

# Business and Human Rights: What Do the New UN Norms Mean for the Business Lawyer?



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**T**he 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' ('the Norms') adopted by a United Nations human rights expert group on 13 August 2003<sup>1</sup> have already come in for much comment from advocates of corporate social responsibility and business associations alike.<sup>2</sup>

The Norms contain basic standards for corporate conduct in human rights and set out UN monitoring mechanisms. The breadth of issues covered is wide: equality and non-discrimination, security of person, rights of workers, respect for national sovereignty, human rights, and consumer and environmental protection.

As lawyers become increasingly aware of their professional role in advising clients on corporate social responsibility, including human rights,<sup>3</sup> the questions now are: what impact will the Norms have on daily practice? How do these UN Norms fit within all the other codes, guidelines and procedures that have seen the light of day in the past years? Will businesses be asked to explain their activities to the United Nations?

The answers are not always easy. They grow out of how the Norms were developed, their content and the ever-evolving context that conditions corporate social responsibility.

Human rights advocates have long been interested in the impact of business on human rights.<sup>4</sup> In 1998, the United Nations Sub-Commission on the Promotion and Protection of Human Rights,<sup>5</sup> a 26-member group of experts reporting to the 53 governments in the Commission on Human Rights, established its own working group on the activities of transnational corporations, which prepared the Norms along with a detailed interpretive Commentary. The drafting was carried out principally by human rights experts but business associations and corporations discussed and commented on the draft norms as they were being prepared.<sup>6</sup> It was the Sub-Commission that approved the Norms by consensus in August and submitted them, along with several recommendations for further action, to the United Nations Commission on Human Rights. The Commission will consider them in March-April 2004.

The adoption of standards within the UN system is the responsibility of intergovernmental organs, such as the Commission and the General Assembly, but the persuasive and moral weight of pronouncements by expert groups such as the

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Sub-Commission should not be dismissed. The niceties of internal UN procedures are often lost on advocates and the general public and can be ineffective as a response to criticism of corporate shortcomings.

On the positive side, the Norms, in the words of Sir Geoffrey Chandler, 'provide significant value for business by bringing together, in a single comprehensive and authoritative document, accepted international standards . . .' based on international declarations and treaties.<sup>7</sup> The Prince of Wales Business Leaders Forum, the Global Reporting Initiative, the Ethical Globalization Initiative and numerous human rights organisations welcomed the Norms, which, in the words of Human Rights Watch, 'fill an important gap in the protection of human rights world-wide . . . and help to level the playing field for companies that want to do the right thing for human rights'.<sup>8</sup>

On the other side, early on in the drafting process, the International Organisation of Employers (IOE), which represents employers, in particular those from the developing world, at the International Labour Organization (ILO), argued for a voluntary approach and against the idea that 'one size fits all' in an area where realities differ greatly. The IOE, in addition, did not see how the drafting of a UN code could go along with the UN Secretary-General's voluntary Global Compact initiative.<sup>9</sup>

The United States Council for International Business (USCIB), in response to the adoption of the Norms, referred to its past opposition to the draft code as 'unworkable, unnecessary, and counter to efforts to promote corporate responsibility' and argued that it was 'totally inappropriate' to transfer responsibility for protecting human rights from governments to companies; they announced that they were working with other business organisations and the US State Department to prepare for the discussion in the coming Commission.<sup>10</sup>

Others argue that while some of the provisions merely make 'real the responsibility of companies as corporate citizens to uphold some of the most fundamental and basic rights that have been agreed as accepted standards for nation states and individuals for decades', there are unfortunate grey areas relating to the meaning of certain of the provisions concerning, for example, adequate worker compensation, and when companies would be obliged to cease doing business in countries where there were serious violations of human rights.<sup>11</sup>

Where does this leave the business lawyer? On the one hand, it is clear that the Norms as adopted by the Sub-Commission are not 'black-letter law', but

rather a work in progress that will be refined as it makes its way through the UN system. On the other hand, since the Norms are based on international law, which countries have undertaken to be translated into national law, a business enterprise might well expect to see similar provisions legally binding on it through national legislation.

The extent of the 'third party effect' of international human rights law must also be examined, ie, how and to what extent do treaty provisions between states directly bind individuals and businesses without having been implemented through national law?

However, the real relevance of the Norms is that they can be seen as expressing the expectations of public opinion and civil society regarding the conduct of enterprises. They thus provide a good basis for action by an enterprise wishing to move proactively to protect its reputation and avoid legal challenges to its business practices.

## A closer look at the Norms

A more detailed look at the Norms reveals first that the role of the state is reaffirmed: 'States have the primary responsibility' for ensuring respect for human rights, 'including ensuring that transnational corporations and other business enterprises respect human rights'. In addition, such enterprises have, 'within their respective spheres of activity and influence', their own specific human rights obligations, both in and outside their home country (para 1). In understanding the Norms, it is necessary to read them in conjunction with the Commentary, also adopted by the Sub-Commission's working group, and which, in some instances, expands significantly the meaning of the Norms themselves.<sup>12</sup>

## Which of your clients are concerned?

The intended reach of the Norms is extensive indeed. Transnational corporations are defined as economic entities 'operating in more than one country or a cluster of economic entities operating in two or more countries . . .' (para 20).

'Other business enterprises' include 'any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor . . .'. And the Norms are presumed to apply, 'as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities

is not entirely local, or the activities involve violations of the right to security' as defined in the Norms (para 21). Further, the Norms also require transnationals and other business enterprises to include the Norms in contracts with, for example, contractors, subcontractors, suppliers, and natural or other legal persons they enter into agreements with (para 15).

