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Douglass Cassel

Notre Dame Law School, doug.cassel@nd.edu

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Douglass Cassel*

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Corporate Initiatives: A Second Human Rights Revolution?

Douglass Cassel

Abstract

This Essay examines the role of multinational corporations in protecting human rights around the globe. Part I analyzes the conduct of corporations, describes examples of corporations' involvement in human rights violations, and discusses the merits of greater responsibility of corporations. Part II suggests that the level of responsibility for a multinational corporation depends on the proximity of the corporation's operations to human rights violations, in combination with the seriousness of the violations, and proposes five gradations of responsibility. This Essay concludes that the evolving nature of the global economy is producing a shift in responsibilities from government to the private sector, particularly multinational corporations, and that those responsibilities may include the power and duty to safeguard human rights.

CORPORATE INITIATIVES: A SECOND HUMAN RIGHTS REVOLUTION?

*Douglass Cassel**

INTRODUCTION

The closing years of the twentieth century may be witnessing the stirrings of a second human rights revolution.

In the first revolution, the human rights conduct of governments became a concern of international law. Beginning in 1945 with the U.N. Charter¹ and the Nuremberg trials,² it overthrew the traditional doctrine that human rights, with few exceptions, lay within the exclusive domestic jurisdiction of sovereign states.³ From those revolutionary beginnings in 1945, international law has steadily expanded both the responsibilities of governments to respect human rights and the sanctions for government officials who violate them.⁴

Yet, even as this first revolution continues to unfold, a second may be underway involving the human rights responsibilities, not of governments, but of private multinational corporations, which in many ways can be more powerful than most national governments. Just as governments accepted international human rights responsibilities in the U.N. Charter and other trea-

* Executive Director, International Human Rights Law Institute, and Jeanne and Joseph Sullivan Program for Human Rights in the Americas, DePaul University College of Law. This Essay is based on an Address given by the Author to the Chicago Council on Foreign Relations, February 7, 1996. The Author acknowledges the valuable research assistance of Ms. Evelyn Marsh, J.D. Candidate, 1997, DePaul University.

1. U.N. CHARTER. Article 1(3) of the Charter provides that one purpose of the United Nations is to "achieve international cooperation in . . . promoting and encouraging respect for human rights." *Id.* art. 1(3). Under Article 55(c) the United Nations commits to promote "universal respect for, and observance of, human rights." *Id.* art. 55(c). Under Article 56 all Member States pledge "to take joint and separate action in cooperation with" the United Nations for that purpose. *Id.* art. 56.

2. See generally *The Nuremberg Trial* 1946, 6 F.R.D. 69, 110 (1946) ("[T]he very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.").

3. See generally Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 1-9 (1982).

4. See *id.* at 9-64; see also, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, 2 Oct. 1995, Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991, *reprinted in* 16 HUM. RTS. L. J. 426 (1995), Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction.

ties, multinational corporations are beginning to accept international human rights responsibilities in the form of self-imposed codes of conduct and other private initiatives.

If this trend portends the beginning of a second human rights revolution, its normative outcome remains unclear. There is not yet boardroom consensus on the responsibility, if any, of multinational corporations with regard to serious human rights violations in countries where they do business.

This Essay examines the role of multinational corporations in protecting human rights around the globe. Part I analyzes the conduct of corporations, describes examples of corporations' involvement in human rights violations, and discusses the merits of greater responsibility of corporations. Part II suggests that the level of responsibility for a multinational corporation depends on the proximity of the corporation's operations to human rights violations, in combination with the seriousness of the violations, and proposes five gradations of responsibility. This Essay concludes that the evolving nature of the global economy is producing a shift in responsibilities from government to the private sector, particularly multinational corporations, and that those responsibilities may include the power and duty to safeguard human rights.

I. *THE RESPONSIBILITIES OF MULTINATIONAL CORPORATIONS*

A. *Case Studies: Royal Dutch Shell and The Gap*

Two recent examples, drawn from opposite ends of the spectrum of corporate social responsibility, illustrate the wide range of current practice.

1. *Royal Dutch Shell in Nigeria*

Netherlands-based Royal Dutch Shell ("Shell") apparently made no serious effort to keep Nigeria's military regime from executing author Ken Saro-Wiwa and eight other environmental activists in November 1995.⁵

For years, Saro-Wiwa led an activist group of the Ogoni ethnic minority in the Niger River Delta. The Ogoni claimed that Shell drilling and pipelines had polluted their waters and

5. *Shell Game in Nigeria*, N.Y. TIMES, Dec. 3, 1995, at 14.

poisoned their lands, ruining not only their environment but their livelihoods, which depended on fishing and farming.⁶ The Ogoni also claimed that they were not benefitting from this exploitation of their land. Although Shell purports to have supported dozens of community projects in Ogoniland and recently boosted its budget for environmental improvements to over US\$100 million,⁷ the Ogoni say that most of the oil money that stayed in Nigeria went into the pockets of corrupt military officers.

In the early 1990's, members of Saro-Wiwa's ethnic activist group allegedly sabotaged Shell's equipment, to the point where Shell ceased operations in Ogoniland in 1993.⁸ To preserve its investment in Nigeria, Shell called upon the local authorities, which would normally seem an appropriate step under these circumstances, to protect their property. Nigeria is ruled, however, by a corrupt, repressive, military regime, currently headed by General Sani Abacha.⁹ For example, its most recent election, in 1993, resulted in the imprisonment of the civilian winner.¹⁰

According to a *New York Times* investigation, Shell called in the Nigerian military's hit squad, known locally as the "kill-and-go mob," against the Ogoni.¹¹ The results were foreseeable, particularly since several prior Shell requests for similar "help" had led to murders and massacres of Ogoni.¹² According to Dr. Owens Wiwa, brother of Ken Saro-Wiwa, security forces killed some 2000 Ogoni and razed thirty villages.¹³

During these operations Shell did not stand idly by, but

6. Paul Lewis, *Nigeria's Deadly Oil War: Shell Defends its Record*, N.Y. TIMES, Feb. 13, 1996, at A1.

7. *Shell Admits Causing Pollution in Nigeria, Announces Survey Plan*, AGENCE FRANCE PRESSE, Feb. 3, 1995, available in LEXIS, World Library, AFPFR File.

