

The 60th Commission on Human Rights:

**NORMS ON THE RESPONSIBILITIES OF  
TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS  
ENTERPRISES WITH REGARD TO HUMAN RIGHTS**

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## A. The Norms: an overview

The *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*<sup>1</sup> (the Norms, hereinafter), were drafted by a working group of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the Commission on Human Rights. Following the adoption of the Norms by consensus, the twenty-six individuals representing all regions of the world that comprise the Sub-Commission then presented them to the Commission. The Sub-Commission then recommended that the Commission invite governments, UN bodies and non-governmental organisations (NGOs) to submit their comments and assist in the establishment of a working group to review the Norms.<sup>2</sup>

Despite that other initiatives on the conduct of transnational corporations (TNCs) already exist, including the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises and the International Labour Organisation (ILO) Tripartite Declaration of Principles, the Norms are the first legal instrument that does not emphasise the non-binding nature. To date, the most comparable project is the United Nations Global Compact, a voluntary initiative launched by Kofi Annan in July 2000 that brings together corporations, UN agencies and civil society organisations in support of nine general principles in the areas of human rights, labour, and the environment. Although both initiatives address similar issues, the 23 provisions of the Norms are outlined in greater detail than the nine general principles of the Global Compact. Moreover, the Global Compact does not outline any mechanism for enforcement, whereas the Norms extend beyond pure voluntarism to include the creation of a mechanism for implementation. Some observers believe that the Norms and the Global Compact could, in fact, complement each other. Indeed, the Global Compact provides an ideal forum for dialogue, experimentation, and learning, and could also serve as a platform for disseminating and promoting the Norms.<sup>3</sup>

Therefore, the Norms constitute a useful legal instrument, providing clarity, legitimacy (as a product of a formal and wide consultation process within the United Nations), and effectiveness to the field of international corporate accountability, a field which remains insufficiently regulated. Moreover, the Norms represent progress in resolving the problem of corporate accountability, an issue that states committed to at the Johannesburg Summit in 2002.<sup>4</sup>

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<sup>1</sup> E/CN.4/Sub.2/2003/12/Rev.2

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?Opendocument>

<sup>2</sup> E/CN.4/Sub.2/2003/L.11 at 52 (2003)

[http://www.coc-runder-tisch.de/kommunikation/texte\\_news/Res\\_Norms.pdf](http://www.coc-runder-tisch.de/kommunikation/texte_news/Res_Norms.pdf)

<sup>3</sup> King, Alison, *The United Nations Human Rights Norms for Business and the UN Global Compact*.

<sup>4</sup> “actively promote corporate responsibility and accountability, based on Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures” Para. 49 of the Plan of Implementation of the World Summit on Sustainable Development.

The main principles and features of the Norms are the following:

- The Norms clearly state, for the first time in an international legal agreement,<sup>5</sup> the obligation of TNCs to promote, to secure the fulfilment of, and to ensure the respect for and the protection of human rights within their sphere of influence and activities. The Norms recognise, however, that states maintain the primary responsibility in the promotion and respect of human rights.
- The second significant feature of the Norms is that they propose mechanisms of implementation, control and enforcement. According to letter H , TNCs shall, as an initial step, incorporate the Norms in their internal rules as well as in their contracts or other arrangements dealing with contractors, distributors, suppliers, etc. Additionally, TNCs will be periodically subjected to monitoring and verification efforts to ensure their compliance with the Norms by United Nations and/or other national or international mechanisms. Finally, states should establish the necessary legal and administrative frameworks for ensuring that the Norms are implemented by TNCs. Domestic or international tribunals shall apply the Norms when determining damages and adequate reparations, as well as criminal sanctions.
- The Norms codify, reaffirm, and rationalise pre-existing obligations. This is clearly evident from the wording of the Norms, as all of the obligations refer to the international conventions in which they are recognised. Specifically, the provisions deal with non-discrimination, the right to security of persons, workers' rights, respect for national sovereignty, respect for human rights, including the prohibition of corruption and fundamental rights to development (food and drinking water, housing, highest attainable physical and mental health standards, etc.) and consumer and environmental protection.

## **B. The Norms at the 60<sup>th</sup> Commission of Human Rights**

The Norms have been, without question, one of the most controversial topics at the 60<sup>th</sup> Commission of Human Rights. Given that this was the first time the Norms were submitted to the human rights body, there was enormous uncertainty about the position the Commission would adopt regarding the Norms.

