with ECPAT International and various other NGOs acting as interim monitoring bodies. The Code was then introduced in the United States, Canada, Argentina, Mexico and Belize with training of tourism officials from MERCOSUR countries beginning in 2005. Most recently, the Code has gained national institutionalisation in Costa Rica and been explored in the context of combating trafficking in Montenegro, Albania, Romania and Bulgaria.

The Code has become a full-fledged organisation with its own governance bodies, namely a steering committee and an executive committee. Members of these bodies include representatives of the tourism industry, governments, and NGOs. The tour operators who have adopted the Code have agreed to produce an annual report on its implementation and to allow the report to be commented upon by steering committee members. An International Secretariat has been established since 2001, initially housed at the UNWTO in Madrid in the framework of the European project funded by the European Commission, and relocated in 2004 to be housed by ECPAT USA in New York with UNICEF funding. As well, a website was launched which contains the Code, a training kit, newsletters, implementation reports and many resources. Since 2004, the majority of funding for the Code has been provided by the Japan National Committee for UNICEF through the UNICEF Innocenti Research Center in Florence and UNICEF Child Protection New York-headquarters.

All signatories who have signed the Code are encouraged to provide a detailed implementation progress report. In both 2003 and 2004 only seven organisations, each year, provided a report. Some of these organisations include Accor, Carlson and TUI

Nordic. Most of the reports indicated that the implementation of the Code has been successful, especially with Accor who has trained 70.7 per cent of its staff.<sup>275</sup> Both Accor<sup>276</sup> and TUI Thomson (UK)<sup>277</sup> in the Dominican Republic indicated an incident in which a staff representative had to turn away a customer because he was accompanied with a child. The staff members knew about the Code policy through training. MyTravel Northern Europe, in its report, did not find the Code policy to be very effective or efficient as their tour operating staff changes every six months and therefore there is a lack of continuity in the work.<sup>278</sup>

Since 2004, the Code registered as an independent organisation in Sweden. In 2006 an organisational logo had been launched and an organisational strategy was adopted in 2007. The Code strategy includes provisions for establishment of regional offices, and a headquarters (likely in Switzerland). Furthermore, a standardised implementation procedure had been adopted to be used for all new signatories since 2007, including the requirements of filling in Application Forms and Action Plans before being accepted for signature of the Code and becoming Code members. At the moment of writing, many of these developments are in progress, depending on the ability to secure additional funding.

Critics of the Code have expressed concerns about the legitimacy of the Code since the guidelines are established “from outside” rather than “domestically”,<sup>279</sup> as well as about its monitoring and control of implementation. However, according to case law, a state which delegates functions to non-state actors, still has an obligation under human rights treaties to ensure the rights of all and to punish violators.<sup>280</sup> Concerns have also been raised as to the challenges implementing the Code in North America to do the litigious nature of the society and worries of sending a wrong message to the industry’s clients.

Country specific codes have brought many successes in helping to undermine CSEC. This format might not, however, prove to be effective in all regions. Child Wise Australia, for example, has noted that such national codes of conduct would have a limited effect because child-sex tourism involving Australians tends to occur outside the work of the mainstream tourism industry such as taxi drivers, shop and restaurant owners, karaoke staff and photo shop staff. However, a number of innovative efforts have been taken in the Pacific region, including the inclusion of a prohibitive clause in the Australian Federation of Travel Agents’ code of ethics.<sup>281</sup> Furthermore, the issue is covered by the national tourism curriculum, “Travel with Care”,<sup>282</sup> so that students are made aware of the issue.<sup>283</sup> Child Wise Australia has also developed a training module and training materials for travel and tourism students, educators and tour leaders. In so doing, they worked closely with the Australian tour operator Intrepid. Recently, a new program, “Choose with Care”, was launched whereby training and workshops, handbooks and video kits and consultancy

services are designed to combat child-sex tourism and educational materials are distributed by every travel industry.<sup>284</sup>

An additional training and network development programme in the Pacific region, which promotes ethical and sustainable tourism practices, is “Child Wise Tourism” working in travel destinations, helping to build capacities to prevent child-sex tourism and making it into a child-safe tourism destination. By 2006, Child Wise had conducted 50 community-based training sessions to the tourism industry in various countries like Thailand, Cambodia, Vietnam and Indonesia, so that tourism staff will be able to identify and report child sexual exploitation.<sup>285</sup>

ECPAT national chapters have developed other such initiatives. For example, ECPAT Austria teamed with the Third World Tourism European Network (TEN) to help establish Project Respect. Project Respect promotes sustainability in tourism and promotes respectful ways of traveling, particularly to developing countries. As well, it educates the Austrian population on the negative impacts of travel.<sup>286</sup> Working closely with local tour operators and hotels, ECPAT Italia has also passed a code of conduct for the Italian Tourism Industry.<sup>287</sup>

Clearly, codes of conduct have become the main instruments for regulating the travel and tourism industry in its interface with children’s rights. They are also “the closest form of rule of law within the workplace in some low-income countries”.<sup>288</sup> Interest in voluntary codes of conduct is often seen as more preferable than government regulations, partly because they are far less costly and they, arguably, establish accountability. However, voluntary codes of conduct may not be effective as they tend to manipulate the population to believe that the situation of which the code is based upon is under control. This can be a threat to society, especially when there is a lack of monitoring.<sup>289</sup> Regulating the private sector providers who voluntarily enact a code of conduct is often challenging for governments, as well. This is often because the private sector spontaneously increases its role in the interests of children, rather than as a result of government planning, therefore making regulation beyond the control of the state.<sup>290</sup>

Another challenge with voluntary codes of conduct is that even the well-intentioned organisations do not often go beyond the drafting its code of conduct. The International Business Ethics Institute (IBEI) is a non-profit educational organisation founded in 1994 in Washington, D.C. and London, England. IBEI promotes business ethics and responsibility in two different ways: It spreads awareness about international business ethics through resources, discussions, publications and their website; and it works closely with and assists companies in establishing international ethical programs so that the organisation can be a



force for positive change within their community without compromising their profit. The Institute realizes that “[c]odes of conduct alone do not effectively promote responsibility and integrity into the workplace or sufficiently communicate a corporate commitment to integrity”.<sup>291</sup> Training for employees is also necessary for employees to understand and apply the values and the code of the organisation.

Similar to resolutions, codes of conduct are not always drafted with stern language. For instance, IFTO’s code of conduct recommends all members to remove any member from their association who knowingly engages in or actively condones sexual exploitation of children. The word “recommends” may fail to clearly define the limits of the organisations’ responsibility.

Codes of conduct without monitoring mechanisms have many limitations. They are optional and are often self-serving. However, the existence of codes of conduct can enhance pressures upon local governments to acknowledge abuses, and bolster domestic legislation. This pressure could, too, extend beyond national borders, strengthening mechanisms for enforcement of protections on an international scale. The more optimistic supporters of codes of conduct have even suggested that, for the reasons provided above, the private sector could surpass governments in protecting fundamental rights, and that such benchmarking could lead to a “race to the top” whereby private sector businesses begin competing with one another to have the “best” record for protecting their local children. Finally, private law suits may result in the failure to comply with voluntary codes and can be taken as evidence that the organisation or individual is not meeting industry standards or exercising due diligence.

### **3.4 Transportation**

Although very much connected to the travel and tourism sub-sector, the transportation industry has a unique role to play in efforts to combat CSEC. Certain actors within the industry have already been explored elsewhere in this report, for example with regards to the work of airline carriers. Because the transport industry includes such a vast array of other groups – from taxi companies to chartered buses – additional mention is made here.

It has been suggested that in the case of sex tourism, taxi companies have a key role to play. Often tourists visiting a new city are unaware of districts that may be home to children living on the street or children being prostituted. Communication with a taxi driver is perhaps the quickest and safest means for tourists to find such locations and even be put

into contact with individuals who can assist in arranging meetings. In this way, taxi drivers act as intermediaries and can prevent the exploitation of children in their communities if appropriately engaged.

Trucking companies have also been implicated in CSEC. In some countries, particularly in South America, children can be found waiting at petrol stations or truck stops for free transport from one part of the country to another. These children are highly vulnerable to exploitation as they are transient and once they board a truck, it is very difficult for law enforcement agencies to trace their whereabouts.

Bus and railway companies also have also been targeted by pimps in North America. These individuals wait at intercity bus terminals for young people disembarking and looking displaced. They then approach them offering assistance, such as jobs or accommodation. These young people are then coerced into prostitution or otherwise exploited, sometimes having their passports or other personal documentation withheld from them.

Some recent projects with respect to the above are worthy of note. In Brazil, the World Childhood Foundation (WCF) has developed a nationwide programme with the transport sector to combat internal trafficking for commercial sexual exploitation. It includes 213 private sector actors, including the truck drivers association, association of distributors, federation of transport industries, tire producers, logistic associations, and insurance companies who all signed a Pact that commits them all to a list of rules to combat trafficking for CSEC on Brazilian roads and highways. The initiative also includes activities with the Federal Highway Patrol and sensitisation initiatives with truck drivers unions, federations, toll companies and transport industry employers organisations such as the Brazilian National Confederation of Transport (CNT) and its apprenticeship and vocational/professional network (SEST/SENAT).<sup>292</sup>

Another promising initiative has been undertaken by the transport union of Burkina Faso. The Union has trained its staff, including bus drivers, on what child trafficking is and how and to whom to report cases of child trafficking. Lessons learned from the initiative have been shared in regional meetings.<sup>293</sup>

Finally, ILO-IPEC's child trafficking project in China (CP-TING), in collaboration with China's railway authorities, developed a campaign against trafficking at the time of China's Spring Festival (New Year) when millions of prospective migrant workers are on the move.<sup>294</sup>

## 4. The Media Sub-Sector

The media may convey stories about CSEC in compassionate and ethical ways, increasing public understanding and involvement. Alternatively, the media can perpetuate exploitation through the inappropriate portrayal of children and child abuse. Several media industries have been criticised for sensationalising child abuse.<sup>295</sup> The Council of Europe has expressed concern that the media can “infiltrate the public with liberal and tolerant attitudes towards child pornography and prostitution”.<sup>296</sup> The American Academy of Paediatrics recently released a report arguing that the media plays a highly influential role in providing youth with distorted impressions of sex and sexuality, rendering them more vulnerable to exploitation.<sup>297</sup> Last year, the American Psychological Association published the results of its study on the sexualisation of girls. The document states that, “Massive exposure to media among youth creates the potential for massive exposure to portrayals that sexualise women and girls and teach girls that women are sexual objects.”<sup>298</sup> The UN Special Rapporteur has recognised that, “media are the most powerful tool of mass communication nationally and internationally, and their potential to protect children from sexual abuse and exploitation should be explored thoroughly”.<sup>299</sup>

### 4.1 The Industries

At the First and Second World Congresses the media’s responsibilities for the protection of children from commercial sexual exploitation was widely discussed. There are many media-related industries in the private sector that have the potential to undermine CSEC and, as is often asserted, carry an ethical if not legal obligation to do so. In this context, the media industries are defined as the modes of communication that have an impact on private or public perceptions of the world.

The proliferation and globalisation of media is one of the major ingredients that have helped define the current “youth” generation. At the 4th World Summit on Media for Children and Adolescents, in 2004, attention was brought to the fact that “[i]n many countries, youth have access to a greater number of multimedia choices than ever before—conventional, satellite and cable TV channels; radio stations; newspapers and magazines; the Internet and computer and video games.”<sup>300</sup> There is a growing concern among parents, researchers and educators about the quality of the media being presented to children, including entertainment featuring violence, sexual content and a lack of diversity, which often influences their expectations of their own life. The media does not only impact

children's perception of the world but it also has an effect on adults by sensationalising stories "at the cost of reinforcing rather than challenging myths and stereotypes."<sup>301</sup>

The International Federation of Journalists, in a comprehensive background paper prepared for the First World Congress, recognised the fact that the media controls and manipulates representations of reality: "The media industry is either a commercial undertaking which exists to produce profit....or it may be subject to political and state controls".<sup>302</sup>

The industries that play a prominent role in shaping perceptions pertaining to CSEC – including journalism, photography, television, acting, modelling, and advertising – are reviewed below. There is a great deal of overlap among these categories, particularly vis-à-vis public awareness initiatives. A number of joint programmes have been developed and/or implemented since the First World Congress. Although many problem areas still remain, some relevant successes have occurred, reinforcing the capacity of media industries to play leading roles in private sector projects aimed at eliminating CSEC. New technologies may also be defined as media; however, the rapid growth and evolution of the Internet and web industries warrants an in-depth analysis in their own right and is therefore studied in another section of this report.

## 4.2 Journalism

A reporting style that is insensitive to the complexities of CSEC can distort relevant issues, sensationalise exploitation and undermine protective programmes. One industry report on the subject asserted that, "the way the media portray children has a profound impact on society's attitude to children and childhood, which also affects the way adults behave. Even the images children themselves see, especially of sex and violence, influence their expectation of their role in life".<sup>303</sup> Journalism can also offer a forum for advertising CSEC. For example, youth may be confronted with "sex work" through print commercials and classified advertisements for escorts or modelling agencies recruiting "innocent" or "barely legal" teens. The industry itself has recognised that protective initiatives, such as codes of ethics, are not widely known by journalists, and at the "Journalism 2000: Child Rights and the Media" conference, journalists in many parts of the world admitted to effectively ignoring the problem of child exploitation.<sup>304</sup>

Fierce competition from within the industry also leads to the exploitation of children. In developing their stories, journalists often lack information about children's education, health and social conditions, which are sometimes kept confidential by government or state institutions. As a result, journalists either report inaccurate information or do not

have important and significant data to substantiate their findings. As well, the way a story is projected by a journalist is dependent on how the reporter wants to represent the situation. Dangers of travel, biases and censorship, all of which may prevent reporters from disclosing certain facts, can too affect the way a story is told.<sup>305</sup>

The International Federation of Journalists, together with the non-governmental organisation Press Wise held a meeting entitled “Tourism and Child Abuse: The Challenges to Media and Industry”. At that gathering, media acknowledged that they could be much more visible in improving protections for CSEC. One of the plenaries’ concluding observations was that, “media must....report fairly, honestly and accurately on the experience of childhood”.<sup>306</sup> Recommendations from the meeting include increased training, heightened professionalism, codes of conduct and broadening the debate of relevant issues.<sup>307</sup>

In May 1998, the International Federation of Journalists drafted an international guideline for journalists covering children’s rights. In 2001, these guidelines were adopted at the Annual Congress of the International Federation of Journalists in Seoul, Korea and were later presented at the Second World Congress. Although the guidelines are a positive start, they do not guarantee that journalists will report ethically; they challenge journalists and other media sectors “to be aware of their responsibilities” when reporting about children.<sup>308</sup> The journalism industry is a self-regulating industry and often it is the case that only grave breaches of their regulations are investigated, while less severe breaches go unsanctioned. Another significant weakness with the journalism code is the language that uses subjective terminology, such as “good taste”, “bad taste”, and “decency”.<sup>309</sup>

Though most journalists are required to follow some form of internal regulation, often established by their union, association or employer, many do not know the details of these documents and a general understanding may not be enough. A recent case demonstrates concerns over adequate training within the industry. Photojournalists working with an international NGO took pictures of crying children at a refugee camp. Eventually it was revealed that the children were weeping because they thought that the photographers were soldiers holding weapons trying to kill them.<sup>310</sup>

Although the role played by journalists towards the elimination of CSEC may currently be inadequate, a number of initiatives have been taken by regional inter-governmental agencies. The European Parliament, in implementing the European Strategy for Children, has committed to increase “public awareness of the social, environmental and technological challenges for children in their everyday lives”.<sup>311</sup> Since then, an ‘anti-CSEC advertising climate’ has been adopted in parts of Europe in an attempt to create child-friendly

advertisement. The European advertisement industry has become more sensitive over matters concerning children.<sup>312</sup>

Several agencies of the UN have acknowledged that the press and other media have essential functions in promoting and protecting the fundamental rights of the child and in helping to make reality of the principles and standards of the CRC. For example, in May 2000, the UN adopted the *Optional Protocol on the sale of children, child prostitution and child pornography*. The *Optional Protocol* came into force on January 18, 2002 and offered an opportunity for journalists to assess governmental action surrounding CSEC. As well, the Protocol and the CRC have measures to monitor countries and give journalists the opportunity to review human rights records pertaining to children in their own country. Every country, once every five years, must submit a report explaining any progress or actions that have been implemented with regards to the CRC. As a result, the media has the capacity scrutinise the strengths and weaknesses of each country's action. To date this has largely been opportunity lost.