8. John Darnton, *Shell Makes a Big Oil Discovery off Nigeria*, N.Y. TIMES, Mar. 12, 1996, at A8.

9. See generally, e.g., U.S. DEP'T STATE, COUNTRY REPORTS ON HUMAN RIGHTS FOR 1994, S. REP. NO. 12, 104th Cong. 1st Sess., 188-200 (1995); HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1996, at 34-40 (1995) [hereinafter HUMAN RIGHTS WATCH WORLD REPORT 1996].

10. U.S. DEP'T STATE, *supra* note 9, at 189, 195.

11. Lewis, *supra* note 6, at A1, A4.

12. See Karl Maier, *Nigerian Dissident Faces Death Penalty*, THE INDEPENDENT, Oct. 29, 1995, World 12; Andy Rowell, *Sleeping With the Enemy*, VILLAGE VOICE, Jan. 23, 1996, World 23.

13. Lewis, *supra* note 6, at A4; Dr. Owens Wiwa, Presentation at the John D. and Catherine T. MacArthur Foundation in Chicago (Feb. 9, 1996) (on file with the *Fordham International Law Journal*).

helped transport troops. As the military attacked Ogoni villages, Dr. Wiwa observed Shell helicopters overhead. His injured patients told him the soldiers came in Shell boats.¹⁴ The *Times* investigation confirms that Shell not only transported, but even paid salary bonuses to troops participating in the repression.¹⁵ According to the *Times*, Shell officials "said it was not unusual for companies seeking protection to pay transportation costs and salary supplements for troops living outside their barracks."¹⁶ When these efforts failed to quell the unrest, the Nigerian regime had Mr. Saro-Wiwa and several other activists arrested, jailed, and prosecuted on murder charges. British Prime Minister John Major later called the trial "fraudulent."¹⁷

During the trial, at least two prosecution witnesses recanted their testimony, claiming that they had been bribed. One key witness swore in an affidavit that he had been promised Shell contracts and money "from Shell and government" to incriminate Saro-Wiwa. The witness claimed that Shell representatives were present when the offer was made, although Shell denies this charge.¹⁸

Dr. Wiwa claims that he met secretly with Shell's top official in Nigeria, and asked the official to use his influence to stop the prosecution. According to Dr. Wiwa, the official replied, "[t]hat's difficult, but not impossible," provided the Ogoni halt their international campaign. Shell admits the meeting, but denies the offer.¹⁹

As the trial unfolded and its unfairness became apparent, international protests mounted,²⁰ but Shell, publicly at least, was

14. Dr. Owens Wiwa, *supra* note 13.

15. Paul Lewis, *Blood and Oil: A Special Report: After Nigeria Represses, Shell Defends it Record*, N.Y. TIMES, Feb. 13, 1996, at A1.

16. Lewis, *supra* note 6, at A4.

17. Ian Black et al., *Nigeria Defies World with Writer's 'Judicial Murder'*, THE GUARDIAN, November 11, 1995, available in LEXIS, Europe Library, GUARDN File.

18. Ade Obisesan, *Saro-Wiwa defence accuses Shell of trying to bribe witness*, AGENCE FRANCE PRESSE, Feb. 28, 1995, available in LEXIS, World Library, AFPFR file; *Shell Denies Foul Play in Nigerian Murder Trial*, THE GUARDIAN, Sept. 29, 1995, available in LEXIS, News Library, CURNWS File.

19. Bob Herbert, *Unholy Alliance in Nigeria*, N.Y. TIMES, Jan. 26, 1996, at A15; Dr. Owens Wiwa, *supra* note 13.

20. See generally, e.g., *Prepared Testimony of Kenneth Roth, Executive Director, Human Rights Watch, Before Senate Committee on Foreign Relations Subcommittee on African Affairs*, FED. NEWS SERV., July 20, 1995, available in LEXIS, News Library, FEDNEW file.

The presence on the tribunal of . . . an active member of the armed forces

silent. When the trial ended in October 1995, Saro-Wiwa and his co-accused were sentenced to death. Protests poured in from the U.N. Human Rights Commission, Amnesty International, the U.S. and British Governments, South Africa's Nelson Mandela, and countless others.²¹

But again, Shell, whose joint venture with Nigeria's state oil company supplied significant revenue for General Abacha's regime, did not protest, at least not publicly.²² "It is not for a commercial organization," the company explained, "to interfere with the legal processes of a sovereign state such as Nigeria."²³

Only after the General's Military Council confirmed the death sentences of Mr. Saro-Wiwa and his colleagues did Shell's Chairman send a last-minute facsimile transmission "requesting clemency on humanitarian grounds."²⁴ But this gesture was too little, too late, for Ken Saro-Wiwa and his colleagues were hanged a few days later.²⁵ Soon thereafter, Shell announced that it would go ahead with a US\$4 billion joint venture natural gas plant in Nigeria, with its partner being General Abacha's state oil company.²⁶

Several key facts remain in dispute regarding Shell's involvement in the violation of human rights in Nigeria. Enough has been substantiated and admitted, however, to raise questions of Shell's possible responsibility for violations of human rights,

under the command of General Abacha, renders the tribunal's independence particularly questionable The tribunal's judgment is not subject to review by a higher court, . . . The eight-month delay in filing charges . . . in conjunction with the procedural irregularities that characterize the trial, strongly suggest that the charges are politically motivated.

Id.

21. See, e.g., *U.N. Human Rights Commission Appeal to Nigerian military*, DEUTSCHE PRESSE-AGENTUR, Nov. 2, 1995, available in LEXIS, World Library, AFPFR file; John Sweeney & Cameron Duodu, *Nigeria? Business as Usual with the General*, CHAPS, THE OBSERVER, Nov. 5, 1995, available in LEXIS, News Library, CURNWS File.

22. Shell Petroleum Development Company of Nigeria operates Nigeria's largest joint venture, on behalf of the state-owned company which owns 55%, Shell which owns 30%, and two other companies which own 10% and 5%, respectively. Tunde Obadina, *Shell Denies Exploitation Charge in Nigeria*, REUTER EUR. BUS. REP., April 16, 1995, available in LEXIS, Busfin Library, REUEUB File. See also Lewis, *supra* note 6, at A4 ("Shell produces roughly half of Nigeria's oil."); Jeremy Watson, *Save Ken Saro-Wiwa*, SCOTLAND ON SUNDAY, Nov. 12, 1995, at 15 (listing Nigerian oil production figures by company).