Although their official stance is that they do not oppose the Norms, several governments, including the United States, the United Kingdom, Saudi Arabia, Egypt and India, pushed behind-the-scenes to take the Norms off the Commission's agenda, arguing that the

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<sup>5</sup> The Universal Declaration of Human Rights states in its preamble that "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 and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

Norms are a duplication of work of other bodies of the UN system.<sup>6</sup> Very few states, such as Switzerland, have openly declared their support for the project.

Some business lobby groups<sup>7</sup>, led by the International Chamber of Commerce (ICC), the International Employers Organisation, the US Council for International Business, and the Confederation of British Industry, have launched a counter-campaign to kill the proposal. The groups presented three main arguments against the Norms:

- The Norms will discourage investment due to the fact that they introduce new obligations to respect vaguely defined rights such as the right to development and workers' right to an "adequate standard of living" as well as onerous reporting requirements. In the long term, this will damage the interests of developing nations.
- It is not the role of corporations to substitute the state. Companies are not subjects of international law and, therefore, they are only bound by domestic rules.
- Existing voluntary standards such as the Global Compact and Codes of Conduct are sufficient to protect human rights. Therefore, the Norms could weaken the importance of the pre-existing agreements. Moreover, prescriptive regulation is not easily adaptable to the different circumstances and resources of individual companies. Additionally, it cannot be assured that sanctions will be fairly applied by an organisation such as the UN, renowned for bureaucratic mismanagement.

On the other hand, there were NGOs and civil society activists campaigning in support of the Norms. However, many also expressed some concern about the Norms as they currently stand. The largest NGO and civil society campaign, initiated by Amnesty International, Rights and Accountability in Development (RAID), and the Internet Network on Economic, Social and Cultural Rights (ESCR-Net), created a Corporate Accountability Discussion Group. Based upon the input of participating groups, the campaign drafted a Statement of Support, endorsed by nearly 200 NGOs, trade unions, and businesses as well as 200 individuals from around the world.

### **NGO Statements**

The arguments of NGOs were expressed in their oral statements at the Commission, delivered under Agenda Item 10 (Economic, Social and Cultural Rights) and under Agenda Item 16 (Report of the Sub-Commission on the Promotion and Protection of Human Rights). The following are summaries of statements referring to the Norms.

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<sup>6</sup> Frances Williams, *Company behavior must be on UN human rights agenda*, Financial Times, 8.4.2004

<sup>7</sup> It has to be noted that certain transnational corporations such as Novartis, British Petrol, Barclays Bank and ABB support the Norms.

- ***Fédération Internationale de Droits de l'Homme (FIDH)***

The FIDH joined forces with a broad coalition of NGOs to strongly assert the view that the UN Norms are an important complement to the duties of governments to enforce existing human rights law. The Norms represent a unique effort to identify and clarify the appropriate responsibilities of business within their sphere of activity and influence. The FIDH urged the Commission to take steps to promote the careful study of the Norms and to continue to work toward the establishment of a common global framework for understanding the responsibilities of business enterprises with regard to human rights.

- ***American Association of Jurists (AAJ)***

The AAJ welcomed the drafting of the Norms and reminded others that the first draft was unacceptable. The positive changes seen in the new version are due, in part, to the work and pressure of NGOs such as AAJ and CETIM. However, there are still several questions that should be addressed if the Norms are to serve as a serious and coherent answer to the problems posed by TNCs. The AAJ argued that the greatest omission was the principle of joint liability of the parent company for the acts of subsidiaries. This is of great importance given that many TNCs attempt to externalise the costs and the risks of production through the relocation of their manufacturing to developing countries. AAJ proposed the creation of a working group to improve the project, fill in any remaining gaps, and study the monitoring mechanisms.

- ***Human Rights Advocates (HRA)***

Human Rights Advocates denounced the practice of TNCs selling toxic products that are banned in the country of origin to poor nations who lack the resources to address health impacts or adequately label these dangerous products. For HRA, the Norms were viewed as a valuable tool for addressing this issue.

- ***Human Rights Council of Australia (HRCA)***

The HRCA explained how some TNCs carry more political and economic weight than many states themselves. As a result, HRCA argued that TNCs are as capable as or more capable than many states in contributing to the protection and promotion of human rights or their violation. In fact, corporations are already major actors in international human rights law, especially with regard to economic, social and cultural rights and the right to development. The Norms attempt to provide a concise summary of the obligations that bind them. HRCA urged the Commission to support the study and further consideration of the Draft Norms on the part of all those with an interest in the promotion and protection of human rights.