Modern media culture has had an increasing influence on youth with regards to sexuality – in many cases, overshadowing traditional sources of such education. New programmes are being designed to approach such education in ways compatible with traditional worldviews. Journalists can promote sex education serving to address some important reproductive health issues, such as HIV/AIDS and pregnancy. Since 120 million children do not attend school around the world, it is important for children to get sex education beyond the classroom.<sup>313</sup> Such campaigns have been manifested in comic books, magazines, and music aimed at youth and in other popular culture media.<sup>314</sup> Furthermore, it is widely recognised that ignorance of sex and sexuality can be very dangerous to youth as myths regarding contraception and sexuality lead youth to be highly vulnerable to CSEC. For example, an innovative programme administered by the local journalist union in Nigeria bases its campaigns on the premise that, “only teenagers who know and value themselves, who are aware of options and who are skilled have the capacity to practise safer and responsible sex”.<sup>315</sup> There is increasing international consensus that mass media outlets, such as journalistic reporting, is uniquely situated to promote education and empowerment to help counteract CSEC because of its wide youth appeal.<sup>316</sup>

Finally, it is important to recognise the potential role that media industries can play in promoting youth empowerment. Confidence and identity-building activities are fundamental in atoning youth to their potential and helping prevent their exploitation. For instance, journalists in South Africa generally narrow children to ‘innocent’, ‘angels’, ‘troublemakers’, ‘rowdy’ and ‘delinquents’. However, many children in South Africa have made it clear that they do not want to be seen as victims of war, famine, or abuse. They would

rather be heard and be seen with a sense of pride and dignity and with an independent perspective of the world.<sup>317</sup> Out of Focus is an initiative that was started in 1994 by Drik, an agency located in Dhaka, Bangladesh. Drik trains children from poor working class families to become photojournalists. The children have control over which images will best represent their community. The photographs taken by these children, most of who cannot read or write, present a unique and powerful perspective that is missing in the professional journal articles. The children and their photographs have been recognised in exhibitions, television, radios and films. As well, some of the photographs have been nominated for awards.<sup>318</sup>

### 4.3 Photography

Photography continues to play a prominent role in the child sex industry, and there are ways in which the private sector can help to alleviate the associated problems. The most widely acknowledged connection between photography and CSEC is in the modelling industry. A UN Special Rapporteur has acknowledged: “The use of teenage girls, some as young as 13, modelling adult fashions may create the impression that thin pre-pubescent bodies are the most sexually desirable”.<sup>319</sup> It has been further recognised that, “photographs of children in their underwear for mail order catalogues are an easily accessible source of material for paedophiles, and are commonly used as such”.<sup>320</sup> A related concern about photography is at the individual level, with the processing of films from private citizens. Although the Internet has largely displaced the use of commercial photo processing in the development of pictures evidencing CSEC, there is still a concern that current levels of interventions at this stage may be inadequate.

Recently there has been enhanced dialogue on the role that various photography industries could play to better protect children. Members of the British Association of Photographers have discussed useful guidelines for professional photography of children, including ways in which children may be photographically portrayed, protection of children while at the shoot, and education for parents regarding legitimacy of agencies.<sup>321</sup> Cases from North America and Europe have helped define the legal parameters of appropriate photography of children.<sup>322</sup> However, there are many more protective measures that could be taken, examples cited in the literature include background checks to ensure whether they have been implicated in exploitation and international databases of known abusers in the field could be developed to allow for police screening of those involved in photography.

Protection of children from harm in this industry is often undermined by protections for the privacy of the alleged abuser. Such concerns have most recently been exemplified by a

high-profile case in the US where an employee at a photo developing shop was fired for violating the store's customer confidentiality policy in reporting photos depicting child abuse.<sup>323</sup>

Photo processing shops can assist in intervention, where films containing evidence of CSEC are submitted for development. In contrast with the case cited above, there have been some cases successfully brought to trial as a result of reporting by photo processors. In the US, a scoutmaster was jailed for possessing photos of a nude 9-year-old. The police discovered the pictures when a clerk from a photo-processing lab alerted authorities.<sup>324</sup> A number of photo processing shops have promulgated mandatory measures for reporting of any questionable photographic images developed in the shop. For example, a large photo processing company, Black's Photography, in Canada has a policy requiring police reporting where employees find questionable material in clients' films. Employees can refuse to print images if their contents are not in compliance with the law or if the images are inappropriate. All employees are trained by these guidelines and may refer back to them at any time while on the job through an electronic resource. A clerk who finds questionable material, under their discretion, must report it to the management team who will determine if they will report the material to the police. The company guidelines contain information of what is considered to be criminal based on the law.<sup>325</sup>

A controversial debate has arisen about whether Information Technology (IT) workers, such as computer engineers or technicians, should report a client who possesses child pornography on their computer. In the US and Canada, bills have recently been proposed to require IT workers to report child pornography.<sup>326</sup> Proposers of these bills claim that it is not a new concept as doctors and nurses have always been required to report suspected child abuse.<sup>327</sup> On the other hand, it has been argued by critics of these bills that IT workers should not report child pornography that they encounter at their workplace because they are not trained to do so. For example, in the US, the law states that the picture of the child must be real and not "morphed" or "enhanced" in order to constitute child pornography. It is difficult enough for legal experts to tell the difference, it is much more challenging for untrained technicians to know. There can also be legal complications if for example the technician saves the image on a disk for evidence. On the one hand, s/he can break the law for violation of privacy and breaking a confidentiality agreement with the client, but on the other hand, if the image is erased, then s/he could be considered to have destroyed the evidence and jeopardising the case.<sup>328</sup>



## 4.4 Television/ Film

There have been several concerns noted about the portrayal of children on television and film. First, there is the alarm related to the manner in which the sexual exploitation of children is represented on tape. Second, there is worry as to the impact that representing inappropriate images has on the child actors. A number of recent television shows and films have been widely criticised for failing to approach the issues underlying CSEC with adequate sensitivity, by suggesting the benefits of “intergenerational same-sex relationships”. Various UN agencies have expressed concern that such representations may pose the risk that audiences will become desensitised to the real horrors of paedophilia and child sex.<sup>329</sup>

As the weaknesses of television and film industries have been widely acknowledged, measures have been put into place to better protect children and to promote the elimination of CSEC. Programmes and guidelines are being developed to assist child actors in coping with sensitive material, and a number of initiatives have been undertaken to guide directors in portraying the subject appropriately. Developments have been made in allowing the filtering and rating of television programmes, as well, to protect children from viewing harmful material. In 1997, the European Parliament proposed requirements for broadcasters to implement complex screening systems. While this move was eventually deemed “premature”, measures were taken to investigate other possible methods for protection. As an intermediary compromise, warnings now precede any potentially damaging programmes.

The television and film industry has been noted for its capacity to increase public awareness of CSEC. The non-governmental organisation Child Wise Australia, as part of a public awareness campaign, launched a number of television commercials portraying stories of children harmed by CSEC.<sup>330</sup> The organisation recruited filmmakers as useful resources for their campaign. In 1999, Air France began a video campaign informing passengers about strict laws in France and abroad that punish those who exploit children. Many similar initiatives, and an exploration of other ways in which television and film can promote the elimination of CSEC, are currently under investigation.

## 4.5 Acting / Modelling

The UN has reported on the impacts of child actors portraying scenes of sexual abuse, as well as the potential for such scenes to provide material to paedophiles.<sup>331</sup> Although some

child actors have gone on in adulthood to recount negative stories of their involvement in exploitative scenes as children,<sup>332</sup> not all actors agree that this is a viable issue. A recent Hollywood film included a scene where a female adult takes a bath with a 10 year-old boy. The child actor in question went on record as stating, “If you knew how they film movies and how the [Alliance of Canadian Cinema, Television and Radio Artists] and [Screen Actors Guild] protect children actors, then you would not be asking me this question. The only people stirring up the bath water in that scene were the media!”<sup>333</sup>

Further attention has been placed on the representation of children, or child-like adults, as sexual objects in the modelling industry. For instance in the Russian Federation and other countries of the Commonwealth of Independent States, modelling is a well-paid job that lures may young girls, which at times can lead to commercial sexual exploitation. As with television and film, the harm to children is threefold: the potential for damage involves the children used in production of the material; children as viewers of the material; and use of the material by abuse-intent adults. It has been argued that acting and modelling agencies must be more sensitive to the implications of using and representing children in their productions. There are many ways in which the industry can better protect children from the harm of CSEC while promoting public awareness of underlying issues. The Entertainment Industry Coalition has drafted a *Code of Ethical Conduct* for parents choosing talent or modelling agencies. Included in these guidelines are details about roles and responsibilities about agents. A chapter is dedicated to work with children, covering such issues as maximum permitted working hours, requirements to protect children from psychological trauma and mandating the engagement of therapists where there is a risk of damage.<sup>334</sup>

More recently, in Canada, one province has been attempting to change its employment legislation to regulate child modeling.<sup>335</sup> The proposed legislation regulates the activities of talent and modelling agencies through licensing, ensuring that fees are not linked to the child’s opportunity to find work, instituting strict requirements for children being promoted by the industry, and improving enforcement mechanisms and penalties. Under the proposed legislation, every child recruitment agency operating in the province would be required to hold a licence issued annually by the province. Any parent, employer, concerned citizen or worker would be able to access a website for information and to check if an agency is registered with the province. The proposed act would also require that any child under the age of 17 who will be promoted by an agency would be required to have a child performer work permit, issued by the province at no cost. Working closely with law enforcement officials and the Canadian Centre for Child Protection, a code of conduct is being developed for agencies that form the framework for the permit.

## 4.6 Advertising

Concerns have been addressed about trends in the fashion industry portraying children in provocative poses, in advertisements for Gucci, Skechers, Buffalo Jeans, and Versace to name a few. Many of the harms associated with the advertising industry are discussed above in reference to acting, television, modelling and film. There are, however, some notable challenges specific to the advertising industry.

The portrayal of children in an exploitative manner in conjunction with popular market products creates an additional layer of potential harm. Public attention was recently focused on the issue with advertisements of Calvin Klein underwear featuring children in sexually suggestive positions. A similar jeans campaign involving teenage models was pulled in 1995 following public pressure. Other companies, such as Abercrombie & Fitch (A&F) use a sexual marketing campaign that is aimed at young people. Besides its thong underwear being sold to children, the company has published a 280-page catalogue with naked young models in sexually suggestive poses. This plastic wrapped catalogue which denotes its adult content, is only distributed to those who are 18 years or older.

There have, however, been a number of positive developments using advertising as a way to undermine CSEC. A particularly groundbreaking innovation has been the collaboration between ECPAT New Zealand and Saatchi & Saatchi, a major advertising agency with offices around the world. Two advertisements are aired on New Zealand television, educating the public about CSEC. They contain the ECPAT logo and provide a telephone number for raising funds to combat exploitation.<sup>336</sup> Many advertising companies recognise the value of preventing CSEC, and will offer advertising services free of charge. However, few firms have actually developed independent programmes or projects or approached non-profit organisations in their communities to offer their support.

## 5. New Technologies Sub-Sector

### 5.1 Child Pornography<sup>337</sup> and the New Information Technologies

In the past decade the Internet has enjoyed an explosion of development, expanding faster than any regulatory scheme can be developed. Its anarchic nature, as a result of its development from a defence initiative to an educational resource to a commercial enterprise has offered abuse-intent adults the luxury of a medium with instantaneous transmission of information and images. The Internet has done more however, than just make existing methods of child abuse more convenient and risk-free; it has offered new and increasingly harmful methods for the violation of children's rights, such as commercial sexual exploitation, harassment and intimidation (including cyber-bullying), exposure to inappropriate and dangerous materials, and socialisation to violence and other forms of psychological manipulations such as self harm or harm to others.<sup>338</sup>

There are many ways in which the Internet is used for such exploitative purposes.<sup>339</sup> The most commonly known use is through the uploading and distribution of pornographic images involving young people. In this manner it is widely recognised that children are doubly harmed; children are abused in the production of the images (a.k.a. children “behind the screens”) and through visual assault when witnessing abuse on their computer monitors (a.k.a. children “in front of the screens”).<sup>340</sup>

Other forms of electronic child abuse may be less obvious. A practice commonly used by child sex abusers is the publication of photographs of the abuse onto the web to be viewed by the public, including the child's peers and family. The consequence is that the child will know for the rest of his or her life that someone is looking at his or her picture on the Internet. The threat of publication of these photos alone is frequently a form of blackmail used by child sex offenders. It has allowed them the opportunity to continue their abuse long-term.

The recent increase in the quantity of child abuse images on the Internet can be traced to two central sources. First, organised crime syndicates regard child pornography as part of a business and the Internet as the most effective means to sell their wares. In 2004, child pornography was worth about \$US 20 billion, 55 per cent of which was generated in the US and 23 per cent in the Russian Federation. Criminal syndicates operate in countries with weak child pornography legislation and no Internet regulation. Studies suggest that

the establishment of a new website selling child pornography can generate revenue of \$US 1.3 million in six weeks.<sup>341</sup> As part of the business, in the Russian Federation, children have been known to be recruited or bought from orphanages. Some get paid commission to find other children to be filmed. Children are systematically arranged to be abused so that consumers can continually buy new material. The more child abuse images that are downloaded, the more children are abused because of the growing market. In 2001, 105,000 abusive images were posted in 30 newsgroups in only 16 days.<sup>342</sup> The second major reason for the increase in child abuse images is that the Internet allows individuals who only had a curiosity for child pornography to explore their interest. Without the Internet, the argument has been put forward that they would have been too scared or lazy to follow through with their desires.