23. Lewis, *supra* note 6, at A4.

24. *Id.*

25. Howard W. French, *Nigeria Executes Critic of Regime; Nations Protest*, N.Y. TIMES, Nov. 11, 1995, at A1.

26. Rowell, *supra* note 12.

both in the military operations and at the trial. At the very least, it is apparent that Shell would not accept any responsibility toward human rights violations by its business partners.

2. The Gap in El Salvador

During 1995, the same year as the Saro-Wiwa trial, The Gap demonstrated a more positive approach to human rights. Like others in its industry, this trendy retailer had recently adopted human rights standards for contractors from whom it buys apparel.²⁷ In early 1995, labor and religious groups mounted a campaign to protest alleged sweatshop conditions at one of The Gap's contractors in El Salvador.²⁸

The campaign attracted the interest of columnist Bob Herbert of the *New York Times*. In a series of columns,²⁹ Herbert detailed how young women at the Salvadoran plant were paid fifty-six cents an hour, which was less than one fifth of minimum cost of living requirements. Herbert also described how the women were forced to work eighteen hours a day and to get tickets from supervisors to go to the bathroom. Many, he said, were fired when they tried to form a union.

The Gap responded to these articles immediately by suspending orders from the contractor involved and by sending investigators, including its corporate vice president, to El Salvador. Initially, The Gap reported that it was unable to corroborate the allegations.³⁰ After several months of continued adverse publicity, however, and after Salvadoran human rights agencies confirmed the allegations,³¹ The Gap relented. Confronted by extreme and contradictory allegations, The Gap refused to do business with the contractor involved until The Gap's guidelines were clearly met. The Gap also refused to contract at all in El

27. THE GAP, SOURCING PRINCIPLES AND GUIDELINES, attached to Letter from Stanley P. Raggio, Senior Vice President, Sourcing and Logistics, The GAP Inc., to Chicago Religious Leadership Network (Nov. 21, 1995) [hereinafter Raggio] (on file with the *Fordham International Law Journal*).

28. Bob Herbert, *In America: A Sweatshop Victory*, N.Y. TIMES, Dec. 22, 1995, at A39.

29. Bob Herbert, *In America: Children of the Dark Ages*, N.Y. TIMES, July 21, 1995, at A25; Bob Herbert, *In America: Sweatshop Beneficiaries*, N.Y. TIMES, July 24, 1995, at A13; Bob Herbert, *In America: Not a Living Wage*, N.Y. TIMES, Oct. 9, 1995, at A17; Bob Herbert, *In America: In Deep Denial*, N.Y. TIMES, Oct. 13, 1995, at A33.

30. *In Deep Denial*, *supra* note 29, at A33.

31. *See Not a Living Wage*, *supra* note 29, at A17; *In Deep Denial*, *supra* note 29, at A33.

Salvador until the Government proved capable of investigating and resolving labor disputes fairly.³²

After further discussions with labor and religious groups, The Gap then made a commitment to take an unusual step, exploring an independent monitoring system for human rights violations by its contractors.³³ In March 1996, The Gap reached agreement with its Salvadoran contractor that several local religious, human rights, and labor groups would independently monitor compliance with The Gap's guidelines in El Salvador.³⁴ At the same time, The Gap neared completion of a re-write of its guidelines, to convert them into a more detailed, specific code of conduct.³⁵

Shell in Nigeria and The Gap in El Salvador are, admittedly, not entirely comparable case studies. After all, Shell refused to accept any responsibility for human rights violations committed by its powerful joint venturer partners, while The Gap took decisive action against a much smaller Salvadoran contractor. Yet, even acknowledging these and other factual differences, the two cases suggest sharply differing views of corporate social responsibility toward human rights violations.

B. *The Development of Codes of Conduct for Multinational Corporations*

1. The United Nations, the Organization for Economic Development, and the International Labor Organization

The divergence of views exemplified by The Gap and Shell is not new or unique. For a decade, beginning in the mid-1970's, an ideologically divided United Nations tried and failed to develop a code of conduct for multinational enterprises.³⁶ In

32. Raggio, *supra* note 27.

33. See Stuart Silverstein, *Labor Dept. Adds GAP Inc. to "Good Guy" Retailer List*, L.A. TIMES, Dec. 22, 1995, at D2; Bob Herbert, *Righting a Wrong*, SACRAMENTO BEE, Dec. 23, 1995, at B6; Journal of Commerce, *GAP Pressures Suppliers to Improve Conditions*, BUFFALO NEWS, Dec. 25, 1995, at B9.

34. Revised Resolution Declaration, March 22, 1996, signed by representatives of Mandarin International, the Archdiocese of San Salvador, the Human Rights Institute of the University of Central America, Centra (a labor organization), and the Mandarin Workers' Union (on file with the *Fordham International Law Journal*).

35. Interview with Dotti Hatcher, Director, Sourcing & Trade Compliance, The Gap, in Chicago (April 15, 1996).

36. See generally Seymour Rubin, *Transnational Corporations and International Codes of*

the mid-1970's, guidelines for multinationals were issued by two more cohesive organizations, the Organization for Economic Cooperation and Development³⁷ ("OECD"), which consists of twenty-six relatively affluent nations, and the International Labor Organization³⁸ ("ILO"), whose 159 member nations have a tradition of pursuing consensus between business and labor.

Yet the OECD and ILO guidelines were limited and broke little new ground, mostly reaffirming the longstanding rights of workers to organize unions,³⁹ to bargain collectively,⁴⁰ and to non-discriminatory employment.⁴¹

2. South Africa: The Sullivan Principles

During the 1970's and 1980's, there was one striking experiment in corporate codes of conduct for human rights: The Sullivan Principles for South Africa.⁴² Developed by Reverend Leon Sullivan, a General Motors board member, these principles were initially adopted in 1977 by twelve U.S. firms, including General Motors. By 1986, approximately 200 of the 260 U.S. corporations doing business in South Africa had adopted the Sullivan Principles.⁴³

Although the Sullivan Principles were limited to protecting human rights in one country, the firms that took part adopted unprecedented, far-reaching commitments to corporate social responsibility toward human rights violations, spurred by a desire to deflect growing calls for divestment from that country. "Sullivan firms" committed themselves not only to racially non-discriminatory employment,⁴⁴ but also to pay fair wages well

Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development, 10 AM. U. J. INT'L L. & POL'Y 1275 (1995).