- ***The Lutheran World Federation (LWF)***

The Lutheran World Federation also expressed its support for the Norms. The organisation called upon the Commission to receive them and asked the Secretary General to circulate the Norms to the UN member states, relevant intergovernmental organisations and UN agencies, NGOs and business groups for their consideration and comments. For the LWF, the Norms seek to apply the moral and ethical framework to the actions of entities that have enjoyed great freedom from accountability since the advent of economic globalisation. The LWF believes it is reasonable to expect that TNCs and other businesses should respect the human dignity of those affected by their activities.

- ***Pax Romana***

Pax Romana noted that TNCs have assumed the status of global actors without due consideration for the respect of human dignity and environmental protection. According to Pax Romana, the negative effects of the economic activities of these corporations are borne primarily by developing countries and include the following:

- The displacement of indigenous and vulnerable people without adequate compensation.
- The prolongation of armed conflicts as a result of the collaboration of TNCs with warring parties in exchange for cheap access to mineral deposits and oil.
- The denial of workers' right to association and bargaining through trade unions, thus perpetuating the problem of low wages.
- The threatening of national identity and culture.

Therefore, Pax Romana welcomed the Norms and supported the adoption of a legal framework binding TNCs to uphold human rights.

**Caucus in support of the Norms<sup>8</sup>**

To many of the nearly 200 civil society organisations that constituted the caucus, the Norms, developed through an open process of consultation over a period of four years, represent a major step forward. By providing coherence to a disparate set of existing human rights obligations and by establishing a common global framework for corporate

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<sup>8</sup> Joint oral intervention by Human Rights Council of Australia, *Mouvement international d'apostolat des milieux sociaux indépendants* (MIAMSI) and World Organisation Against Torture (OMCT). Supported by: Amnesty International, ESCR-Net, RAID, Berne Declaration, Centre on Economic and Social Rights (CESR), Earth Justice, Franciscans International, International Federation of Human Rights (FIDH), International Service for Human Rights, ONZ, Misereor, World University Service and a caucus of nearly 200 organisations and 200 individuals.

responsibility with regard to human rights, the Norms help to clarify the role of TNCs. Without undermining the responsibilities of governments, the Norms will encourage the development of a stable environment for investment and business, regulated by the rule of law and clearly-defined rights and responsibilities. The caucus did not want the Norms to be subjected to a rushed decision and hoped that discussions involving all relevant parties at the Commission would continue.

### **Side meetings**

During lunch breaks, NGOs organised fringe meetings where they freely discussed various subjects. The two meetings referring to the Norms were attended by a high number of observers from NGOs and government missions, indicating the diversity of actors interested in the issue.

#### ***1. Panel discussion: “Norms on the responsibilities of transnational corporations and other enterprises with regard to human rights”***

This side event was organised by the Friederich Ebert Foundation. The panel, comprised of six experts on the subject, aimed to promote the Norms and shed some light on various controversial issues.

David Weissbrodt, an expert from the Sub-Commission of Human Rights, first explained how the Norms were drafted. The process he described was an accessible and multilateral one, where all actors were invited to participate. He then clarified the main features and principles of the Norms:

- The primary responsibility to promote and ensure respect for human rights rests with the state, whereas business enterprises have the obligation to fulfil this responsibility within their respective spheres of activity and influence.
- The Norms apply to all types of companies (not only transnational corporations, but also domestic businesses), in attempt to attract more than just the few companies who have joined the Global Compact initiative.
- The Norms are mere recommendations, due to the fact that the Commission of Human Rights lacks the capacity to enact binding rules. However, the Norms restate many obligations already outlined under ILO treaties or humanitarian rules. In fact, the Norms are meant to serve as a summary or overview of pre-existing rules and as a comprehensive guide for companies who want to protect human rights.
- The most desirable way of implementing the Norms would be through their incorporation into the Codes of Conduct of enterprises. However, it remains to be seen how the Norms will be interpreted or monitored. Even though trade unions will have a primary role in this issue, governments should also establish a

framework for the application of the Norms and mechanisms for reparation in case of violation.

Dwight Justice spoke on behalf of the International Confederation of Free Trade Unions, stating that the ICFTU did neither endorse nor reject the Norms, given that ICFTU has some reservations about the Norms as they currently stand. Firstly, the ICFTU felt that the Norms might undermine the initiative of Global Compact, created by the UN Secretary General, which facilitates a global dialogue between the different actors in the international arena. Secondly, the ICFTU was concerned that the difference between the obligations of states and the obligations of corporations is not clear in the Norms. In fact, the wording of the obligations of both is very similar. According to Justice, the state is the only body capable of promoting and assuring compliance with human rights obligations. So far, no other entity has been created with the capacity to do so and the alleged substitutes are not credible.