Although the increase in Internet use is not necessarily the cause of the increase in child exploitation, there is a link.<sup>343</sup> Like other forms of pornography, Internet generated material has allowed greater means for the “normalisation” of sexual contact between adults and children as the abuse images are often used in the grooming process of victims. Research indicates that child sex abusers show both adult and child pornography to their victims as a grooming process to lower the child’s resistance before abuse. Child pornography also acts as a reinforcement and justification for the abusers. This statement contradicts the belief of some commentators who suggest that child pornography helps potential abusers control their urges to abuse a child, by devoting their energy to fantasising instead.<sup>344</sup> As a result of this research, it would appear that the role of industry should be to monitor and ultimately prevent the grooming in avoidance of actual face to face meetings.

There has been a great increase in the number of Internet users, and many technological advances have been made in the past year alone. Although the industry has not been consistent among businesses or geographic areas, it seems as if the message may still be lost on many. A recent study indicates that “only one quarter of children’s websites post privacy policies and only 6% ask children to get their parents’ permission before sending in personal information.”<sup>345</sup>

Finally, freedom of expression has been used to defend the artistic expression of exploitative images on the Internet and has created a serious conflict between artistic merit and children’s rights. It must be accepted that “...rights are never absolute. ...[F]reedom of opinion is restricted in international law where such expression contravenes the respect of the rights or reputations of others or is necessary for the protection of national security or of public order, or of public health or morals.”<sup>346</sup> Resolving the conflict of rights can either be the government’s responsibility by enacting legislation that permits or restricts certain behaviour, or the court can adjudicate on the matter on a case by case basis. Two

North American cases illustrate how dangerous conflicting rights can be to children. In *R. v. Sharp*<sup>347</sup>, a self-proclaimed pedophile argued that Canada's laws on child pornography violated his freedom of expression that is guaranteed in the *Canadian Charter of Rights and Freedoms*. He was successful at the court of first instance and court of appeal. In *Ashcroft v. Free Speech Coalition*<sup>348</sup> it was decided by the US Supreme Court that the "virtual child pornography" of the federal *Child Pornography Prevention Act* violated the first amendment to the US Constitution.

## 5.2 Filtering and Content Rating Systems

Technologies are being developed that filter and rate content so that individuals and Internet service providers (ISPs) can prevent harmful material from entering their spheres. These systems are most useful in regulating legal but undesirable material. David Kerr, the Chief Executive of the Internet Watch Foundation in the United Kingdom, has suggested that, "most governments and much of the industry have accepted that this approach is the best hope for maintaining free speech on the Internet, whilst allowing consumers to choose what they do not wish to see".<sup>349</sup> Once perfected, this technology could help eliminate the receipt of such information, but does little to stop the creation and dissemination, to a willing recipient, of child pornography unless there is universal cooperation on the part of ISPs.

Current rating systems are highly subjective, and therefore do not reflect an internationally recognised standard. Filtering systems in their present state have many weaknesses. An often-cited example is the fact that, by filtering out keywords, useful information pertaining to sex education or health is blocked. The Internet Content Rating Association (ICRA), an international non-profit membership organisation promotes child protection and free speech rights through self-regulation.<sup>350</sup> ICRA provides Internet content providers the opportunity to label their sites so as to allow the end users to filter content they do not think is appropriate. Through completion of a questionnaire content provider complete a series of descriptors, which allows them to label their sites. The descriptors are labels that contain comprehensive definitions to describe what can be found on the website. For instance "sexual material" contains passionate kissing, obscured or implied sexual acts, erotica etc. While there is some subjectivity when determining the descriptors, ICRA has developed an international consultation process, therefore providing the descriptor selection with reasonable consistency through different cultures and languages. As well, the labels are descriptive, rather than evaluative, ensuring the process is more objective. There are over 100,000 content providers that have been labelled, including Microsoft, AOL and Yahoo that represent millions of webpages. It should be noted however, that the process

of sites labelling their content is a voluntary one and many of the sited do not undertake this added workload. Although when labelled, browsers can technically read the ratings and block content, they are seldom configured to do so. The default settings for the web browsers do not start at the strictest settings.

In terms of the client side filtering that exists for individual computers, it has been suggested that such products should be part of the operating systems or a free add-on rather than software that the customers is forced to pay. Further, offenders have found easy ways to circumvent this technology by deliberately misspelling terms or using online slang.<sup>351</sup> Law enforcement has reported that offenders deliberately misspell domain names like 'Disneyland' or a name of a popular artist in order to lure children to pornographic sites. Children are particularly more vulnerable than adults in these situations because they are more likely to misspell words.<sup>352</sup>

### 5.3 Walled Gardens

One of the most effective methods for preventing people from accessing harmful material online is found in "walled gardens". Walled gardens are collections of websites that have been pre-screened and pre-approved as being safe for children.<sup>353</sup> Quite opposite to the practice of filtering, which grants access to all material unless stopped through keywords, walled gardens ban entry of any material that has not specifically been endorsed by trained professionals. There are a number of advantages of a framework such as walled gardens, including the security that the screening has been done by "real life" individuals rather than a software package, and that they are extremely safe.

There have also been concerns raised about walled gardens. The portals require high maintenance as Websites and their addresses change frequently. Further, the sites that are approved will often reflect the philosophies and priorities of the individuals screening the material. The risk of sites being slanted based upon a political or religious disposition exists. This danger is clearly exemplified in the approach by the Singapore Government to all its Internet material. In measures that drastically undermine online freedom of expression, Singapore prevents access to any information that may "undermine public morals, political stability and religious harmony".<sup>354</sup> This is an example of "walled gardens" to the extreme.

Highly subjective, the sites chosen could very easily bar material that effectively prevents CSEC. For example, education on sex and sexuality has been widely acknowledged to empower youth to prevent their exploitation but it is possible that such information would be caught as "undermining public morals".<sup>355</sup>

With the advent of the social networking websites and their prevalence, the popularity of these protected spaces are rapidly declining. The question that must now be answered is how to keep children in a kind of “safe space” when the urge to communicate with other peers, through the multifaceted applications found in these social networking spaces are so appealing. Sites like Club Penguin, which are very popular, point to the fact that there must be an alternative form of Facebook or MySpace for young people.

## 5.4 Internet Service Providers

Throughout the various meetings on the subject, it has been suggested that ISPs should be liable for the content made available through their servers. It has been argued that these profit making enterprises have a moral obligation and legal responsibility to prevent child pornography on the Internet. The ISPs contend that the vast amounts of material passing through their networks render it difficult, if not impossible, to monitor. Moreover, many countries have minimum *mens rea* (i.e., legal knowledge) requirements for such liability, and as such their actions would be ineffective if not unconstitutional. Although some ISPs have taken active measures, such as filtering the content and posting online guidelines, it does not seem to be enough.

A precedent setting case from Germany examines the potential liability of service providers. A local court of Munich held the managing director of an ISP liable for failing to adequately block pedophilia newsgroups. This decision was overturned in 1999 at the appellate level, as it was held that there was no technology at the time that could have even allowed for an effective block. A more recent Canadian case, however, held operators of an electronic bulletin board containing child pornography to be legally responsible for the material. The latter case indicates that there may be new minimum obligations to at least inquire as to the content of material. Another case from Germany makes an attempt to extend liability for Internet content beyond its own borders. The Federal Court of Justice indicated that German law applies to material that foreigners “put on a foreign server that is accessible to Internet users in Germany”. This decision could have a chilling effect for those attempting to post material considered to represent CSEC on servers outside domestic jurisdiction.<sup>356</sup> Internet Watch Foundation, based in the U.K., announced that out of all the child pornography Websites reported to them from the U.K., one per cent of the websites originated within the U.K., while 55 per cent of the websites were traced back to American ISPs that sell space to other countries. Some countries have started to pass mandatory reporting legislation for the industry. In Canada, the province of Manitoba is currently debating such a bill.<sup>357</sup>



Research is currently being undertaken to verify the extent to which ISPs can be expected to participate in the elimination of child pornography from the Internet.<sup>358</sup> It has been widely acknowledged that ISPs are well positioned to assist in the fight because offenders need ISPs to access the Internet, and law enforcement officials need ISPs to trace offenders.<sup>359</sup> Some potential solutions include requiring ISPs to record and verify client data to ensure the names provided are not false; requiring ISPs to keep records of information that have passed through their servers for an agreed-upon minimum amount of time; requiring ISPs to select which Usenet groups to mount, rejecting those who explicitly indicate that the contents may include pornography. The Australian Internet Association recently established a code of conduct to begin laying a framework for such ethical practices. ECPAT International recently signed contracts with ten major ISPs from Taiwan to protect children from harmful content on the Internet. The ISPs are obligated to create a child protection team, as well as include a section on the website for child safety.<sup>360</sup>

Although having the ISPs on board would be a help, it would not solve the entire problem. In North America, there have been a series of cases involving stolen wireless connections. “War driving” is a common phrase used for individuals who drive in neighbourhoods with a laptop and try to intercept Internet connection from nearby homes. This allows the individual to look at illegal sites without getting caught because the only lead the ISP would have is to the person who the Internet connection belongs to.<sup>361</sup>

Encryption software provides a further challenge to law enforcement agencies attempting to investigate and prosecute child sex offenders. A MNC investigation concerning the world’s largest Internet pornography ring illustrates the difficulties of such encryption programs. Upon the discovery and arrest of various members of the “Wonderland Club”, a ring collaborating in the fabrication and possession of nearly one million pornographic representations of children, authorities were unable to crack all the encryption codes to reveal evidence of the crimes.<sup>362</sup> The Soviet KGB allegedly developed the encryption programs that were used by members of the Wonderland Club. In a Canadian case, the man who was charged with child pornography had “forgotten” the password to the installed encryption software, therefore police were unable to access 41,000 files of pictures.<sup>363</sup> Investigators with the British National Crime Squad, US Customs and Interpol, working together, were unable to decode the software used for both Internet transmission and hard drive copies and were thus unable to secure all the evidence required to bring the case to trial.<sup>364</sup>

Virtual payment is another way for offenders to remain anonymous. Credit card companies are being urged to stop accepting payment for child pornography websites, this includes stopping payments through “e-gold”, which allows purchasers to hide credit card information. Paypal, an online payment processor, announced that it would fine customers

up to \$US 500 if they violate the company's policy of using their services for such things as pornography. Although this is a positive step to eliminating the distribution of pornography, it may not be effective to people who are buying such products. The policy only applies to individuals or companies who sell the illegal material. People who are buying the material may have their account either limited or closed.<sup>365</sup> The role of the financial sub-sector in CSEC is discussed elsewhere in this report.

## 5.5 Chatrooms and Social Networking Sites

Abuse-intent adults use online chatrooms to lure children. A recent study on the matter concluded that 76 per cent of encounters between an offender and a victim are initiated in online chatrooms.<sup>366</sup> Further, the study shows that most victims of such encounters are girls between the ages of 13 and 15. The offender usually starts a conversation with the girl after reading their online profile and may send an electronic greeting card to initiate dialogue.

Some offenders subscribe to online games, which allow them to meet young people with the same interests. They later lure the children to chat over Instant Messenger (IM). IM began as a peer-to-peer software program that allows individuals to exchange data and communicate with each other. This network did not involve host servers and is thus more difficult to monitor traffic between sites. Today, the various IM programs operate using different technologies, some that do involve hosting servers.

Both the offenders and children say and do things differently online than they would in a physical setting because they do not feel as inhibited due to anonymity. Conversations usually last about a month before pictures are exchanged or they start to speak on the telephone. It is not uncommon for the adult to send a child a pre-paid cell phone, not only to develop a relationship but also to potentially track the child's whereabouts with a satellite positioning system.<sup>367</sup>

One study suggests that about 80 per cent of cyber relationships talk about sex, with 20 per cent resulting in cybersex.<sup>368</sup> The same study demonstrates that an alarming 74 per cent of online adult/child relationships meet face-to-face and 93 per cent of the encounters have illegal sexual contact. Most of these encounters meet more than once. Only 5 per cent of the encounters result in violence such as rape.<sup>369</sup> Since both parties are less inhibited as well as the high speed of which information gets transmitted, relationships develop more rapidly. It should be noted that the few studies that exist on this topic are very US-centric

and contain a small sample population. Unfortunately, at this point they represent the only research in this area.

There have been some measures taken, such as prevention messages advising children not to talk to strangers or give personal information; however studies show that more work needs to be done directly with the children and their families. Youth are more likely to form online relationships if they are troubled or in a bad relationship with their parents. If there is a lot of conflict or not enough monitoring by parents, children become vulnerable to speak to strangers online. As well, children who are lonely, depressed, gay or victims of sexual abuse are more prone to online relationships.<sup>370</sup> Many offenders offer victims drugs or alcohol to lure them into posing for pictures. It is not unusual for offenders to drug victims before they abuse them. The child's addiction to the drugs or alcohol may continue after the abuse, making the victims crave drugs knowing that the offender will have more. Many of the children do not realise that these relationships are illegal or they do not consider the publicity, embarrassment and life disruption it can cause. Often children do not know that the sexual pictures they may pose for may end up on the Internet.

In an attempt to discourage illegal behaviour in chatrooms and to ward off pedophiles, Microsoft has closed free chatroom services in 28 countries. Sceptics believe that it is an attempt to get people to subscribe to their paid chatrooms. It has been said that, "they are shutting down services for which people are not paying and getting a good bit of P.R. out of it."<sup>371</sup> This move is believed to divide the Internet community between the 'haves' and 'have nots'. At the same time, it may attract children to other more harmful sites, like IM.

Social networking sites allow users to create their own content and share it with a group of other individuals who share a common platform (i.e., attend the same school) or have a similar interest (i.e., enjoy the same music). There are many such sites, the most notorious being My Space, Facebook and YouTube. These sites are all similar in so much as they are, first, dependant on the end-users to provide the actual content; second, they are largely unmonitored and unregulated; and third, they are of great appeal to children and young people. There are many reasons for the appeal of social networking services. A recent report on the topic identifies the key attractions as including the ability to create original and personal content that can be quickly published onto a website and the opportunities for children and young people to express themselves through these services and to connect and communicate easily with others.<sup>372</sup> The allure that these sites offer to young people are shared by those who wish to harm them, and as such social networking sites may provide a contact between child and abuse-intent adults.

As the genre is so new, there have been few achievements with respect to child protection and social networking sites. Like much of the Internet, the sites themselves often go unmonitored and unregulated. They are largely dependent on the end-user to act as a police force by reporting any inappropriate content to the site administrators. As a result, effort has been placed on trying to ensure the end-user is age appropriate and can make appropriate decisions. Some sites have set minimum age registrations for use of their pages, most often being 13 years of age. In order to prevent children from falsely representing their ages, some technologies have been implemented to attempt verification.<sup>373</sup>

## 5.6 Software Manufacturers and Online Gaming

Recognising that there is an insufficient amount of law enforcement personnel to personally scan every suspected image of child abuse, other mechanisms for the investigations of Internet crimes against children are required. A few computerised databases containing child abuse images and images of those involved in the abuse, have been developed with the assistance of private sector software manufacturers. In 2003, Imagis formally launched ChildBase, a program that digitalises images and in minutes provides information about its content.<sup>374</sup> This particular database saves law enforcement agencies significant time as it matches pictures to determine if the image has been viewed by someone else on a previous occasion. As well, this software cross-references facial features that do not change, even with aging. As well, the software can identify where the abuse took place by focusing on the physical environment and the architectural features. For instance, a child abuse picture containing a unique looking roof directed law enforcement officials to a country, city and neighbourhood where they would be able to find a roof similar to that contained in the picture. It is interesting to note that Imagis sells its software to police departments.