37. Organization for Economic Co-Operation and Development, Guidelines for Multinational Enterprises (1976), 15 I.L.M. 967 (1976) [hereinafter OECD].

38. International Labor Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), 17 I.L.M. 422 (1978) [hereinafter ILO].

39. OECD, *supra* note 37, art. 7(b)(1); ILO, *supra* note 38, art. 41.

40. OECD, *supra* note 37, art. 7(b)(1); ILO, *supra* note 38, arts. 48-55.

41. OECD, *supra* note 37, art. 7(b); ILO, *supra* note 38, arts. 21-23.

42. The Sullivan Statement of Principles (4th Amplification), November 8, 1984, 24 I.L.M. 1464 (1985) [hereinafter Sullivan Principles].

43. Patricia Arnold & Theresa Hammond, *The Role of Accounting in Ideological Conflict: Lessons from the South African Divestment Movement*, 19 ACCT., ORGANIZATIONS, AND SOC. 111, 116 (1994).

44. Sullivan Principles, *supra* note 42, Principle II.

above the minimum cost of living,⁴⁵ to provide managerial training programs for blacks and other non-whites,⁴⁶ to provide their workers supportive services for housing, health care, transportation and recreation,⁴⁷ and to use corporate influence to help end apartheid in South Africa.⁴⁸ Each Sullivan Firm's performance was subject to outside audit and public reports by Arthur D. Little.⁴⁹

One might ask whether events in Nigeria would have turned out differently had Shell undertaken similar commitments for the Ogoni. Nevertheless, far-reaching as they were, the Sullivan Principles failed both in their ostensible goal, to bring down apartheid, and in their tactical goal, to offer a publicly palatable alternative to divestment from South Africa. By 1987, even Reverend Sullivan pronounced his principles a failure and disassociated himself from their further use.⁵⁰ When apartheid ultimately did fall in South Africa, it fell because of other factors, such as corporate disinvestment from and government sanctions against South Africa, and not the Sullivan Principles.

3. Northern Ireland: The MacBride Principles

In the mid-1980's, an experiment similar to the Sullivan Principles, called the MacBride Principles,⁵¹ was initiated for Northern Ireland. The MacBride Principles' purpose differs from the Sullivan Principles, in that they are not intended to deflect divestment, for which there has been no serious support, but instead to secure equal treatment for Catholic workers in Protestant-majority Northern Ireland. The scope of the MacBride Principles is more limited, focusing on non-discrimination, without mandating higher wages or additional social services.

"MacBride firms" do, however, make one unusual commitment with potential applications elsewhere, which is to make reasonable, good faith efforts to protect the personal safety of their workers not only at the workplace, but while travelling to and

45. *Id.* Principle III.

46. *Id.* Principle V.

47. *Id.* Principle VI.

48. *Id.*

49. Arnold & Hammond, *supra* note 43, at 114.

50. *Id.* at 118.

51. IRISH NATIONAL CAUCUS, THE MACBRIDE PRINCIPLES (1984).

from work.⁵²

As of February 1995, thirty-two of the eighty publicly traded U.S. firms operating in Northern Ireland had signed on to the MacBride Principles.⁵³ Sixteen states and more than forty cities have enacted MacBride Principles laws.⁵⁴

C. Corporate Human Rights Policies and Codes of Conduct

Granted, the Sullivan and MacBride Principles are unique cases because they relate to particular troubled nations, each with strong political constituencies in the United States. Yet, those endeavors raise a question of principle: If multinationals can undertake such proactive commitments in South Africa and Northern Ireland, how can they deny similar social responsibilities in other countries with serious human rights problems?

1. Firms with Global Codes and Policies

A growing number of firms have answered that question by adopting "global" human rights codes of conduct and policies for their operations and contractors. Spurred largely by media revelations of forced labor in China and child labor in Southeast Asia in the early 1990's,⁵⁵ many major retailers and apparel and footwear firms have adopted policies and codes that address forced labor, child labor, labor organizing and bargaining, non-discrimination, worker health and safety, and in some cases minimum wage, and maximum hour guidelines.⁵⁶

52. *Id.* art. 2.

53. *Id.*

54. Conor O'Clery, *US Funds for Ireland Must Meet MacBride Principles*, IRISH TIMES, Jan. 3, 1995, available in LEXIS, News Library, CURNWS File.

55. See, e.g., *Ethical Shopping: Human Rights*, THE ECONOMIST, June 3, 1995, at 58. Levi Strauss introduced new terms of engagement after it was discovered in 1992 to be buying clothes from underpaid and mistreated workers in Saipan. *Id.* Wal-Mart took similar steps after the National Broadcasting Company, in 1993, showed children in a Bangladeshi factory making Wal-Mart shirts. *Id.* Doug Cogan, *Worker Standards for Non-U.S. Suppliers*, INVESTOR RESP. RES. CENT., Mar. 2, 1995, at 7 [hereinafter IRRC].

56. See, e.g., Diane Orentlicher & Timothy Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 125 (1993) ("Human Rights Provisions of Levi Strauss & Co.'s 'Business Partner Terms of Engagement'"); *Id.* at 127 ("Reebok International Ltd.'s 'Human Rights Production Standards'"); *Id.* at 129 ("Human Rights Provisions of Phillips-Van Heusen Policy 'A Shared Commitment: Requirements for Suppliers, Contractors, Business Partners'"); Bruce Landay, *One American Corporation's Attempt to Define and Play a Role in the Global Environment: Some Observations on the Standards for Social Responsibility of the Timberland Company*, 1994 ASIL PROC. 284 (1994) [hereinafter *Timberland Policy*].