Lee Swepston, a representative of the International Labour Organisation, spoke on a personal capacity, given that the ILO has not yet made a public statement on the Norms. Quoting paragraphs of the ILO report “A Fair Globalisation: Creating opportunities for all”, Swepston also commented that the Norms are consistent with today’s trends in international law. He welcomed the extensive references to ILO standards concerning worker rights, noting that re-statements do not normally retain the same level of protection. However, he considered that the Norms were drafted as if they stated obligations for corporations. Therefore, he felt that the tone of the Norms should be changed in recognition that only governments can sign treaties and therefore be subject to international obligations. He also noted that it is preferable to create a mechanism in which corporations are involved in the creation rather than one that is imposed upon them from outside.

Tricia Feney, a representative of Amnesty International, addressed the social reasons for the Norms and explained why Amnesty International endorses them and has been using them to test the legality of corporation activities, even before their adoption. In her opinion, the Norms exist to prevent cases such as the one in Congo, where transnational corporations took advantage of the lack of authority in the failing state to exploit natural and human resources, prolonging the conflict, to some extent. Feney also argued against the “hysterical” reactions of institutions such as the ICC, which announced that the Norms will give incentives to break contracts of distribution without real legal basis and will act as a deterrent for foreign investment. Mrs. Feney countered this argument, claiming that the more corporations are aware of their obligations, the more they will be ready to invest. Indeed, she argued, transparency and information tend to increase investment.

Chris Sidoti, a representative of International Service for Human Rights, expressed his disappointment that no rule about discrimination based on sexual orientation was included in the Norms. He then outlined his vision of contemporary international law, one that differed from those of Justice and Swepston. Sidoti recognized that international



law was originally built upon the foundations of the nation state. However, as he explained, international law is a living body capable of evolving and, as a result, it is no longer possible to see states as the sole actors. In international humanitarian law and Criminal Law, individuals are given legal personality. Also, in the field of human rights, it should be accepted that actors other than states are responsible for violations of human rights, especially when these actors are sometimes more politically and economically powerful than states.

Joseph Rajkumar, a representative of Pax Romana, avoided the technical legal aspects that previous speakers had touched upon. Instead, Rajkumar denounced the influence of the corporate sector in national elections and the violations of workers' rights by corporations in India and other developing countries.

***2) Conference and debate on transnational corporations and human rights organised by the American Association of Jurists and Centre Europe-Tiers Monde (CETIM).***

The Chair of the session, Florian Rochat, from CETIM, introduced the debate, explaining how TNCs often escape national jurisdiction through the practice of externalising costs and risks. Therefore, he argued, the Norms need to be improved in areas such as monitoring and the principle of joint liability.

Gilbert Gouverneur, from Friends of the Earth, described a Monsanto case study in which a group of farmers are being prosecuted for destroying fields of transgenic products.

Aurèle Clemencin, from Greenpeace, presented the case of the explosion of a US chemical corporation factory in Bhopal (India) as a clear example of the impacts of TNC relocation to developing countries. The explosion caused 12 000 deaths as well as countless illnesses, physical aberrations, and abortions. Greenpeace affirmed that Bhopal was a crime rather than an accident because Union Carbide had not taken the necessary measures of security and precaution; the machines were badly maintained and the staff was insufficiently trained. Moreover, the directors of the factory immediately flew back to the United States and refused to give any information about the polluting product's chemical composition to doctors, which could have improved the treatment of patients. Clemencin also explained how the American Court declared it had no jurisdiction over the affair and how the final compensation, sentenced by an Indian Court, was a shamefully small amount of \$400 per injured and \$1 200\$ per death.

Following this disaster, Greenpeace drafted the Bhopal principles on corporate accountability. The principles are as follows:

- Implement Rio Principle 13: Address liability and compensation for the victims of pollution and environmental damage).
- Extend corporate liability to parent companies as well as individual liability to directors, without requirement of fault.

- Ensure corporate liability for damage beyond national jurisdictions.
- Protect human rights.
- Provide for public participation and the right to know: commercial confidentiality must not outweigh the interest of the public to know the dangers of the outputs.
- Adhere to the highest standard in places where environmental or human rights protection is weaker.
- Avoid excessive corporate influence over governance.
- Protect food sovereignty over corporations.
- Implement the precautionary principle and require environmental assessments.
- Promote clean and sustainable development.

Alejandro Teitenbaum explained how AAJ and CETIM have kept a close eye on the activities of the working group on TNCs, created in 1998, and how these organisations actively contribute to the debate on the project of the Norms. They welcomed the transformation of the first draft, a voluntary code of guidelines seen as too vague, into the current project. However, they still believe that the Norms lack important elements such as the joint liability of the parent companies for the acts of suppliers, subsidiaries and contractors as well as individual responsibility of the directors in criminal cases such as complicity in the killing of political leaders. As a result, they maintain that a working group needs to be formed in the Commission to analyse and improve the Norms.