A similar software database has been designed and sponsored by Microsoft Canada, after they received a plea from Canadian law enforcements. Child Exploitation Tracking System (CETS), a \$US 2.5 million project funded by Microsoft International, provides advanced software tools and technology to be used by investigators. Developed in partnership with the Royal Canadian Mounted Police and the Toronto Police Service, CETS serves as a good example of how law enforcements and the software industry can work together. This tracking system does not repeat information but rather links criminal behaviour online and allows computer systems from different countries and different technologies to communicate with one another.

Online games are games played over some form of computer network. At the present, this almost always means the Internet or equivalent technology; but games have always used

whatever technology was current: modems before the Internet, and hard-wired terminals before modems. The expansion of online gaming has reflected the overall expansion of computer networks from small local networks to the Internet and the growth of Internet access itself. Online games can range from simple text based games to games incorporating complex graphics and virtual worlds populated by many players simultaneously. Many online games have associated online communities, making online games a form of social activity beyond single player games.

The rising popularity of Flash and Java led to an Internet revolution where websites could utilise streaming video, audio, and a whole new set of user interactivity. When Microsoft began packaging Flash as a pre-installed component of Internet Explorer, the Internet began to shift from a data/information spectrum to also offer on-demand entertainment. This revolution paved the way for sites to offer games to web surfers. Most online games charge a monthly fee to subscribe to their services, although some offer an alternative no monthly fee scheme. Many other sites relied on advertising revenues from on-site sponsors, while others, let people play for free while leaving the players the option of paying, unlocking new content for the members.

The challenge with online gaming is the virtual nature of the medium. What occurs online may be occurring offline as well but there appears to be only anecdotal evidence to support this. For example, law enforcement have reported that upon infiltrating child sex offender networks they have found references to discussions among the network and even trading of virtual money to purchase virtual child pornography.<sup>375</sup>

Online multiplayer interactive games are a boom business, notably in North and Southeast Asia, and draw in millions of people. This business, involving both fantasy game-playing and gambling sites, will be promoted and expanded greatly in the near future. Handheld games consoles with Internet capabilities will further promote virtual interactions. Online games potentially provide a new platform where children and young people will be exposed to solicitations and potentially harmful interactions with other people online. Social impact assessments from a child protection perspective appear not to be available.<sup>376</sup>

## 5.7 Global Responses

One of the major obstacles to overcome in combating CSEC online is the international dimension of the problem. In January 1999, UNESCO sponsored the “Expert Meeting on the Sexual Abuse of Children, Child Pornography and Pedophilia on the Internet”, in Paris.<sup>377</sup> This conference was designed to bring together experts in all relevant fields

– children’s rights advocates, government representatives, and law enforcement agencies, Internet specialists – in order to establish an international framework which could more effectively prevent the use of the Internet in the commission of offences against children, without limiting the free-flow of information and the growth of new technologies. These issues were examined again at a conference held in Vienna, Austria on Combating Child Pornography on the Internet.<sup>378</sup> The event represented an attempt to reinforce cooperation between law enforcement officials and members of the Internet industry. In March of 2004, the U.K. government hosted a conference in Wilton Park, entitled “Combating Child Abuse on the Internet: An International Response”, addressed the threats posed by those abusing children via the Internet and discussed mechanisms to combat this at the national and international level.

There have been some positive steps in the international scene. The G8 countries have cooperated through initiatives such as the Virtual Global Summits and various Interpol activities that include 187 member countries.<sup>379</sup> These international gatherings have set out a number of guiding principles and suggestions as to how the Internet can best be controlled, and have examined the responsibilities of private sector Internet companies. Some of the commonly proposed solutions have been discussed elsewhere in this paper.

Certain multi-stakeholder initiatives have recently been developed to try and tackle the global nature of the phenomena. The Virtual Global Taskforce (VGT) is made up of law enforcement agencies from around the world working together to fight child abuse online. The aim of the VGT is to build an effective, international partnership of law enforcement agencies that helps to protect children from online child abuse. The objectives of the VGT are to make the Internet a safer place, to identify, locate and help children at risk and to hold perpetrators appropriately to account. The VGT is made up of the Australian Federal Police, the Child Exploitation and Online Protection Centre in the U.K., the Italian Postal and Communication Police Service, the Royal Canadian Mounted Police, the US Department of Homeland Security and Interpol. Jim Gamble, the Chief Executive of the Child Exploitation and Online Protection Centre is the Chair of the VGT. The VGT delivers low-cost, high impact initiatives that prevent and deter paedophiles from exploiting children online.<sup>380</sup>

Similarly, ECPAT International has led the formation of the Dynamic Coalition on Child Safety online at the Internet Global Forum (IGF) to maintain a constant emphasis on child protection issues bringing in industry and child rights agencies under one platform. The IGF was developed in preparation for the UN World Summit on the Information Society. Its mandate includes: discuss public policy issues related to key elements of Internet governance in order to foster the sustainability, robustness, security, stability and

development of the Internet; facilitate discourse between bodies dealing with different cross-cutting international public policies regarding the Internet and discuss issues that do not fall within the scope of any existing body; interface with appropriate inter-governmental organisations and other institutions on matters under their purview; facilitate the exchange of information and best practices, and in this regard make full use of the expertise of the academic, scientific and technical communities; advise all stakeholders in proposing ways and means to accelerate the availability and affordability of the Internet in the developing world; strengthen and enhance the engagement of stakeholders in existing and/or future Internet governance mechanisms, particularly those from developing countries; identify emerging issues, bring them to the attention of the relevant bodies and the general public, and, where appropriate, make recommendations; contribute to capacity building for Internet governance in developing countries, drawing fully on local sources of knowledge and expertise; promote and assess, on an ongoing basis, the embodiment of WSIS principles in Internet governance processes; discuss, inter alia, issues relating to critical Internet resources; help to find solutions to the issues arising from the use and misuse of the Internet, of particular concern to everyday users; and publish its proceedings. This year the workshop, which will be chaired by ECPAT International, will showcase panellists from private sector such as social networks, mobile phones, independent Internet expert and European child rights network.

## 5.8 Future of the Internet Revolution

Although the Internet is rapidly expanding, the private sector can play an essential role in helping to maintain the “integrity of the medium”.<sup>381</sup> ISPs could require identification in order to subscribe, or the ISPs could then retain information about the subscriber’s account. (This may, however, require amendment of current privacy laws.<sup>382</sup>) Content rating and filtering systems will become more highly developed and reliable so as to offer a greater degree of reliability.<sup>383</sup> As outlined above, codes of conduct have their drawbacks but can nevertheless serve to offer guidance as to practices most appropriate in preventing the Internet from playing a predominant role in CSEC. As stated in the conclusions of the Vienna Conference on Combating Child Pornography on the Internet:

Child pornography on the Internet is a growing problem, and as more of the world comes online, it will continue to grow. It does not know or respect borders. The fight against it is facing particular technical and legal challenges, including fast technical innovations and changing patterns e.g. concerning places of origin and forms of exchange. The fight against this abuse cannot be done alone but only through strong international cooperation, among governments, particularly

law enforcement agencies, but equally between States and the Internet industry, hotlines and nongovernmental organisations. Therefore, one of the main outcomes of this conference is the forging of a strong international partnership among all different stakeholders in the fight against child pornography on the Internet.<sup>384</sup>

Encryption is an important and necessary Internet tool in a time of rapid and frequent transmission of information that must be secured. For example, details about criminal investigations, bank data and business transactions need to be under a shield of high-level security. Furthermore, without appropriate encryption tools, there is risk of “information theft” whereby work is appropriated by parties who would stand to gain from that information. However, encryption also poses a high burden where it impedes law enforcement and evidence gathering. A possible solution to challenges posed by encryption may be found in the model of “keyescrowed encryption”. This requires sellers of encryption to provide keys to the codes to trusted third parties (i.e., the police). Computer industries have strongly resisted this initiative, claiming that it would put them at a competitive disadvantage when compared to encryption-providers in other countries.<sup>385</sup> As a result, the US Government recently decided to fund a new code-breaking unit rather than attempt to enforce distribution of the keys to those codes.

Additional limitations to code distribution may be found in nations’ individual constitutional constraints. To furnish authorities with access to private material could violate any number of privacy protections. It is necessary, however, that the trend of protecting corporate interests and privacy interests of known abusers be reversed. Key-escrowed encryption appears to offer the most effective solution to enforcement of laws preventing CSEC. In some jurisdictions, it is a crime to refuse to tell police the key for encryption software. Microsoft has recently been criticised as a result of its BitLocker encryption software. With the release of Vista, BitLocker comes free with the Windows Vista Enterprise and Ultimate Versions. “Criminals are taking advantage of these technologies like BitLocker,” police have noted, “BitLocker was the real driving force because it’s become ubiquitous.”<sup>386</sup> In response to critics, Microsoft introduced the Computer Online Forensic Evidence Extractor (COFEE). Interestingly enough, COFEE does not actually break BitLocker or open a back door, rather it captures live data on a computer for forensic testing. The Stanford Center for Internet and Society has reported in a press release that “it is ironic that Microsoft built BitLocker and is now trying to provide law enforcement with a tool to get around it.”<sup>387</sup>

A newer phenomenon faced by child advocates and law enforcement is mobile phone technology that has private Internet space. Traditional phone companies do not use ISPs as servers and therefore it is much more difficult to both monitor and control. With the



development of the smart phones and converged devices the access to the Internet is more like the traditional Internet and the mobile operators do provide linkages with ISPs and data flows through the International backbones back and forth to such devices. Since mobile phones now feature digital camera functions, as well as digital video, pictures can be taken anywhere and sent via phones across borders without a trace. The link between this next generation of telephone and viewing of pornography is evident.<sup>388</sup> Despite the risk to children, mobile phone companies have been resistant to turning off the Internet applications, even when requested by parents.<sup>389</sup>

Mobile bullying has become a problem around children. Besides bullying on Internet chatrooms and via email, mobile text bullying is the most significant form of bullying. According to a U.K. survey, 97 per cent of 12 to 16 year olds own a mobile phone.<sup>390</sup> Children who often find the messages threatening or discomfoting in some way receive unwelcome text messages. To a child, a mobile phone is one of their most treasured possession and they rarely go anywhere without it. For this reason, mobile bullies always have a way of reaching them, whether at school, at home or on outings. The child often feels trapped in this situation because they are afraid of telling their parents since it may result in them having their phone taken away. Since children often do not know whom to turn to in situations such as these, the National Children's House (NCH) and Tesco Mobile launched an interactive website to provide young people with information and advice about mobile bullying. As well, they have created a hotline where an individual can text a special number if they are being bullied and get advice.<sup>391</sup>

## 6. Financial Sub-Sector

It has been argued within the discourse of the private sector's involvement in CSEC, the most noticeably absent cohort of those implicated has been the financial sub-sector. This sub-sector has traditionally consisted of financial institutions, credit card companies and third party payment companies. Newer operators include digital currency providers (e.g., e-Gold Ltd.) and virtual convertible currency suppliers (e.g., Entropia Universe). The involvement of these industries in the buying, selling and trading of child abuse images has been known to law enforcement agencies and child rights groups even before the First World Congress in 1996 highlighted the connection. Despite the sub-sector's long-standing association with CSEC activities, the vast majority of financial institutions have opted not to participate in the conferences or debates on the topic and have been relatively silent on their efforts to cease the use of their products in the course of CSEC activities.

In the past three years, likely the result of a rise in fraudulent monetary transactions including a general increase in identity theft, a number of reports have been published focusing on a perceived need to better monitor and regulate the financial industries. In December 2005, the US Treasury Department published the *US National Money Laundering Threat Assessment*.<sup>392</sup> According to the report, criminals are enjoying new advantages with globalisation and the advent of new financial services such as stored value cards and online payment services. The report identifies and assesses 13 systemic financial threats against the US and, of those, two (e.g., online payment systems and stored value cards) are considered to be emerging threats. The report notes:

New and innovative online payment services are emerging globally in response to market demand from individuals and online merchants... [O]nline merchants, particularly those in sectors with high 'chargeback' rates, are generating demand for new payment methods. There are hundreds of these online payment systems. These markets embrace online payment systems that set their own clearing and settlement terms absent any consumer protection regulations. Typically, transactions through these service providers are considered final with no recourse for individuals who believe they have been defrauded. The consequence, according to federal law enforcement agencies, is that these systems have become favorite payment mechanisms for online perpetrators of fraudulent investment schemes and other illegal activity.<sup>393</sup>

From a global perspective, the Financial Action Task Force (FATF) has also commented on the use of alternative payment methods as a cause of global concern. The FATF is an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. Created in 1989, the Task Force works to generate the necessary political will to bring about legislative and regulatory reforms.<sup>394</sup> In October 2006, it released a report on new payment methods.<sup>395</sup> The report found that, while there is a legitimate market demand for these alternative payment methods – such as prepaid cards, electronic purses and mobile payments – they are highly vulnerable to money laundering and terrorist financing schemes. Specifically, cross-border providers of new payment methods may pose more risk than providers operating exclusively within a particular country. The FATF report recommended continued vigilance by all countries to further assess the impact of evolving technologies on cross-border and domestic regulatory frameworks. However, given the level of corruption or collusion on the part of some foreign governments in various types of criminal activities, strict monitoring and enforcement of financial transactions is unlikely.

In 2006, several global financial institutions, with the encouragement of US Senator Richard C. Shelby, partnered with the US-based International Center for Missing and Exploited Children (ICMEC) to launch the Financial Coalition against Child Pornography (FCACP). FCACP is comprised of leading banks, credit card companies, third party payments companies and Internet services companies, and represents nearly 90 per cent of the US payments industry. Its goal is to eradicate the profitability of commercial child pornography by following the flow of funds and shutting down the payments accounts that are being used by these illegal enterprises. Members of FCACP include: America Online; American Express Company; Google; MasterCard; Microsoft; PayPal; Visa and Western Union. FCACP also benefits from the advice and counsel provided by law firms, financial associations, cyber security experts and US regulators.

In preparation for the World Congress III, the FCACP will be circulating a paper on the work of the Coalition to date and some of the challenges the Coalition faces in meeting its objectives. At a recent global meeting on CSR at the sexual exploitation of children and youth,<sup>396</sup> a number of FCACP accomplishments were highlighted by its spokesperson, including the publication of the “Internet Merchant Acquisition and Monitoring Best Practices for Prevention and Detection of Commercial Child Pornography”, distributed by the US Comptroller of the Currency and the US Federal Deposit Insurance Corporation to executives of banks across the country.

Since the launch of FCACP, the Coalition states that it has become more difficult for US Federal law enforcement to use credit cards in their investigations. It is suggested that if

law enforcement is having trouble using credit cards, making these transactions, it stands to reason that the consumer is as well. Further, the purchase price for these images of sexually exploited children has risen dramatically – an indication that FCACP efforts may be affecting the profitability of these sites. Other countries, including Canada and several EU states, are currently reviewing the FCACP model to determine whether a similar coalition could function in their jurisdictions.