The list of clothiers with such policies and codes now includes, for example: Levi Strauss, Sears, J.C. Penney, Wal-Mart, Phillips-Van Heusen, and The Gap.⁵⁷ Footwear giants Nike, Reebok, and Timberland have also adopted codes.⁵⁸ At least thirty-six member firms of the Athletic Footwear Association, representing ninety percent of industry sales, have signed on to an industry code.⁵⁹ And in 1995, Starbucks became the first publicly traded firm in agricultural imports, coffee beans, to adopt a code.⁶⁰

Some firms have gone so far as to pull their entire operations out of countries where human rights are pervasively violated. Levi Strauss⁶¹ and Timberland⁶² have announced their departures from China. Furthermore, Levi Strauss, Liz Claiborne, Eddie Bauer, and Federated Department Stores, owner of Macy's, have pulled out of Burma.⁶³

In addition, some eight-hundred firms have formed an association for clearinghouse and consulting purposes, called Business for Social Responsibility⁶⁴ ("BSR"), whose main activities include a program on "business and human rights." While most members are small or medium size firms, BSR boasts more than forty firms with annual gross revenues exceeding US\$5 billion.⁶⁵ BSR's membership includes such heavyweights as AT&T, Coopers & Lybrand, Dayton Hudson, Federal Express, The Gap, Home Depot, Honeywell, Polaroid, Revlon, Taco Bell, and

57. See generally Orentlicher & Gelatt, *supra* note 56, at 67, 106-08; *Ethical Shopping*, *supra* note 55; IRRC, *supra* note 55.

58. IRRC, *supra* note 55, at 1, 3.

59. John Duerden, 'Walking the Walk' on Global Ethics, DIRECTORS & BOARDS (INVESTMENT DEALERS' DIGEST INC.), Mar. 22, 1995; ATHLETIC FOOTWEAR ASSOCIATION, STATEMENT OF GUIDELINES ON PRACTICES OF BUSINESS PARTNERS; COMMITMENT TO GUIDELINES ON PRACTICES OF BUSINESS PARTNERS, Aug. 31, 1993 (on file with the *Fordham International Law Journal*).

60. Starbucks Asks Foreign Suppliers to Improve Working Conditions, WALL ST. J., Oct. 23, 1995, at B4 [hereinafter *Improve Working Conditions*]; IRRC, *supra* note 55, at 8.

61. *Improve Working Conditions*, *supra* note 60, at B4. According to the National Labor Committee, however, it is not entirely clear that Levi Strauss has fully left China. Interview with Charles Kernaghan, National Labor Committee Director (February 1996).

62. Landay, *supra* note 56.

63. *Ethical Shopping*, *supra* note 55.

64. Marian Courtney, *A Company with a Social Conscience*, N.Y. TIMES, Mar. 6, 1994, § 13 (NJ ed.) at 1.

65. Interview with Aron Cramer, Director of Business and Human Rights Program, Business for Social Responsibility (February 1996).

Viacom. Notably, BSR's President, Robert Dunn, is former Vice President of Corporate Affairs for Levi Strauss & Co.⁶⁶

While use of human rights codes continues to spread rapidly, they have yet to be universally adopted. In a survey of 150 multinationals in retail and other likely industries, BSR found only about twenty-five with human rights codes.⁶⁷ Franklin Research and Development, a Boston-based social responsibility investing firm, believes that fewer than ten percent of U.S.-based multinationals have such codes.⁶⁸ Still, the growth in corporate commitments to human rights, even in the space of a few years, is impressive.

2. The Clinton Administration's Model Business Principles

The U.S. Government is also involved. In 1994, when U.S. President Bill Clinton de-linked U.S. trade policy with China from human rights, he promised to emphasize corporate human rights codes as an alternative. One year later, in May 1995, the Administration formally published a set of Model Business Principles,⁶⁹ not only for China, but for all nations.

The Administration's Model Principles are voluntary, with no provisions for governmental monitoring or enforcement. Instead, they encourage "all businesses to adopt and implement voluntary codes of conduct for doing business around the world."⁷⁰ The Model Principles suggest that such corporate codes cover at least the following: (1) workplace health and safety; (2) fair employment practices, including bans on child labor, forced labor and discrimination, and the rights to organize unions and bargain collectively; (3) environmental protection; (4) compliance with laws against bribery and corruption; and (5) a corporate culture that respects free expression and does not condone political coercion in the workplace, that contributes to communities in which the company operates, and that values ethical conduct.

The Administration's Model Principles, which reflected

66. BUSINESS FOR SOCIAL RESPONSIBILITY (SAN FRANCISCO), PROMOTIONAL MATERIAL (on file with the *Fordham International Law Journal*).

67. Cramer, *supra* note 65.

68. N.M., *Saving the Brand Name*, MACLAEN'S, Dec. 11, 1995, at 30.

69. Bureau of National Affairs, Inc., *Voluntary "Model Business Principles" Issued by the Clinton Administration May 26, 1995*, DAILY REP. FOR EXECUTIVES, May 31, 1995.

70. *Id.*

compromises both within the Government and without, were initially criticized by both human rights and business groups. Human Rights Watch/Asia, which had lobbied for more hard-hitting, enforceable measures targeted at China, criticized the Model Principles as "far too vague and broadly worded to have any impact on the specific problem they were meant to address: human rights violations in China."⁷¹

The United States Council for International Business, on the other hand, issued a statement expressing its preference for the OECD and ILO guidelines of the 1970's that, it claimed, addressed most of the areas in the Administration's principles. The OECD and ILO guidelines, it noted, have the advantage of being multilateral, thus not putting U.S.-based firms at a competitive disadvantage. And, it added pointedly, the OECD and ILO follow-up procedures indicate that those organizations cannot judge the performance of individual companies.⁷²

After these initial criticisms, however, both human rights and business groups seemed to reconcile themselves to the Administration's initiative. Human rights groups seem to regard the Model Principles as a positive if modest step, while the Administration found eight large firms: Boeing, Honeywell, GE, Westinghouse, Digital Electric, Kodak, Rockwell and Loral, willing to support its Principles "as a useful reference point for framing the codes of conduct of individual businesses."⁷³

Since May 1995, the Model Principles have not been high on the Administration's list of priorities. No one in Washington seems to be monitoring how many firms have actually taken up the invitation to adopt codes reflecting the Model Principles. Their implementation has been entrusted to the U.S. Department of Commerce. By March 1996, the Commerce Department's efforts appear to consist mainly of looking for a place to put an information clearinghouse, and working on nomination procedures for the awards it plans to hand out annually to firms exemplifying the Model Principles.⁷⁴

One should not that, despite the U.S. Council for Interna-

71. *Press Release*, Human Rights Watch/Asia, Mar. 27, 1995.