### **Special Rapporteurs**

There was no Special Rapporteur presenting the Norms to the Commission on behalf of the working group. However, other Special Rapporteurs made reference to the Norms in their reports.

- The Report on the Right to Food<sup>9</sup>, submitted by Jean Ziegler, highlighted the relevance of the Norms to the development of the concept of the right to food, given that corporate control over agribusiness, food, and water sectors is growing. He explained how concentration has produced huge transnational holdings that monopolise the food chain and how the top 200 corporations in the world now control approximately one quarter of the world's total productive assets. Under the traditional application of human rights law, only governments are responsible for violations of human rights. According to this interpretation, corporations are only held accountable indirectly by Governments who

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<sup>9</sup> E/CN.4/2004/10

have the duty to protect their citizens against any negative impact on their human rights. However, due to the development of intergovernmental instruments and voluntary codes of conduct, it is now increasingly understood that also corporations also have obligations to respect human rights. Until now, a strong and coherent system to ensure these obligations are met has been missing. According to Ziegler, the Norms proposed by the Sub-Commission are meant to fill this gap.

- In her Report on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights<sup>10</sup>, Ms. Fatma-Zohra Ouhachi-Vesely, acknowledged the complaints received about companies who fail to compensate or assist victims, who evade obligations to remediate damaged environments and who violate human rights by failing to monitor, report and provide essential information concerning their products and processes. This lack of accountability is attributable to two main factors: first, problems in access to justice in many developing countries where the corporations are based and the harm occurs, and second, the “corporate veil” where the parent company behaves as only a shareholder and therefore shirks responsibility for the wrongdoing of its subsidiaries who are often virtually bankrupt and uninsured. Therefore, Ouhachi-Vesely welcomed the Norms as an important step towards ensuring international accountability of private companies.

### **C- The future of the Norms**

Even though no state tackled the issue of the Norms in any of their official statements or interventions, the Commission finally adopted the Norms by consensus, under Agenda Item 16 (Report of the Sub-Commission on the Promotion and Protection of Human Rights), a resolution sponsored by UK<sup>11</sup> entitled “Responsibilities of transnational corporations and related business enterprises with regard to human rights”<sup>12</sup>. The resolution recommends the ECOSOC to:

- a) Confirm the importance and priority of the question;
- b) Request the Office of the High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards on to the responsibility of TNCs with regard to human rights, after consultation with all relevant stakeholders. The report is to be submitted to the Commission at its sixty-first session in order to identify options for strengthening these standards and possible means of implementation;
- c) Affirm that the Norms, as a draft proposal not requested by the Commission, has no legal standing and that the Sub-Commission should not perform any monitoring function in this regard.

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<sup>10</sup> E/CN.4/2004/46

<sup>11</sup> Cosponsors: Austria, Belgium, Czech Republic, Ethiopia, Ghana, Hungary, Ireland, Japan, Mexico, Norway, South Africa and Sweden

<sup>12</sup> E/CN.4/2004/L.73/Rev.1

The resolution was seen to be very politically balanced and was welcomed by both human rights activists and business representatives.

In general, NGOs were pleased with the fact that corporate responsibility is now firmly entrenched in the agenda of the Commission. The caucus considered the campaign successful in its initial goal, which was to ensure that the Commission refrain from any rushed judgment and maintain the Norms in the agenda for the next Session. Indeed, as is evident from their interventions at the Commission, NGOs feared a decision based on insufficient information and/or misinformation from business lobby groups.

The next phase of the campaign will consist of strengthening the Norms by putting them into practice. In the meantime, there are many obstacles NGOs will have to face. Despite that the resolution confirmed the priority of the issue, it also showed a certain degree of reluctance from the state members of the Commission. Paragraph C states clearly that the Norms are not legally binding and that no monitoring function should be performed.

The future of the Norms is still uncertain as they are at a very initial stage. If approved by the Commission following years of discussion, they will still have to be adopted by the Economic and Social Council after which the Norms could be presented to the General Assembly, which may approve them through a resolution. Even then, the Norms would not be binding upon member states because General Assembly resolutions are not binding except when they address issues pertaining to customary law.

Therefore, until the Norms are finalised and UN members agree on how to enforce compliance, supporters of the Norms will have to remain patient. Meanwhile, they will have to recognise the Norms as a large step forward in addressing corporate accountability.