Although the inclusion of the financial sub-sector in the battle against CSEC is welcomed, the issue of profiting through the selling and purchasing of child abuse images – both from the merchant and consumer side – has not yet been addressed. Credit card companies that receive a percentage of each merchant transaction (typically 1-3 per cent), as well as interest on the credit cards from the consumer (typically 18-21 per cent) retain the profits even after the rogue merchant or criminal consumer is caught. This has yet to be publicly addressed by the Coalition or its members.

## 7. Conclusions

Although this report is intended to be read independent of other documents, reference has been made throughout to three key studies that should be reviewed in detail as they very much compliment the research presented here. A synopsis of each is outlined below.

### 7.1 United Nations Secretary-General's Study on Violence against Children<sup>397</sup>

Much violence against children remains hidden and is often socially approved, according to the UN Secretary-General's Study on Violence against Children released in August 2006. According to the Study, violence against children includes physical violence, psychological violence, discrimination, neglect and maltreatment. It ranges from sexual abuse in the home to corporal and humiliating punishment at school; from the use of physical restraints in children's homes to brutality at the hands of law enforcement officers; from abuse and neglect in institutions to gang warfare on the streets where children play or work; from infanticide to so-called 'honour' killing.

The Study, which combines human rights, public health and child protection perspectives, focuses on five settings where violence occurs: home and family; schools and educational settings; institutions (care and judicial); the workplace; and the community. Although the consequences may vary according to the nature and severity of the violence inflicted, the short- and long-term repercussions for children are very often grave and damaging. The physical, emotional and psychological scars of violence can have severe implications for a child's development, health and ability to learn. Studies referenced in the report suggest that experiencing violence in childhood is strongly associated with health risk behaviours later in life, such as smoking, alcohol and drug abuse, physical inactivity and obesity.

The report to the General Assembly by an Independent Expert charged with its completion calls for a wide range of actions to be taken to prevent and respond to violence against children across all the settings where it occurs. Twelve overarching recommendations address areas such as national strategies and systems, data collection and ensuring accountability. At a global level, the report calls for the appointment of a Special Representative on Violence against Children, with an initial mandate of four years, to act as a high-profile global advocate to promote prevention and elimination of all violence against children and to

encourage cooperation and follow-up. It also includes some more specific recommendations including, *inter alia*: in every country, a national strategy, policy or plan of action on violence against children, with realistic and time-bound targets, and integrated into national planning processes, should be developed and coordinated by an agency that can bring multiple sectors together; laws and policies to prohibit all forms of violence against children in all settings with no person below 18 years of age subjected to the death penalty or a sentence of life imprisonment without possibility of release; ongoing training and education for those who work with children to equip them to prevent, detect and respond to violence against children; improved data collection and information systems to identify children at risk, inform policy and programming and track progress; and ratification and implementation of all relevant international treaties and obligations.

The Study offers recommendations for each of the five settings on which it focuses. Perhaps of greatest relevance to this discourse are the suggestions for the workplace. One such recommendation is to:

Enlist the support of the private sector, trade unions and civil society to form partnerships that stimulate corporate social responsibility measures, and encourage the private sector, trade unions and civil society to adopt ethical guidelines in support of prevention programming in the workplace.<sup>398</sup>

## **7.2 Protect, Respect and Remedy: A Framework for Business and Human Rights**

In April 2008, the UN's Special Representative on issues of human rights, transnational corporations and other business enterprises released his final report titled, *Protect, Respect and Remedy: A Framework for Business and Human Rights*.<sup>399</sup> The Special Representative opens his report by defining what he sees as being the problem – why his task as Special Representative needed doing at all. In his view, what he calls the “predicament” of business and human rights stems from “governance gaps created by globalisation” – where the impact of corporations on human rights (and indeed on other issues) exceeds the ability of states and societies to manage the adverse consequences.

The report notes that progress has been made in the past decade in attempting to fill these “governance gaps”. However, while the steps taken – for example the Global Compact – are to be welcomed, the fundamental problem, according to the author, is that there are too few of them and they do not cohere as parts of a more systemic response. The aim of

the report is therefore to propose a systematic framework for the management of business responsibility and accountability for maintaining human rights.

The first element in the Special Representative's governance framework rests on the state's duty to protect the human rights of its people. As he observes, this duty is well understood, and is enshrined in international law and custom. The problem is how states may fulfill this duty with respect to business activities. He makes a number of recommendations on how this might be achieved. First, states need to foster corporate cultures in which respect for human rights is integral. This might be done, for example, through modifying disclosure requirements for listed companies. Second, states need to align their policies much more closely. While he does not name names, the Special Representative criticizes governments that "take on human rights commitments without regard to implementation". Thirdly, he advocates more help from the international community to individual states to achieve greater policy coherence on business and human rights. This work he ascribes firmly to human rights bodies such as the UN Office of the High Commissioner for Human Rights.

The second part of his trinity is "the baseline responsibility of companies to respect human rights". Central to this is the need for companies to observe due diligence in understanding and managing the human rights impacts of their operations. He argues that companies already have in place systems to assess and manage financial and legal risks, and this approach should be extended also to cover human rights impacts.

The Special Representative makes it clear that companies' human rights due diligence should extend beyond evaluation of their own activities to include consideration of "abuse through the relationships connected with their activities". Through such a process companies can avoid complicity in human rights abuses. Legal complicity is clearly defined but differing non-legal interpretations made by campaigners, social investors and others make this a grey area in which "it is not possible to specify definitive tests for what constitutes complicity in any given context".

Perhaps of greatest relevance here is the report's section on remedies. The author points out that any system of human rights protection is useless unless there are effective mechanisms to investigate, punish and redress abuses. He acknowledges that a number of processes already exist, including international agreements such as the CRC; national mechanisms such as the UK Health and Safety Executive; and multi-stakeholder initiatives such as the Voluntary Principles on Security and Human Rights. However, he concludes that this "patchwork of mechanisms" is flawed and is in serious need of improvement. He then explains that states should strengthen the legal frameworks to "hear complaints and enforce

remedies against all corporations operating or based in their territory”. He also argues for a strengthening of existing structures, such as the National Contact Points for the OECD Guidelines, which he describes as “potentially an important vehicle for providing remedy”.

### 7.3 Stockholm Declaration, Agenda for Action and Monitoring Reports

The First World Congress against CSEC was a landmark event, providing testimony that convinced the world that sexual violations against children exist in all nations, respective of cultural differences or geographic location. It marked the first public recognition by governments of the existence of CSEC and resulted in a commitment to a global *Declaration and Agenda for Action*, which was formally adopted by 122 governments, as a guide to the specific measures that must be taken to protect children’s right to live free from sexual exploitation.

Since 1996, a broad alliance of governments and nongovernment entities has focused efforts around this Agenda (bolstered by a Second World Congress held in Yokohama during which the number of countries adopting the Agenda rose to 159 – a figure which has since risen to 161) and made progress in improving protection for children from commercial sexual exploitation. However, the increasing sophistication of resources available to those who seek to exploit children has grown in equal measure.

Experience demonstrates that the level of responsibility and role that a government takes to set and uphold standards of protection, like the lead taken for protecting children’s rights, determines the nature, quantity and quality of what the country achieves for its children. Governments can and have accelerated progress for implementation of the *Agenda for Action*, but their actions have not been uniform, neither are legal measures alone enough to stop the demand for sex with children.

Based on the framework of the *Agenda for Action*, the Global Monitoring Reports on the Status of Action against CSEC,<sup>400</sup> published regularly by ECPAT International, provide a baseline of information on actions taken and the urgent work that remains to be done to protect children from the exploitation and abuse that is still perpetrated with impunity in many countries.

Broadly, these actions required are focused on: Coordination and Cooperation; Prevention;



Protection; Recovery, Rehabilitation and Reintegration; and Child Participation. The *Agenda for Action* is thus the formal and guiding structure used by governments that have adopted it and are committed to working against CSEC.

Preparatory work for the reports involved a review of the literature available on sexual exploitation in each of the countries where ECPAT works. Extensive research revealed a lack of information in the areas of Recovery, Rehabilitation and Reintegration; and Child Participation, thus the reports focus only on the areas of Coordination and Cooperation; Prevention; and Protection, and where verifiable information could be obtained, on the other two areas.

The reports highlight the widespread sexualization of images and contact with children. This coincides with trends of children being frequently victimized by adults for commercial sex, under the misperception of their ability to consent to exploitation. Analyses of countries around the world show that poverty, low levels of education and political and civil unrest still force huge numbers of children into sexual exploitation. At the same time, new consumer culture and media influence are redefining the boundaries of social belonging, creating profound pressures which can propel children into the hands of adults who will use their bodies and exploit children's search for resources to meet these expectations. While the children are often wrongly blamed, the role of the perpetrator who exploits them through abuse of power and wealth goes largely unnoticed and unaddressed. Only half of the countries examined have child prostitution laws that carry penalties for exploiters and, in most cases, prosecution is constrained by the necessity to prove rape, coercion or corruption of minors.

While the global awareness of child-sex tourism has led to improvements in prevention and protection mechanisms, the dramatic growth in low-cost airline routes and an increase in worldwide tourism have facilitated the ease with which abusers can access children without constraint in virtually any destination. Likewise, new developments in information technology are seeing multi-billion dollar growth in child pornography materials and the number of adults accessing images of child abuse. The children they seek to entrap can now be victimized from anywhere in the world with very few countries putting sufficient protection measures in place.

The reports also seek to contribute to other international mechanisms that exist to protect children's rights: the CRC and the *Optional Protocol on the sale of children, child prostitution and child pornography*, to strengthen the implementation and action against CSEC at all levels.

Another important objective of the reports is to stimulate the exchange of experience and knowledge among countries and different actors to create a dialogue that can further work against CSEC. The implementation of the *Agenda for Action* is urgently required; the reports clearly illustrate that there is a compelling need for global action to protect children from these inhuman violations. No doubt the Third World Congress will assist in this regard.

## 7.4 Final Remarks

The private sector has been implicated in CSEC. Given the pervasiveness of the sector, their involvement is unavoidable; how the various parties react to this involvement is dependent on several factors including the level of involvement, the nature of the work and the motivation of the employees, director and share holders. This study has analyzed the options available in order to hold private sector industries accountable for violations of the most fundamental right of children to be protected from sexual exploitation

Although internal and external corporate social responsibility tools have increased in popularity since the First and Second World Congresses, codes of conduct and other devices have been heavily criticized as being ineffective and nothing more than a public relations exercise. Some of the negativity may have merit, but exceptions do exist and good work has been done without the need for government intervention. Internationally, global standard setting through intergovernmental organisations, have offered an alternative to the micro industry approach adopted on an ad hoc basis. Although this international “soft law” does offer the benefit of much greater public awareness and professional support from an international secretariat, the voluntary and self-policing characteristics have also brought these approaches into disrepute. The most recent trend has been to try and hold the private sector accountable by alleged treating violations of international law (including the CRC and its Optional Protocols) as actionable, in the way that human rights violations committed by a state are actionable in some domestic courts of law. This use of “hard law” also has its drawbacks – most often the cost of mounting the case and the lengthy period between commencing and concluding an application – and likely a combination of all these tools are needed to make progress.

This report has also highlighted which private sector sub-sectors are involved in the crime and which industries are helping to combat or, in some cases, contribute to CSEC. The focus has been on travel and tourism, the media, the emerging field of new technologies and the financial industries. Reference was also made to businesses that have not yet immersed themselves in this work, but have the potential to assist in its prevention. Although each

group has, at minimum, acknowledged their role in CSEC activities, all industries involved can no doubt do more to create, promote and implement projects that would further advance the protection of children.

# Endnotes

- 1 Mark Erik Hecht is an academic, a lawyer and a human rights advocate. Professor Hecht's primary research interest is international child law, specifically the role and involvement of the private sector in the commercial sexual exploitation of children. Professor Hecht sits on the Canadian government's Committee against the Commercial Sexual Exploitation of Children and Youth and the Patron Board of the Alliance for the Rights of Children. He is the national coordinator for CINCYP. The Canadian Information Network on Child and Youth Rights, based in Ottawa and Senior Legal Counsel to Beyond Borders: Ensuring Global Justice for Children based in Winnipeg. From 1999-2005, he was a member of the Executive Committee of ECPAT International.
- 2 Although limited research has been conducted on the topic of the private sector's involvement in CSEC, that which has been produced concludes that the private sector is certainly involved in the activity. For a review generated by the United Nations see: UN Commission on Human Rights. *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* (E/CN.4/2001/78). 2001; and UNICEF. *Profiting from Abuse: An investigation into the sexual exploitation of our children*. New York: 2001. For a cursory investigation from the non-governmental sector see UNICEF. *The Role and Involvement of the Private Sector: A contribution of ECPAT International to the 2nd World Congress Against Commercial Sexual Exploitation of Children*. New York: 2001. Many industries have gone on record as acknowledging the use of their products or services in CSEC-related activities. For example, see International Hotel & Restaurant Association. *Resolution adopted by 34th Congress*. Mexico City: 30 Oct., 1996 that states, "The IH & RA and its member associations ... recognize that, unfortunately, some child sex abusers may attempt to use our hotels as the location where they commit their crimes;" and Microsoft. *Report on On-Line Safety and Security*, which states: "Microsoft cooperates with law enforcement authorities around the world to help combat the distribution of illegal content using our online services. We do not knowingly tolerate anyone using our services to endanger children in any way." Accessed on 14 Oct. 2008 from: <http://microsoft.ninemsn.com.au/protectyourkids.aspx>. More examples will be provided throughout this report.
- 3 First World Congress against Commercial Sexual Exploitation of Children. *Declaration and Agenda for Action*. Stockholm. 27-31 Aug., 1996. Article 5.
- 4 Ibid. Articles 1-6.
- 5 ECPAT International. "How Many Children are Victims?" *Frequently Asked Questions about CSEC*. Note also that UNICEF does not keep statistics on victims or survivors of commercial sexual exploitation of children; its closest variable would be child labour data.
- 6 For example, UNICEF has consistently stated that an estimated two million children – mainly girls but a significant number of boys – are believed to be part of the multi-billion dollar commercial sex trade. However, UNICEF has not published its definition of "commercial sex trade". Presumably it is consistent with the *Optional Protocol to the Convention on the Rights of the Child*, but this is narrower than the ECPAT International definition, which is broader than Interpol's definition.
- 7 For example, a child who has been sexually exploited by a family member at home may not know that the family member had videotaped the violation and traded it on the Internet. Some cases have been reported to Interpol where children have been drugged and the images of the abuse were taken while the child slept unknowingly. See: Interpol. *Report of the 20th Meeting of the Interpol Specialist Group on Crimes against Children*. Thun, Switzerland; 22-24 Oct., 2002.
- 8 See: ECPAT. *Report on the ECPAT Regional Consultation on the Commercial Sexual Exploitation of Children in North Africa*. Rabat, Morocco: 12-13 June, 2003. The Executive Summary, by Dr. Najat M'jid, explains that CSEC in the region is still poorly understood because, "it is taboo in many countries; there are too many different definitions and concepts; sexual exploitation of children is treated as 'violence and trauma' and national studies based on strict methodology and harmonised standards are lacking".
- 9 The International Society for the Prevention of Child Abuse and Neglect provides data on the "gross