72. *U.S. Council Comments on Business Principles*, BUS. WIRE, April 5, 1995, available in LEXIS, News Library, Currnws File.

73. Paul Lewis, *U.S. Provides First Details of its Business Ethics Code*, N.Y. TIMES, May 27, 1995, at 36.

74. *Id.*; Interview with Administration Officials (Jan. & Feb., 1996).

tional Business' stress on the need for multilateralism, the Administration does not appear even to have asked the OECD or ILO to adopt the Model Principles.⁷⁵ If governmental and inter-governmental efforts are to be helpful in encouraging multinationals to adopt human rights codes, much remains to be done. For now, many multinationals are well ahead of the Administration, the OECD, and the ILO on human rights.

D. *Divergent Views on the Need for Greater Corporate Responsibility
Toward Human Rights Violations*

1. Activist Groups

Labor, religious, and human rights groups increasingly focus on the human rights responsibilities of multinationals, and effectively so. Starbucks adopted its code after dozens of its stores were leafleted.⁷⁶ The Gap adopted independent monitoring and strengthened its guidelines after meeting and corresponding with dozens of activists from coast to coast.⁷⁷

In September 1995, three groups, the New York-based, interdenominational Interfaith Center on Corporate Responsibility, and similar Canadian and British religious coalitions, published and invited comments on a draft set of Principles for Corporate Responsibility: Benchmarks for Measuring Business Performance.⁷⁸ As befits the faith of the authors, they raised the level of standards above the global corporate codes adopted to date by multinationals, especially with respect to guidelines for minimum wages.⁷⁹

No doubt, then, there is measurable movement, principally

75. On November 9, 1995, Deputy Assistant Secretary of State for Labor and External Affairs Gare Smith "introduced" the Model Business Principles to the Subcommittee on Multinational Enterprises of the International Labor Organization. His prepared statement expressed eagerness for "multinational support for the Model Principles," but did not specifically ask the International Labor Organization ("ILO") to adopt them. GARE SMITH, PREPARED STATEMENT TO THE SUBCOMMITTEE ON MULTINATIONAL ENTERPRISES, INTERNATIONAL LABOR ORGANIZATION 4 (on file with the *Fordham International Law Journal*).

76. Nancy J. Kim, *Companies Issuing Codes of Conduct; Shareholders, Public Both Apply Pressure*, BERGEN RECORD, Sept. 10, 1995, at B1; G. Pascal Zachary, *Starbucks Asks Foreign Suppliers to Improve Working Conditions*, WALL ST. J., Oct. 23, 1995, at B4.

77. Interview with The Gap Officials (December 1995).

78. Interfaith Center on Corporate Responsibility, *Principles for Global Corporate Responsibility*, 24 CORP. EXAMINER 2-4 (Sept. 1, 1995) [hereinafter Interfaith Center].

79. See generally *id.*

by multinationals and social activists, but also by governments, toward firms assuming a significant degree of responsibility with respect to human rights violations in countries where they do business.

2. Opposition to the Merits of Corporate Initiatives

But there is also respectable opposition to the assumption of human rights responsibilities by corporations. Twenty-five years ago, Nobel Prize-winning economist Milton Friedman of the University of Chicago published an article calling corporate social responsibility a "fundamentally subversive doctrine" in a free society.⁸⁰ In Friedman's view, when executives commit corporate funds for social responsibility, they wrongfully usurp the funds of their shareholders, or possibly of their customers, or even of their employees. Accordingly, doing public good is the responsibility of government, not business. In Friedman's view, "there is only one social responsibility of business — . . . to increase its profits so long as it stays within the rules of the game."⁸¹

Whatever one's view of that doctrine, it has two loopholes that are immediately relevant. First, Friedman espoused his doctrine for a free society,⁸² of which many countries with human rights violations are not. Nigeria, for example, is not a free society. If one insists that only the Government can do good in Nigeria, then good simply would go undone.

Second, Friedman also allowed for corporate social responsibility where it is in the financial self-interest of the corporation, and hence of its stockholders.⁸³ There are many reasons why voluntary human rights codes may be in a corporation's business self-interest. In South Africa, for example, apartheid hurt profits. As two scholars noted recently in a British accounting journal, multinational industry in South Africa "had a special interest

80. Milton Friedman, *The Social Responsibility of Business is to Increase Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine) at 32, 125.

81. *Id.* For a more recent version see William Safire, *The New Socialism*, N.Y. TIMES, Feb. 26, 1996, at A13. "What are the primary 'social' responsibilities of a corporation? To serve its owners by returning a profit and its community by paying taxes; to earn the allegiance of customers by delivering value; and to provide a secure future for employees who help it succeed in the marketplace." *Id.*

82. Friedman, *supra* note 80, at 125.

83. *Id.* at 124.

in labor reforms. The policy of reserving skilled jobs for whites produced labor shortages; political unrest and strikes in urban centers cut profit margins; and international economic sanctions limited access to world markets."⁸⁴

More broadly, Citibank's John J. Keller, a specialist on emerging markets, told the American Society of International Law in 1994 that, in the long run, educated and healthy workers are needed for economic development, which in turn increases business opportunities.⁸⁵ Even in the short term, underfed workers may be less productive.

Not only worker rights, but human rights in the broader society can be good for business. Longtime business executive and now Under Secretary of State for Economic Affairs, Joan Spero, puts it in businesslike terms: "A world community that respects democracy and human rights will provide a more hospitable climate for American trade and commerce Repression fosters instability in the long run and puts investment at greater risk of expropriation or loss."⁸⁶

Skeptical watchers of the "bottom-line" may remain unconvinced that the promotion of human rights is good for business. Perhaps the "human rights is good for business" perspective is true in general or in the long run, critics may say, but what is the reality for my company, and for my profits next quarter? For such skeptics, activists would do well to recall that many of today's corporate codes for human rights were adopted following pressure from consumers, social investors, labor, or the press, often in combination. Where a corporation's self-interest is not self-evident, outside assistance may facilitate enlightenment.

3. Ethical Motives for Corporate Codes

While human rights may often comport with even the most miserly definition of a corporation's self-interest, I would prefer to make the case for social responsibility at two arguably higher ethical levels. First, corporations are run not by robots, but by people, each of whom must confront his or her own conscience. How many executives would be comfortable letting Ken Saro-

84. Arnold and Hammond, *supra* note 43, at 116.

85. John J. Keller, *Multinational Business and Human Rights*, ASIL PROC., 1994, 271, 273-274.

86. *Id.* at 277.

Wiwa hang, if they thought they could stop it? How many, if they witnessed twelve-year olds slaving away long hours in Salvadoran sweatshops, would simply shrug it off?

In a 1995 article in *Directors & Boards* magazine, John Duerden, former President of Reebok, put it this way:

As a public company, we have an ethical responsibility to build value for Reebok's shareholders — but not at all possible costs. What we seek is harmony between the profit-maximizing demands of our free-market system and the legitimate needs of our shareholders, and the needs and aspirations of the larger world community in which we are all citizens.⁸⁷

The second of the two higher ethical grounds is the proper role of a multinational corporation in the globalized economy of the twenty-first century. In the quarter century since Mr. Friedman published his article, the World has changed dramatically. International trade, which accounted for about one tenth of the U.S. economy in the 1960's, has more than doubled to between one fifth and one quarter in the 1990's.⁸⁸

In 1970, there were some seven-thousand multinational corporations in the World. Today, there are more than five times that number.⁸⁹ A rough estimate by the editors of the *Economist* indicates that the three-hundred largest multinationals now control about one fourth of the World's productive assets.⁹⁰

As the real power of multinationals has grown, the real power of national governments has shrunk. Most U.N. Member States have economies far smaller than the annual revenues of large multinationals. As Richard Barnet and John Cavanagh point out in their 1995 book *Global Dreams*, "Ford's economy is larger than Saudi Arabia's and Norway's."⁹¹ And the economies of those two nations, in turn, dwarf those of nearly every nation in Africa.⁹²

What this means is that in the current and future global

87. Duerden, *supra* note 59.

88. RICHARD J. BARNET & JOHN CAVANAGH, *GLOBAL DREAMS* 20 n.4 (1995) (noting that international trade accounted for 26% in 1990); IRRRC, *supra* note 55, at 4 (noting that international trade accounted for 22% in 1996).

89. BARNET & CAVANAGH, *supra* note 88, at 423.

90. *Id.* (citing *A Survey of Multinationals*, THE ECONOMIST, Mar. 27, 1993, at 5-6).

91. *Id.* at 14.

92. See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 192-93, 212 (1995).

economy, Milton Friedman's theories simply don't work. In most countries, governments have limited power or resources to do good. If multinationals turn their backs, exploitation will continue. Human beings will be left to fall between the twin pillars of hapless governments and careless corporations. That cannot be why society created the legal fiction of the corporation. And that cannot be a world that will last.

4. Economic Development and Human Rights

Some may argue that corporations need not take specific action toward human rights violations, because simply by investing in a developing economy, they set in motion a chain of events that leads to a more open society. That is sometimes true. Development may create a middle class, and it may generate the revenues that governments need to do public good.⁹³

But as Human Rights Watch observed in its World Report 1996:

This argument . . . ignores the fact that, for every liberalizing Taiwan there is a Singapore, Indonesia, China or Peru where economic growth has simply bolstered an Authoritarian regime. Indeed, even if economic development could be correlated in the long-term with improved respect for human rights — an unproved proposition — that would offer little solace to those imprisoned and tortured in the meantime.⁹⁴

II. *HOW RESPONSIBLE SHOULD CORPORATIONS BE?*

Having determined that multinationals should undertake some responsibility toward human rights violations in countries where they do business, the question then becomes how much is enough? And how much is feasible, given stiff international competition? Without pretending to have a complete answer,

93. See Orentlicher & Gelatt, *supra* note 56, at 98-102.

94. HUMAN RIGHTS WATCH WORLD REPORT 1996, *supra* note 9, at 362. See also Steven Erlanger, *Clinton Administration Study Finds the Chinese Guilty of Widespread Human Rights Abuses*, N.Y. TIMES, Mar. 7, 1996, at A4 (quoting U.S. DEP'T ST., COUNTRY REPORTS ON HUMAN RIGHTS FOR 1995)

The experience of China in the past few years demonstrates that while economic growth, trade and social mobility create an improved standard of living, they cannot by themselves bring about greater respect for human rights in the absence of a willingness by political authorities to abide by the fundamental international norms.

Id.

one might suggest gradations of responsibility, depending on the circumstances. The closer the violations come to the company's operations, and the more serious they are, the greater the firm's responsibility. As an initial hypothesis, one might suggest the following five levels of responsibility.

1. Treatment of Firm or Contractor Employees

Treatment of firm or contractor employees is one of the clearest cases for corporate responsibility, as reflected in the codes of conduct being adopted by increasing numbers of multinationals. Many important issues must be addressed in drafting and implementing such codes. For example, what grounds of discrimination are to be prohibited? (Unlike some other companies, Wal-Mart⁹⁵ and Timberland⁹⁶ bar discrimination based on disability or sexual orientation.) What age is a child?⁹⁷ How many hours of work are too many?⁹⁸ What measures are most likely to ensure compliance?⁹⁹

One of the more important questions for the welfare of employees is wage level. Codes to date adopt a range of approaches to the determination of wage levels. The Administration's Model Principles, however, do not even mention wages. Levi Strauss calls for paying the legal minimum or prevailing local wage,¹⁰⁰ whereas Reebok calls for whichever is higher.¹⁰¹ Neither approach is assured of treating workers with even mini-

95. IRRC, *supra* note 55, at 8.

96. Landay, *supra* note 56, at 284.

97. For example, Levi Strauss' Terms of Engagement define a child as less than 14 years of age or younger than the compulsory age to be in school. Orendlicher & Gelatt, *supra* note 56, at 125. Reebok's Standards state that child "generally" refers to one less than 14 years of age, or younger than the compulsory school age, "if that age is higher than 14." Reebok uses a higher age in countries where the law sets a higher age. *Id.* at 128. ILO standards set the minimum age for employment at the age of completion of compulsory schooling and, "in any case," not less than 15, except that underdeveloped nations, after consultation with the ILO, may initially set the minimum age at 14. *Id.* at 114 (discussing ILO Convention No. 138, *Minimum Age Convention*).