- underreporting” by governments of crimes against children, including sexual offences. See ISPCAN. *World Perspectives on Child Abuse: The Fifth International Resource Book*. Carol Stream, Illinois: 2004.
- <sup>10</sup> See: AIM: Accuracy in Media. “The Child Rapist Next Door.” *Children, Youth and Media around the World: An Overview of Trends and Issues*. S. Gigli, ed. New York: UNICEF and Intermedia, 2004.
- <sup>11</sup> Frontline: Defenders of Human Rights Defenders maintains an extensive database of attacks on those conducting research into human rights violations, including sexual crimes against children.
- <sup>12</sup> Vitit Muntarbhorn is a Professor of Law at Chulalongkorn University in Thailand. As the former UN Special Rapporteur on the sale of children, child pornography and child prostitution, he was appointed General Rapporteur to the First World Congress in 1996 and again to the Second World Congress in 2001.
- <sup>13</sup> First World Congress against Commercial Sexual Exploitation of Children. *Declaration and Agenda for Action*. Stockholm: 27-31 Aug., 1996. Article 5.
- <sup>14</sup> Second World Congress against Commercial Sexual Exploitation of Children. *The Yokohama Global Commitment*. Yokohama: 17-20 Dec., 2001.
- <sup>15</sup> See: UN 57th Commission on Human Rights. *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* (E/CN.4/2001/78). 2001. 7, para. 20.
- <sup>16</sup> See: International Labour Organization (ILO). *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (3rd Ed.) 2001. 2, para. 6.
- <sup>17</sup> The OECD groups 30 member countries that have declared a shared commitment to democratic government and the market economy. With active relationships with some 70 other countries, non-government organisations and civil society, it has a global reach. Best known for its publications and its statistics, its work covers economic and social issues from macroeconomics, to trade, education, development and science and innovation. The OECD also produces internationally agreed instruments, decisions and recommendations to promote “rules of the game” in areas where multilateral agreement is necessary for individual countries to make progress in a globalised economy. Dialogue, consensus, peer review and pressure have been the traditional pillars of work for the OECD. The OECD will be reviewed later in this report.
- <sup>18</sup> See: OECD. *The OECD Guidelines for Multinational Enterprises: Revision 2000*. Paris: OECD Publications, 2000. 17, para. 3.
- <sup>19</sup> D. Korten. *When Corporations Rule the World*. San Francisco: Kumarian Press Inc., Berrett-Koeler Publishers, Inc., 2001. 127
- <sup>20</sup> UN General Assembly. *Convention against Transnational Organised Crime* (A/RES/55/25). 15 Nov. 2000.
- <sup>21</sup> UN General Assembly. *Protocol to Prevent, Suppress, and Punish Trafficking in Persons* (A/RES/55/25). 15 Nov. 2000.
- <sup>22</sup> UN General Assembly. *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (A/RES/54/263). 25 May 2000.
- <sup>23</sup> UN Commission on Human Rights. *Rights of the Child: Report submitted by Juan Miguel Petit, Special Rapporteur on the sale of children, child prostitution, and child pornography* (E/CN.4/2004/9). 5 January 2004.
- <sup>24</sup> Ibid.
- <sup>25</sup> “Exiting strategies” are programmes targeted to young people involved in commercial sexual exploitation. They are offered through a partnership between NGOs and the private sector to offer survivors the opportunity to leave their “trade” and seek other employment opportunities.
- <sup>26</sup> R.D. Richards, C. Calvert. “Untangling Child Pornography from the Adult Entertainment Industry: An inside Look at the Industry’s Efforts to Protect Minors.” *California Western Law Review*, 4 (2), 2008, 526.
- <sup>27</sup> F.S. Lane. *Obscene Profits: The Entrepreneurs of Pornography in the Cyber Age*. New York: Routledge, 2000.
- <sup>28</sup> Canada. Industry Canada. *Corporate Social Responsibility*. 23 Nov. 2007. Accessed on 13 Oct. 2008 from: [www.ic.gc.ca](http://www.ic.gc.ca)
- <sup>29</sup> Ibid.
- <sup>30</sup> The FTSE-350 stock market index incorporates the 350 largest corporations, by capitalization, which has their primary listing on the London Stock Exchange.
- <sup>31</sup> “CSR on the rise.” *Financial Management*. 1 Mar. 2008. 8.
- <sup>32</sup> “Assessing the impact of societal issues: A McKinsey global survey.” *The McKinsey Quarterly*. 1 Nov. 2007.
- <sup>33</sup> “Corporate Social Responsibility: Going Global.” *The Economist*. 17 Jan. 2008.
- <sup>34</sup> Harvard Kennedy School. *Corporate Social Responsibility Initiative*. 2008.

- <sup>35</sup> Canada. Industry Canada. *Corporate Social Responsibility*. 23 Nov. 2007. Accessed on 13 Oct. 2008 from: [www.ic.gc.ca](http://www.ic.gc.ca)
- <sup>36</sup> United Kingdom. *What is CSR?* 2004. Accessed on 13 Oct. 2008 from: [www.berr.gov.uk/whatwedo/sectors/sustainability/corp-responsibility/page45192.html](http://www.berr.gov.uk/whatwedo/sectors/sustainability/corp-responsibility/page45192.html)
- <sup>37</sup> Canada. Industry Canada. *Corporate Social Responsibility*. 23 Nov. 2007. Accessed on 13 Oct. 2008 from: [www.ic.gc.ca](http://www.ic.gc.ca)
- <sup>38</sup> K. Buhmann. "Corporate social responsibility: what role for law? Some aspects of law and CSR." *Corporate Governance*, 6 (2), 2006, 188-202.
- <sup>39</sup> W. Baue, "New French law mandates corporate social and environmental reporting." *Sustainability Investment News*. 14 Mar. 2002.
- <sup>40</sup> UN Global Compact. *How to Join the Global Compact*. Accessed on 13 Oct. 2008 from: [www.unglobalcompact.org](http://www.unglobalcompact.org)
- <sup>41</sup> Ibid.
- <sup>42</sup> International Organisation for Standardization (ISO). *About ISO SR*. Accessed on 14 Oct. 2008 from: [www.iso.org](http://www.iso.org)
- <sup>43</sup> International Labour Organisation (ILO). *Child Labour*. Geneva: ILO, 2008.
- <sup>44</sup> Ibid.
- <sup>45</sup> Ibid.
- <sup>46</sup> Centre for Constitutional Rights. *Corporate Human Rights Abuse*. 2007. Accessed on 14 Oct. 2008 from: <http://ccrjustice.org/corporate-human-rights-abuse>
- <sup>47</sup> Gabriel Katsh. "Fueling genocide." *Multinational Monitor*. 21 Oct. 2000: 13-16.
- <sup>48</sup> This section of the study is meant to provide the context necessary to put forward the arguments favouring one private sector accountability mechanism over another. It is not meant to be a primer on international human rights law. For a proper review of international human rights law see: H.J. Steiner, P. Alston. *International Human Rights in Context: Law, Politics and Morals* (2nd ed). New York: Oxford University Press, 2000; and M. Freeman, G. Van Ert. *International Human Rights Law*. Toronto: Irwin Law Inc., 2004.
- <sup>49</sup> UN General Assembly. *Convention on the Rights of the Child* (A/RES/44/25). 20 Nov. 1989.
- <sup>50</sup> The CRC is the most widely and rapidly ratified human rights treaty in history. Only two countries, Somalia and the United States, have not ratified the agreement. Somalia is currently unable to proceed to ratification as it has no recognised government. By signing the Convention, the United States has signalled its intention to ratify but has yet to do so.
- <sup>51</sup> UN General Assembly. *Convention on the Rights of the Child* (A/RES/44/49). 20 Nov. 1989. Article 1.
- <sup>52</sup> UN General Assembly. *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (A/RES/54/49). 25 May 2000.
- <sup>53</sup> Ibid. Article 2.
- <sup>54</sup> Ibid.
- <sup>55</sup> UN General Assembly. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children* (A/RES/55/25). 15 Nov. 2000.
- <sup>56</sup> UN General Assembly. *Convention against Transnational Organised Crime and its Protocols* (A/RES/55/25). 15 Nov. 2000.
- <sup>57</sup> UN General Assembly. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children* (A/RES/55/25). 15 Nov. 2000. Articles 3 and Part III.
- <sup>58</sup> UN General Assembly. *Convention on the Elimination of All Forms of Discrimination against Women* (A/RES/34/180). 18 Dec. 1979.
- <sup>59</sup> Ibid. Article 1.
- <sup>60</sup> In October 1999 the United Nations Division for the Advancement of Women organised a judicial colloquium on the application of international human rights law at the domestic level. The meeting was held in commemoration of the 20th anniversary of the adoption of the CEDAW and the 10th anniversary of the CRC. The final report states, "Participants agreed that it was essential to promote respect for and adherence to international and regional human rights norms, particularly those affecting women and girls. They underscored the compatibility and complementarity of international and regional human rights guarantees and recommended that such guarantees must be considered as intrinsic to domestic law in national courts. Participants recommended that all judicial

- officers be guided by international human rights instruments, including the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the *Convention on the Rights of the Child* (CRC), in the interpretation and application of national constitutions, laws and practices, including customary law that affect the girl-child.” UN Division for the Advancement of Women. “Communiqué.” Vienna: United Nations Office at Vienna, 1999.
- <sup>61</sup> UN General Assembly. *Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages* (A/RES/1763(XVII)). 7 Nov. 1962.
- <sup>62</sup> UN General Assembly. *Declaration on the Elimination of Violence against Women* (A/RES/48/104). 20 Dec. 1993.
- <sup>63</sup> International Labour Organisation (ILO). *Worst Forms of Child Labour Convention* (ILOLEX No. C182). 17 June, 1999.
- <sup>64</sup> Ibid. Article 3.
- <sup>65</sup> Ibid.
- <sup>66</sup> Ibid. Article 1.
- <sup>67</sup> UN General Assembly. *Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)* (A/RES/44/33). 29 Nov. 1985.
- <sup>68</sup> Ibid. Rule 4.
- <sup>69</sup> UN General Assembly. *Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)* (A/RES/45/112). 14 Dec. 1990.
- <sup>70</sup> Ibid. Part I.
- <sup>71</sup> UN General Assembly. *Universal Declaration of Human Rights* (A/RES/217A (III)). 10 Dec. 1948.
- <sup>72</sup> Ibid.
- <sup>73</sup> Ibid. Article 30.
- <sup>74</sup> UN General Assembly. *International Covenant on Economic, Social and Cultural Rights* (A/RES/2200A (XXI)). 16 Dec. 1996.
- <sup>75</sup> UN General Assembly. *International Covenant on Civil and Political Rights* (A/RES/2200A (XXI)). 16 Dec. 1966.
- <sup>76</sup> *The Bretton Woods Agreement* was signed in 1944, with the intention to provide economic aid for reconstruction of postwar Europe and foster greater international economic cooperation among nations. It established a postwar international monetary system of convertible currencies, fixed exchange rates and free trade, marking an end to protectionist economic policies and state isolationism which commentators suggested was the cause of the economic depression of the 1930’s.
- <sup>77</sup> While a company is not legally obligated under international law to comply with human rights standards, those companies who have violated them have found, to their cost, that society at large will condemn them. See: J. C. Hong. “Enforcement of Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers against MNCs for Labor Rights Violations.” *Wisconsin International Law Journal*, 19, 2000, 42; Amnesty International. *Is it any of your Business?* London: Amnesty International UK, 2000. 83-85.
- <sup>78</sup> R. Cherington, “Securities Laws and Corporate Social Responsibility: Toward and Expanded Use of Rule 10B-5.” *University of Pennsylvania Journal of International Economic Law*, 25, 2004, 1454.
- <sup>79</sup> Ibid. A violation of a code can be used against an MNC in a legal action if the employees or directors of the MNC proclaim adherence to it, thus creating certain legal expectations.
- <sup>80</sup> The Sullivan Statement of Principles (4th Amplification), November 8, 1984, 24 I.L.M. 1496 (1985).
- <sup>81</sup> UN Commission on Human Rights. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (E/CN.4/Sub.2/2003/12/Rev.2). 2003.
- <sup>82</sup> UN Office of the High Commissioner for Human Rights. *Human rights and transnational corporations and other business enterprises* (E/CN.4/RES/2005/69). 20 Apr. 2005.
- <sup>83</sup> Ibid. The Special Representative’s mandate is to: identify and clarify standards of corporate responsibility and accountability, elaborate on the State’s role in effectively regulating and adjudicating the role of TNCs and other business enterprises, research and clarify the implications for TNCs and other business enterprises of concepts such as “complicity” and “sphere of influence,” develop materials and methodologies for undertaking human rights impact assessments of activities of TNCs, and compile a compendium of best practices of States and TNCs.

- <sup>84</sup> On 31 Jan. 1999, UN Secretary-General Kofi Annan proposed a global compact between business leaders and the UN. (UN “Press Release: Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos” (SG/SM/6881). 1 Feb. 1999. 1.) Annan called on businesses “... individually through [their] firms, and collectively through [their] business associations [...] to embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices” (UN 2.). In exchange, the United Nations agreed to assist business and social groups to develop solutions for concerns in these areas (UN 3.). A year later, an interactive website was established to provide resource information on corporate citizenship. Then on July 26 2000, the Compact was formally launched (UN Global Compact. Global Compact Homepage. Accessed on 14 Oct. 2008 from: [www.unglobalcompact.org](http://www.unglobalcompact.org)); to date, over 4300 businesses from 120 countries participate in the Compact (UN Global Compact. “Global Compact Participants.” 19 June 2008. Accessed on 14 Oct. 2008 from: [www.unglobalcompact.org/ParticipantsAndStakeholders/index.html](http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html)). Initially the Global Compact included only nine principles in these three areas, but a tenth principle in the area of anti-corruption was added at the Global Compact Leaders Summit in June 2004 (UN Global Compact. “Corporate Leaders at Global Compact Summit Pledge to Battle Corruption.” 25 June 2004. Accessed on 14 Oct. 2008 from: [www.unglobalcompact.org](http://www.unglobalcompact.org)).
- <sup>85</sup> There are six UN agencies involved in the Global Compact: the Office of the High Commissioner for Human Rights (OHCHR); United Nations Environment Programme (UNEP); International Labour Organisation (ILO); United Nations Office on Drugs and Crime (UNODC); United Nations Development Programme (UNDP); and United Nations Industrial Development Organisation (UNIDO). The six agencies share resources and expertise and periodically meet to coordinate activities between themselves and the Global Compact Office.
- <sup>86</sup> The ten principles are drawn from the *Universal Declaration on Human Rights*, the ILO 1998 *Fundamental Principles on Rights at work*, the *Rio Declaration on Environment and Development* and the United Nations *Convention against Corruption* (UN Global Compact. *The Ten Principles*. Accessed on 14 Oct. 2008 from: [www.unglobalcompact.org](http://www.unglobalcompact.org)).
- <sup>87</sup> It should be noted, this does not suggest the collective bargaining and discrimination principles are irrelevant to a discussion of CSEC. The argument could be made that collective bargaining enables workers to negotiate fair wages and a higher standard of living, meaning parents need not rely on their children to contribute to the family wage. Similarly, it could be argued that the discrimination principle protects children raised by single-mothers, a disabled parent, or in families of a minority group.
- <sup>88</sup> For example, a company using ‘a restricted legalistic interpretation,’ may limit those considered within its sphere of influence to employees and shareholders since they have a direct relationship to these parties. On the other hand, a company using ‘a more contemporary view’ may expand its sphere of influence to include parties with whom the company has political, economic, geographical or contractual relationships.
- <sup>89</sup> Four kinds of participating firms have been noted in the academic literature: First, companies forced to adopt corporate social responsibility because of pressure from activists; second, companies from developing countries who wish to learn about potential private-public initiatives; third, companies interested in exploring future public-private initiatives and how international organisations may assist them; finally, benevolent firms interested in “making the world a better place”.
- <sup>90</sup> “Blue-wash” is a term coined by activists for companies taking part in the UN-sponsored Global Compact (thus, draping themselves in UN-blue) in order to cover up their own corporate misdeeds.
- <sup>91</sup> In 1998, the Sub-Commission on the Promotion and Protection of Human Rights (“Sub-Commission”) established a Working Group on Transnational Corporations (“Working Group”). The Working Group was established for three years to research the effects of TNCs on human rights (UN Sub-Commission on the Promotion and Protection of Human Rights. *The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations* (E/CN.4/SUB.2/RES/1998/8). 8 Aug. 1998); its mandate was extended in 2001 and 2004 for three years, respectively (Sub-Commission. *The effects of the working methods and activities of transnational corporations on the enjoyment of human rights* (E/CN.4/SUB.2/RES/2001/3). 31 July 2001). Initially, the group’s mandate did not include drafting a code of conduct, but David Weissbrodt began this task in 1999; in 2001, the Working Group’s mandate officially included activities related to drafting a code (Sub-Commission 2001). In March 2003, the working group presented a draft to the sub-commission, which was unanimously approved in August and



- transmitted to the Commission on Human Rights (“Commission”) (UN Sub-Commission on the Promotion and Protection of Human rights. *Responsibilities of transnational corporations and other business enterprises with regard to human rights* (E/CN.4/SUB.2/RES/2003/16). 20 Oct. 2003). In 2004 the Commission did three things: first, confirmed the importance of TNCs responsibilities regarding human rights; second, requested the Office of the High Commissioner on Human Rights (OHCHR) to report on the legal status of current initiatives; and third, affirmed the norms have no legal standing, and ordered the Sub-Commission not to begin monitoring functions (Sub-Commission. *The effects of the working methods and activities of transnational corporations on the enjoyment of human rights* (E/CN.4/SUB.2/RES/2004/16). 9 Aug. 2004).
- <sup>92</sup> The Norms will have an effect in both the short and long term. In the short term, the Norms will become the international standard for corporate human rights responsibilities. In the long term, the Norms may serve as a blueprint for future international standards. It is also interesting to note that human rights treaties usually grow out of declarations or other “soft-law” instruments as a necessary step in consensus building required for treaty drafting.
- <sup>93</sup> UN Sub-Commission on the Promotion and Protection of Human Rights. “Preamble.” *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (E/CN.4/Sub.2/2003/12/Rev.2). 26 Aug. 2003. TNCs are further obligated to “... respect generally recognised responsibilities and norms contained in United Nations treaties and other international instruments...” some of which are listed in the preamble.
- <sup>94</sup> Ibid.
- <sup>95</sup> UN Sub-Commission on the Promotion and Protection of Human Rights. *Commentary on the Norms and responsibilities of transnational corporations and other business enterprises with regard to human rights* (E/CN.4/Sub.2/2003/38/Rev.2). 26 Aug. 2003. ). [Hereinafter referred to as UN Commentary.]
- <sup>96</sup> As with the discrimination provision contained in the Global Compact, its exclusion does not mean it is irrelevant to the discussion on CSEC. It is worth noting, that the provision enumerates age as grounds for discrimination, and then specifically states that children may be given greater protection.
- <sup>97</sup> UN Sub-Commission on the Promotion and Protection of Human Rights. *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (E/CN.4/Sub.2/2003/12/Rev.2). 26 Aug. 2003. Point 20. [Hereinafter referred to as UN Norms.]
- <sup>98</sup> Ibid., point 21.
- <sup>99</sup> Ibid., point 22.
- <sup>100</sup> Ibid., point 23.
- <sup>101</sup> UN Sub-Commission on the Promotion and Protection of Human Rights. “Preamble.” *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (E/CN.4/Sub.2/2003/12/Rev.2). 26 Aug. 2003. The list of documents is extensive. Some notable examples are: the *Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*; the *Convention on the Rights of the Child*; the United Nations *Convention against Transnational Organised Crime*; and conventions and recommendations of the International Labour Organisation.
- <sup>102</sup> Ibid. Including: the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*; the *Declaration on Fundamental Principles and Rights at Work*; the *Guidelines for Multinational Enterprises*; and the United Nations Global Compact initiative).
- <sup>103</sup> Ibid.
- <sup>104</sup> UN *Commentary*. 1(a).
- <sup>105</sup> Ibid., 1(b). (TNCs have an obligation to exercise ‘due diligence’ to ensure they do not contribute to, or benefit from, human rights abuses; refrain from activities that undermine the rule of law and others efforts to promote and ensure respect of human rights; and help promote and ensure respect for human rights).
- <sup>106</sup> UN *Norms*, C. *Norms* point 3 (specifically: war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law).
- <sup>107</sup> *Commentary*, 3(a), 3(b).
- <sup>108</sup> *Norms*, point 4. See also *Commentary* 4(a) (lists relevant international Norms).
- <sup>109</sup> *Commentary*, 4(b), 4(d)

- <sup>110</sup> *Norms*, D.
- <sup>111</sup> *Norms*, point 5. (Reading the prohibition against using forced or compulsory labour together with the Commentary, an obligation to actively prevent forced and compulsory labour emerges). See also Commentary 5(a) – 5(c).
- <sup>112</sup> *Norms*, point 6.
- <sup>113</sup> *Norms*, point 7. (TNCs are required to provide a safe and healthy working environment in line with national and international obligations). See also *Commentary* 8(a) – 8 (e). This obligation will not be explored further in this discussion. The argument could be made that this section, in so far as it protects adult wage-earners safety, and ensures they will be able to continue to support their families, prevents children from being economically exploited.
- <sup>114</sup> *Norms*, point 8 (remuneration must ensure an adequate standard of living and account for ‘progressive improvement’). This obligation will not be explored further in this discussion. However, the arguments could be made that this section is important as it eliminates the need for children to supplement the family wage; furthermore, ‘progressive improvement’ implies the improvement of a child’s quality of life. It is worth slightly elaborating on the obligation as set out in the *Commentary*. See *Commentary* 8(a) – 8(e) (TNCs are required to provide workers with the higher of, remuneration agreed upon or fixed by national laws, particularly in least developed countries. If TNCs use ‘allowance’ as part payment, it must be reasonably valuable and beneficial to workers and their families).
- <sup>115</sup> *Norms*, point 9 (TNCs are required to ensure freedom of association and collective bargaining.) See also *Commentary*, 9(a) – 9(e). This obligation will not be explored further in this discussion. As with the discussion of collective bargaining in the Global Compact, its exclusion from the discussion does not make it irrelevant..
- <sup>116</sup> *Norms*, point 6.
- <sup>117</sup> *Commentary*, 6(a). (Children employed before completing compulsory schooling or the age of 15; employed in a manner which is harmful to their health or development, prevents them from attending school or performing school-related activities; or employed inconsistently with international human rights standards, listed in the *Commentary*, constitutes economic exploitation.)
- <sup>118</sup> *Commentary*, 6(b) – 6(c) (no person under 18 is permitted to undertake hazardous work, work interfering with education or work which jeopardizes health, safety and morals. TNCs may, however, employ persons between 13 and 15 in light work, if permitted to do so by national law. Light work is defined as work not likely harmful to health and development, work which will not interfere with schooling, or training programs).
- <sup>119</sup> *Commentary*, 6(d).
- <sup>120</sup> *Ibid.*, 6(d).
- <sup>121</sup> *Norms*, E (the contents of this section are not completely unique. For instances, corrupt practices are addressed, in that TNCs are prohibited from giving or receiving a bribe or other advantage to anyone or any entity. Furthermore, this section addresses complicity, without specifically using the term. TNCs must not support, solicit or encourage others in the abuse of human rights, and ensure their goods and services will not be used by others to abuse human rights).
- <sup>122</sup> *Norms*, point 10 (TNCs must respect applicable international law, national laws and regulations, administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies).
- <sup>123</sup> *Commentary*, 10(a) – 10(d) (TNCs are obligated to respect the right to development and the right to enjoy economic, social, cultural and political development. Furthermore, TNCs are required, so far as they are able, to encourage social progress and development by ‘expanding economic opportunities.’ TNCs have special obligations regarding indigenous peoples relating to: indigenous lands, subsistence, health and culture. Finally, TNCs have obligations regarding the use intellectual property rights as they relate to social and economic welfare).
- <sup>124</sup> *Norms*, point 12 (TNCs are obligated to respect, contribute to and refrain from obstructing the realization of: the right to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression).
- <sup>125</sup> *Commentary*, 12(a) – 12(e).
- <sup>126</sup> *Norms*, H. See also *Commentary* 15(a) – 15(f), 16(a) – 16(i), 17(a).
- <sup>127</sup> *Norms*, point 15.

- <sup>128</sup> *Commentary*, 15(a) – 15(f) (TNCs must make internal rules and implementation procedures available to stakeholders, provide training to managers and workers, ensure business partners follow the Norms or similar norms, disclose information regarding activities, structure, finances and performance, inform stakeholders when their health, safety or the environment may be endangered by their activities and continually improve implementation).
- <sup>129</sup> *Norms*, point 16 (requires monitoring be transparent, independent and take account of input from stakeholders). TNCs themselves also have obligations regarding monitoring. See *Commentary* 16(d) (for instance, making reports on workplaces observed and remediation efforts undertaken as a result of monitoring to relevant stakeholders). See also *Commentary* 16(g) (TNCs are obligated to conduct periodic assessment of compliance which takes account of stakeholders input).
- <sup>130</sup> *Commentary*, 16(a) – 16(c) (it is suggested monitoring be undertaken by UN human rights treaty bodies or the Commission on Human Rights by creating reporting requirements and mechanisms. Furthermore, it is suggested that the Sub-Commission and working group monitor compliance and develop best practices by receiving information from stakeholders. Finally, stakeholders are encouraged to use the Norms: trade unions as a basis of negotiating agreements; NGOs as a basis for expectations of conduct and industry groups to monitor compliance).
- <sup>131</sup> *Commentary*, 16(e), 16(f).
- <sup>132</sup> *Ibid.*, 16(i) (TNCs are obligated to study human rights impacts of potential initiatives or projects).
- <sup>133</sup> *Ibid.*, 16(h) (TNCs are obligated to include action plans or methods of reparation and redress if assessments reveal inadequate compliance).
- <sup>134</sup> *Norms*, point 17.
- <sup>135</sup> *Ibid* (specifically reparations, restitution, compensation and rehabilitation).
- <sup>136</sup> Three possible readings have been noted in the literature: Strong, which suggests a duty to translate the Norms into national legislation; weak, which suggests an obligation to develop ‘operative human rights culture’ for TNCs; eclectic, which suggests progressive implementation.
- <sup>137</sup> ILO. *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*. Geneva: International Labour Office, 1977; *Declaration on Fundamental Principles and Rights at Work*. Geneva: ILO, 1977. In 1972, a tripartite meeting was established to explore the relationship between MNEs and Social Policy. Later, a tripartite group was established to prepare a Draft Declaration, which was adopted by the Governing Body of the ILO in 1977. Since then, the Declaration has undergone some changes: the text has been revised (in 2000 (ILO. *Tripartite Declaration* (3rd ed). Geneva: ILO, 2000) and 2006 (ILO. *Tripartite Declaration* (4th ed). Geneva: ILO, 2006), relevant Recommendations and Conventions, and those referred to in the *Tripartite Declaration*, have been updated (in 1987, 1995, 2000 and 2006), a follow-up procedure has been added (in 1980 and updated in 1987) and the Declaration has incorporated the Fundamental Principles and its follow-up procedure (in 2000). At its 295th session in March of 2006, the Governing Body adopted an updated version of the Declaration (ILO. *Tripartite Declaration* (4th ed.). Geneva: ILO, 2006).
- <sup>138</sup> ILO. *Tripartite Declaration* (4th ed). Geneva: ILO, 2006. Para. 1.
- <sup>139</sup> *Ibid.*, para. 6 (for instance, MNEs may be of public, mixed or private ownership operating outside of their home country and generally include parent companies and local entities).
- <sup>140</sup> *Ibid.*, para. 7 (importantly, the voluntary observance of the *Tripartite Declaration* does not “... limit or affect obligations arising out of the ratification of any ILO Convention”).
- <sup>141</sup> *Ibid.*, para. 5. See also para. 3 (Governments are to further this aim by adopting “... appropriate laws and policies, measures and actions...” while labour organisations are to cooperate amongst themselves and governments of ‘all countries’). See also para. 4, *Belgian Case* no. 1 (“... no one party can be regarded as a main beneficiary of the Declaration; each, within its sphere of action, is both a beneficiary of and a contributor to the co-operative and mutually dependent effort of all to further social progress, in line with national policy objectives”).
- <sup>142</sup> *Ibid.*, “General Policies.” Para. 8 (regarding international standards, the UDHR, ICCPR, ICESCR and the Constitution of the ILO are referenced. Parties are also referred to the ILO *Declaration on Fundamental Principles and Rights at Work*, other commitments entered into and accepted international obligations). See *Belgian Case* no. 2(a) (para. 21) (the *Tripartite Declaration* cannot be interpreted to exempt any party from complying with either domestic laws or international standards; furthermore principles are addressed to and should be fully respected and implemented by all parties).