98. For example, Levi Strauss will not use contractors who regularly require more than 60-hour work weeks. Orendlicher & Gelatt, *supra* note 56, at 125. Reebok "will seek" business partners who meet that limit, but in addition "will favor" those who use 48-hour work weeks as their maximum normal requirement. *Id.* at 127. *See also id.* at 113-14 (discussing, *inter alia*, ILO Convention No. 1, *Hours of Work (Industry) Convention*, which promulgated general rule of 48-hour maximum).

99. *See, e.g.*, Duerden, *supra* note 59; IRRC, *supra* note 55, at 9-10.

100. IRRC, *supra* note 55, at 7.

101. *Id.* at 8.

mal dignity. Some countries have no legal minimum wage, and others set it below the cost of living. Furthermore, prevailing local wages may be too low to meet even minimal needs for human health, nutrition, and development. One ILO study found that eighty-eight percent of women living near Jakarta, earning the minimum wage of US\$1.80 per day, were malnourished.¹⁰²

Recognizing these deficiencies, the Interfaith Center's Principles call for a "sustainable community salary,"¹⁰³ which would be enough to cover not only basic family needs but a range of discretionary expenditures as well.

At some point, however, wage increases conflict with a company's competitive requirements. Nevertheless, there is room for current corporate codes to improve without seriously threatening corporate competitiveness. After all, recall that Sullivan Principle multinationals in South Africa committed to, and did, pay wages significantly above local minimum living costs.¹⁰⁴

102. *Id.* at 14.

103. Interfaith Center, *supra* note 78, at 5, 9. The three religious sponsors of the Principles have not yet reached full agreement on a wage standard. The U.S. Interfaith Center proposes that companies pay "sustainable community wages which enable employees, especially women, to meet both the basic needs of themselves and their families as well as to invest in the ongoing development of sustainability in local communities through the use of discretionary income." *Id.* principle 3.2.P.3, at 9 (regular type). This includes "enough discretionary income for a worker to participate in the support of the development of small businesses in a local community, including the support of the cultural and civic needs of the community. The salary allows for long-range planning and participation." *Id.* at 5, para. T.5. The British and Canadian groups propose a similar, but simpler and perhaps more modest standard. Omitting reference to sustainable community and without special mention of women, they propose that companies pay "adequate compensation which enables employees to both meet the needs of themselves and their families and provide discretionary income." *Id.* principle 3.2.P.3, at 9.

104. Sullivan Principles, *supra* note 42, at 1497. *See also* ARTHUR D. LITTLE, INC., SEVENTEENTH REPORT ON THE SIGNATORY COMPANIES TO THE STATEMENT OF PRINCIPLES FOR SOUTH AFRICA 13 (1993).

Because there is no national minimum wage, this program uses two minimum economic living level wages determined annually by two universities However, because the minimum economic levels are at the subsistence level, Signatories are required to pay a premium of at least 30 percent [above the minima]. The lowest-paid employee received, on average, 94 percent above [the minima]

Id.

2. Directly Supporting the Repressive Activities of a Repressive Regime

One area where the responsibilities of corporations would seem clear is where the corporation directly supports the repressive activities of the forces violating human rights. Who supplied General Abacha with the noose to hang Ken Saro-Wiwa? Another example is when Polaroid supplied the film for the photo identification cards that South African security forces used to keep blacks in their place under apartheid.¹⁰⁵ In cases like these, multinationals have a responsibility not to be complicit.

3. Supporting the Non-Repressive Activities of a Repressive Regime

Shell's natural gas plant in Nigeria may, by itself, be harmless or even beneficial to Nigerians. On the other hand, it may help General Abacha to retain power longer. In cases like these, whether to do business at all in a pervasively repressive country, the level of responsibility for the corporation depends on the circumstances. One factor, as noted by the Interfaith Center on Corporate Responsibility, is whether there exists a strong indigenous movement calling for divestment.¹⁰⁶ In South Africa there was, whereas in Northern Ireland there is not.

4. Corporate Advocacy on Issues Related to Its Operations

Shell should have spoken up sooner and more forcefully against the show trial of Ken Saro-Wiwa, just as The Gap ultimately spoke out against its Salvadoran contractor and on the Salvadoran Government. As the *New York Times* recently editorialized, "Shell, surely, has never hesitated to use its influence on matters of Nigerian tax policy, environmental rules, labor laws and trade policies."¹⁰⁷ Why make an exception for human rights violations closely connected to the company's operations?

5. Corporate Advocacy on Issues Not Directly Related to Its Operations

At first blush, this may seem to exceed the proper bounds for a multinational enterprise. But consider the Sullivan Princi-

105. Arnold & Hammond, *supra* note 43, at 121.

106. Interfaith Center, *supra* note 78, art. 2.3.P.1., at 8.

107. *Shell Game in Nigeria*, *supra* note 5, at 14.

ples, which called on U.S. firms to "Support the ending of all Apartheid laws."¹⁰⁸ Under this mandate, the U.S. Corporate Council for Change in South Africa, in 1985, published advertisements in the *Johannesburg Press* calling for the abolition of racial discrimination.¹⁰⁹ The more serious and widespread the violations, the stronger the case for multinationals to condemn them.

CONCLUSION

The eve of the twenty-first century is marked by economic globalization, expansion in the number of free enterprise economies, and by privatization. As responsibilities thus shift from the public to the private sector and especially to multinationals, governments and intergovernmental organizations wield correspondingly less power. Even where governments have the political will, they may lack effective power to safeguard basic rights, a power which increasingly, for an important spectrum of rights, rests in the private hands of multinational corporations. Whether incipient trends in corporate responsibility will ripen into a second human rights revolution remains to be seen. But in view of the impressive and growing power of multinational enterprises to affect basic rights, human rights advocates would do well to monitor and nurture these developments. Executives of multinationals, for their part, might reflect upon whether along with their expanding reach and influence comes added responsibilities.

108. Sullivan Principles, *supra* note 42, Principle VI.

109. Arnold & Hammond, *supra* note 43, at 116.