- <sup>143</sup> Ibid., “General Policies.” Para. 9 (governments are urged to ratify particular Conventions or at least apply the principles embodied therein through national policies. MNEs are expected to refer to these Conventions and related Recommendations for guidance, in the event of non-complaint countries), (fn 1) (included in the list of Conventions are: *Convention (No. 29) concerning Forced or Compulsory Labor*; *Convention (No. 105) concerning the Abolition of Forced Labor*; *Convention (No. 138) concerning Minimum Age for Admission to Employment*; *Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor*. Also included are several Recommendations; most notably: *Recommendation (No. 35) concerning Indirect Compulsion to Labor*; *Recommendation (No. 146) concerning Minimum Age for Admission to Employment*; *Recommendation (No. 190) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor*).
- <sup>144</sup> Ibid., “General Policies.” Para. 12.
- <sup>145</sup> Ibid., “General Policies.” Paras. 10, 11 (enterprise activities should not conflict with development priorities and social aims of the host country).
- <sup>146</sup> Ibid., “Employment Promotion.” Para 13. See also para 14 (employment promotion is particularly important in developing countries).
- <sup>147</sup> Ibid., “Employment Promotion.” Para. 13.
- <sup>148</sup> Ibid., “Employment Promotion.” Para. 14 (specifically: general conclusions adopted by the Tripartite world conference on Employment, Income Distribution and Social Progress and International Division of Labour and the Global Employment Agenda).
- <sup>149</sup> Ibid., “Employment Promotion.” Paras. 16–20 (for instance, MNEs are asked to: increase employment opportunities, taking into account national employment policies, objectives of the host state, security of employment and long-term enterprise development; give employment priority to nationals of the host country; use technology to generate employment and adapt technology to the needs of the host country; and assist in developing national industrial development).
- <sup>150</sup> Ibid., “Training.” Para. 29 (fn 8) (references specific conventions focused on Human Resources Development).
- <sup>151</sup> Ibid., “Training.” Para. 30 (training should develop generally useful skills, promote career opportunities and be carried out in cooperation with authorities in the host country, labour organisations and local, national or international institutions).
- <sup>152</sup> Ibid., “Training.” Para. 31 (MNEs are asked to participate in programmes, aimed at encouraging skill formation and development, encouraged by host governments and supported by labour organisations. Furthermore, if possible, MNEs are asked to offer the services of resource personnel to assist in training programmes).
- <sup>153</sup> The provisions addressing wages, benefits and conditions of work and safety and health are only indirectly related to the CSEC. These obligations will not be explored further in this discussion; however, this does not mean they are irrelevant to the discussion. As with the fair remuneration section in the Norm, the argument could be made that this section eliminates the need for children to supplement the family wage. Furthermore, the obligations attempt to protect income groups equally, and therefore, protect children in various income groups equally. With reference to health and safety the argument could be made that this section, in so far as it protects adult wage-earners safety and ensures they will be able to continue to support their families, prevents children from being economically exploited. For more detail regarding MNEs obligations regarding wages, benefits and conditions of work, see *ibid.*, “Wages, Benefits and Conditions of Work.” Paras. 33–34 (wages, benefits and conditions of work are to be no less favourable than those offered by comparable employers in the host country and satisfy the ‘basic needs’ of workers and their families; governments are asked to ensure lower income groups benefit “as much as possible” from the activity of MNEs). For more detail regarding MNEs obligations regarding safety and health, see *ibid.*, “Safety and Health.” Paras. 37–40 (MNEs are asked to “... maintain the highest standards of safety and health, in conformity with national requirements [...]).
- <sup>154</sup> Ibid., “Minimum Age.” Para. 36.
- <sup>155</sup> Ibid., “Minimum Age.” Para. 36 (fn 11) (references *Convention (No. 138)*, Article 1; *Convention (No. 182)*, Article 1).
- <sup>156</sup> Ibid., “Freedom of Association and Right to Organise.” Paras. 42–48 (gives workers the right to join workers organisations subject only to the rules of the organisation and protects them from anti-union discrimination and interference from MNEs. Governments are prohibited from promising to limit freedom of association or collective bargaining rights as incentives to attract foreign investment). This obligation will not be explored

- further in this discussion. This does not make the obligation irrelevant to the discussion, however.
- <sup>157</sup> Ibid., “Collective Bargaining.” Paras. 49-56 (obligations are not particularly onerous for MNEs. For instance, MNEs are asked: to provide facilities to assist in developing collective agreements; not to influence negotiations by threatening to move an operating unit from the host country; and provide workers representatives with information required for meaningful negotiations). This obligation will not be explored further in this discussion. This does not make the obligation irrelevant to the discussion, however.
- <sup>158</sup> Ibid., “Consultation.” Para. 57 (although not a substitute for collective bargaining, multinational and national enterprises are asked to provide for regular consultation with labour organisations). This obligation will not be explored further in this discussion.
- <sup>159</sup> Ibid., “Examination of Grievances.” Para. 58 (allows workers to submit grievances without suffering any prejudice as a result and have their grievances examined “pursuant to an appropriate procedure”). This obligation will not be explored further in this discussion. This does not mean this provision irrelevant. The argument could be made that this provision is vital to protecting children from exploitation; if an MNE is unaware of exploitative practice, it will be unable to craft a remedy.
- <sup>160</sup> Ibid., “Settlement of Industrial Disputes.” Para. 59 (suggests enterprise, and worker organisations develop ‘conciliation machinery’ to assist in the prevention and settlement of industrial disputes). This obligation will not be explored further in this discussion.
- <sup>161</sup> Ibid., “Industrial Relations.” Para. 41.
- <sup>162</sup> Follow-Up Procedures (1980) (reporting occurs via questionnaire sent to governments every four years and is completed after ‘full consultation’ with labour organisations. Observations from labour organisations are to be incorporated into reports. The International Labour office is also asked to undertake annual studies of topics relevant to the *Tripartite Declaration*).
- <sup>163</sup> Follow-up (1986), (para. 2) (this mechanism can only be invoked in limited circumstances: it cannot be invoked in respect of national law and practice, international labour Conventions and Recommendations or matters falling under the freedom of association procedure. Furthermore, the provision only resolves disputes in so far as it interprets provisions to settle disagreements over meaning, arising from an actual situation between parties).
- <sup>164</sup> ILO. *ILO Declaration on Fundamental Principles and Rights at Work*. Geneva: June, 1998.
- <sup>165</sup> Ibid.
- <sup>166</sup> ILO. “Addendum II.” *Tripartite Declaration* (3rd ed). Geneva: ILO, 2000.
- <sup>167</sup> ILO. *ILO Declaration on Fundamental Principles and Rights at Work*. Geneva: June, 1998. Para. 2, para. 1 (the basis of this position is that “...all Members have endorsed the principles and rights set out in its Constitution and in the *Declaration of Philadelphia*, and have undertaken to work towards attaining the overall objectives of the Organisation [...]”).
- <sup>168</sup> ILO. “Addendum II.” *Tripartite Declaration* (3rd ed). Geneva: ILO, 2000. (“... the interpretation and application of the *Tripartite Declaration* [...] should fully take into account the objectives of the *ILO Declaration on Fundamental Principles and Rights at Work*[,]” without “... [affecting] the voluntary character or the meaning of the provisions of the *Tripartite Declaration* [...]”).
- <sup>169</sup> ILO. *ILO Declaration on Fundamental Principles and Rights at Work*. Geneva: June, 1998. Preamble (including social justice, peace, equality, social progress and poverty eradication).
- <sup>170</sup> Ibid. Preamble.
- <sup>171</sup> Ibid. Preamble.
- <sup>172</sup> Ibid., para 2.
- <sup>173</sup> Ibid., para 3 (including through use of its constitutional, operational and budgetary resources and encouraging other international organisations to support these efforts).
- <sup>174</sup> Ibid., Annex, I: Overall Purpose. Para. 2.
- <sup>175</sup> Ibid., Annex, I: Overall Purpose. Paras. 1, 2.
- <sup>176</sup> Ibid., Annex, I: Overall Purpose. Para. 3.
- <sup>177</sup> Ibid., Annex II: Annual follow-up concerning non-ratified fundamental Conventions: A Purpose and Scope. Para 1.
- <sup>178</sup> Ibid., Annex II: Annual follow-up concerning non-ratified fundamental Conventions: A Purpose and Scope. Paras 1-3 (the Governing Body may appoint a group of experts to write an introduction to reports to address any aspect needing a more in-depth discussion).

- <sup>179</sup> Ibid., Annex, III: Global Report.
- <sup>180</sup> Ibid., Annex, III: Global Report: A Purpose and Scope. Para. 2.
- <sup>181</sup> Ibid., Annex, III: Global Report: A Purpose and Scope. Para. 1.
- <sup>182</sup> Ibid., Annex, III: Global Report, B: Modalities. Para. 1: using official information, information gathered in accordance with established procedures, or on findings of the annual follow-up), para. 2.
- <sup>183</sup> Ibid., Annex, III: Global Report, B: Modalities. Para. 2.
- <sup>184</sup> Organisation for Economic Co-Operation and Development (OECD). “Guidelines for Multinational Enterprises.” *Declaration and Decisions on International Investment and Multinational Enterprises* (DAFFE/IME(2000)20). 8 Nov. 2000. [Hereinafter referred to as OECD. “Guidelines.”]
- <sup>185</sup> Organisation for Economic Co-Operation and Development (OECD). *Declaration and Decisions on International Investment and Multinational Enterprises* (DAFFE/IME (2000)20). 8 Nov. 2000. The Declaration is composed of the Guidelines, the National Treatment Instrument, an instrument on International Investment Incentives and Disincentives and an instrument on Conflicting Requirements. For the purpose of this discussion, only the Guidelines will be explored. The Guidelines were subject to amendments in 1979, 1984 and 1991; major revision began in 1998 with consultations with business, labour and non-governmental organisations. The official revision, completed in 2000, widened the scope of the Guidelines, improved the implementation process and added provisions addressing human rights.
- <sup>186</sup> OECD “Guidelines.” Paras. 1, 7.
- <sup>187</sup> Ibid., para 10 (“[t]he common aim of the governments adhering to the Guidelines is to encourage the positive contributions that [MNEs] can make to economic, environmental and social progress and to minimize the difficulties to which their various operations may give rise. [...]. Governments adhering to the Guidelines are committed to continual improvement of both domestic and international policies with a view to improving the welfare and living standards of all people”).
- <sup>188</sup> Ibid. As the Guidelines will only be explored in so far as it relates to the CSEC, not all headings are relevant to the discussion. Obligations related to Environment, Combating Bribery, Consumer Interests, Competition and Taxation will not be explored.
- <sup>189</sup> Ibid., 2.
- <sup>190</sup> OECD. “Commentary.” *The OECD Guidelines for Multinational Enterprises: Revision 2000*. Paris: OECD Publications, 2000. [Hereinafter referred to as OECD. “Commentary.” Revision 2000.]
- <sup>191</sup> OECD. “Guidelines.” Part I.
- <sup>192</sup> Ibid., Part II. See also OECD. “Commentary.” Revision 2000. Para. 1 (“[t]he General Policies chapter [...] is important for setting the tone and establishing common fundamental principles for specific recommendations in subsequent chapters”).
- <sup>193</sup> OECD. “Guidelines.” Part I, para. 3 (“[t]hese usually comprise companies or other enterprises established in more than one country and so linked that they may co-ordinate their operations in various ways. [...]. Ownership may be private, state or mixed. The Guidelines are address to all the entities within the [MNE] (parent companies and/or local entities)”).
- <sup>194</sup> Ibid., Part I, para. 7 (Governments have the right to “... prescribe the conditions under which [MNEs] operate within their jurisdictions, subject to International Law...”). See also OECD “Commentary.” Revision 2000. Para. 2 (“[o]beying domestic law is the first obligation of business. [...]. [The Guidelines] represent supplementary principles and standards of behaviour of a non-legal character”).
- <sup>195</sup> OECD. “Guidelines.” Part II, paras 1-11.
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- <sup>198</sup> Ibid., Part II, para. 3. See also “General Policies.” Para. 5 (refers to human capital formation and employee development through hiring practices, training and other employee developments).
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- to “applicable” law and regulations, [acknowledging] the fact that [MNEs], [...], may be subject to national, sub-national, as well as supra-national levels of regulation [...]. The terms “prevailing labour relations” and “employment practices” are sufficiently broad to permit a variety of interpretations in light of different national circumstances [...]).
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- <sup>204</sup> OECD. “Commentary.” Revision 2000. Para. 20 (the human rights provisions echo rights found in the ILOs Fundamental Principles and that the ILOs Tripartite Declaration can assist in understanding the Guidelines).
- <sup>205</sup> See also *ibid.* Para. 20-22 (The four human rights principles echo the rights in ILO. *Declaration on Fundamental Principles and Rights at Work*. Geneva: ILO, 1977. Specifically, the ‘effective abolition of child labour’ refers to ILO Convention 182 concerning the worst forms of child labour and ILO Convention 138 and Recommendation 146, regarding the minimum age of employment (ILO Convention 182: *Worst Forms of Child Labour Convention*, 1999; ILO Convention 138: *Minimum Age Convention*, 1973; and ILO Recommendation 146: *Minimum Age Recommendation*, 1973. Accessed on 14 Oct. 2008 from: [www.ilo.org](http://www.ilo.org)). Furthermore, MNEs may contribute to the effective abolition of child labour through labour management practices, creation of high quality and well paid jobs and contributing to economic growth, which all address ‘the root causes of poverty in general and of child labour in practice.’ MNEs may also contribute to a ‘lasting solution’ by, for example, raising the standards of education in host countries). Para. 23 (regarding compulsory labour, MNEs are directed to Conventions 29 and 105 (ILO Convention 29: *Forced Labour Convention*, 1930 and ILO Convention 105: *Abolition of Forced Labour Convention*, 1957. Accessed on 14 Oct. 2008 from: [www.ilo.org](http://www.ilo.org)). Para. 24 (regarding non-discrimination, MNEs are directed to ILO Convention 111 which enumerates an unexhausted list of impermissible grounds for discrimination in hiring, discharge, pay, promotion, training and retirement (ILO Convention 111: *Discrimination (Employment and Occupation) Convention*, 1958. Accessed on 14 Oct. 2008 from: [www.ilo.org](http://www.ilo.org)).
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- <sup>207</sup> See OECD “Guidelines.” Part VIII, paras. 1-5 (MNEs are asked, where applicable, relevant or practical, to contribute to the development of innovative capacity; adopt policies allowing for the ‘rapid diffusion of technology and know-how’; develop science and technology to address the needs of local markets; employ locals in science and technology and encourage their training; grant Intellectual Property licenses or technology transfer, so as to contribute to long-term development prospects of host countries; and participate in research projects with local universities, public research institutions and local individuals).
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of the Guidelines).

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- <sup>228</sup> In *Filitarga* the court stated, "Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."
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- <sup>232</sup> 70 F.3d 232 C.A.2 (N.Y.), 1995.
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The World Congress III against Sexual Exploitation of Children and Adolescents aims to mobilise all countries to guarantee the rights of children and adolescents to be protected against sexual exploitation by taking action to:

- Build on current achievements, examine new challenges and dimensions of sexual exploitation and set more targeted strategies and measures to address them;
- Examine initiatives that have been effective in different regions and identify channels to facilitate better exchange of experience, skills and knowledge;
- Open new channels and secure greater international cooperation on key issues (including cross-border and inter-regional cooperation) to facilitate collaborations for counteraction;
- Catalyse a systemic and inter-sectoral approach to guarantee children and adolescents' right to be protected from sexual exploitation; and
- Establish time-bound goals to promote and monitor progress on action plans made by the Congress.

Commercial sexual exploitation of children occurs in many different ways and in a wide variety of settings. The underlying causes are numerous, complex and closely interrelated and must be analysed, understood and confronted accordingly. In order to facilitate the implementation of the objectives of the World Congress III, the Central Organizing Committee (Government of Brazil, UNICEF, ECPAT and the NGO Group for the Convention on the Rights of the Child) commissioned thematic papers on five major areas of this complex phenomenon and violation of child rights.

The World Congress III themes are on:

- Theme 1: Dimensions of Commercial Sexual Exploitation: prostitution of children, child trafficking for sexual purposes, child abuse images and sexual exploitation online, sexual exploitation of children in tourism
- Theme 2: Legal Frameworks and Law Enforcement
- Theme 3: Integrated Inter-Sectoral Policies
- Theme 4: Role of the Private Sector and Corporate Social Responsibility
- Theme 5: Strategies for International Cooperation