Defining the scope of application of the Norms both in terms of the entities addressed and the meaning of 'spheres of activity and influence' will clearly be one of the important topics of discussion as work proceeds, but it is clear that their intended reach goes well beyond the traditional transnational corporation.

### **What are the human rights obligations of transnational corporations and other business enterprises?**

As mentioned above, the rights encompassed by the Norms extend from equality and non-discrimination, security of person, rights of workers, respect for national sovereignty and human rights, to consumer and environmental protection. Certain rights are described in distressingly broad terms for the business lawyer, others are rather precise but might be difficult to implement and others should present no problem of interpretation. A few salient points are set out below, based both on the Norms and the Commentary.

Some of the human rights obligations are framed extensively. The basic obligation of transnationals and other business enterprises is, 'within their respective spheres of activity and influence, . . . to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups'. This covers both not contributing directly or indirectly to human rights abuses, and not directly or indirectly benefiting from abuses that were known or should have been known (para 1).<sup>15</sup>

Transnationals and other business enterprises shall 'respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights 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, and shall refrain from actions which obstruct or impede the realization of those rights' (para 12).

This is very much the terminology used to describe the obligations of states in international human rights treaties and declarations, and rightly raises concern as to the exact nature of the obligations and how to measure compliance. This broad terminology could well give free range to those interested in corporation bashing rather than in working to improve performance.

However, going from broadly framed principles to more clearly defined obligations is not a new challenge. Over the years, the United Nations and other organisations have developed mechanisms, generally based on dialogue, aimed at more clearly defining human rights responsibilities and giving those responsible for action the required space for carrying out their obligations. Moreover, many of the rights protected by the Norms have already been given relatively clear interpretations in existing treaties, such as the ILO conventions, and through the interpretation machinery of international organisations.

Nevertheless, the difficulties in dealing with such broad language must be faced and the coming challenge will be to adapt existing methods of interpretation to the new circumstances of dealing with business enterprises as participants.

### **Equal opportunity and non-discrimination**

The Norms begin with a very broad non-discrimination clause, which prohibits discrimination based, *inter alia*, on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, and age (except for children). This is extended in the Commentary to include HIV/Aids status, marital status, pregnancy and sexual orientation. Many of these provisions are based on existing international agreements, including those relating to HIV/Aids and disability. Nevertheless, their implementation may well face challenges arising from national legislation, social policy and sensitivities (para 2).

### **Security of persons**

The conduct of security forces in protecting installations or reacting to demonstrations is one of the major recent causes of criticisms of corporations. The Norms require such security services to observe international human rights norms, such as the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the UN Code of Conduct for such officials, and set out detailed guidance on managing security forces. The Norms

also place restrictions on the sale of police or security equipment and prohibit the production or sale of weapons that are illegal under international law (paras 3-4).

### Workers' rights

The Norms pay particular attention to the rights of workers, based principally on ILO conventions and recommendations. The issues dealt with include forced or compulsory labour, child labour, safe and healthy working environments, remuneration ensuring an adequate standard of living, collective bargaining and the right to strike (paras 5-9). While these rights benefit from rather detailed commentaries, the point has been made that such concepts as 'remuneration ensuring an adequate standard of living' are very difficult to apply in practice.<sup>14</sup>

### Respect for national sovereignty and human rights

Transnationals or other business enterprises are expected to respect national law and policies in the economic, social and cultural fields, contribute to those policies, respect the rights of indigenous peoples and not engage in or encourage corruption (paras 10-11).

### Consumer and environmental protection

Provisions are included on protecting the consumer from harmful products, ensuring the safety and quality of the goods and services provided and observing the precautionary principle. Reference is made to international standards on breast-milk substitutes and ethical criteria for medical drug promotion (para 13).

Regarding the environment, the Norms provide for respect for national laws and international agreements and for the precautionary principle, and provide that transnationals and other business enterprises shall be responsible for the environmental and health impact of their activities. Rather detailed guidance is given on these matters (para 14).

### Implementing the Norms

The Norms require transnationals or other business enterprises to adopt internal rules in compliance with the Norms, to establish a periodic reporting procedure and to include the Norms in contracts with business partners. Internationally, the Norms provide for 'periodic monitoring and verification by United Nations, other international and national

mechanisms already in existence or yet to be created . . .'. Various UN human rights bodies would be involved and details are provided on methods by which transnationals and other business enterprises should carry out their monitoring responsibilities (paras 15-18).

### Monitoring now

Many of the monitoring procedures mentioned in the Norms and the Commentary would become operational only on approval by an intergovernmental UN body. However, the Sub-Commission in the resolution approving the Norms requested the working group that had prepared them to receive information from a wide range of sources, including NGOs, about 'the possible negative impact of the activities of transnational corporations and other business enterprises on human rights', with particular reference to the Norms, and to 'invite the transnational corporation or other business enterprises concerned to provide any comments they may wish within a reasonable time'.<sup>15</sup> This clearly sets the stage for dialogue with transnationals and other business enterprises on their practices, which could begin as early as 2004.

### What does this mean for the business lawyer?

The adoption of these Norms by UN human rights experts is an important recognition of the legitimate role of business in fostering 'economic well-being, development, technological improvement and wealth', alongside the real concerns about their potentially negative effects on human rights.<sup>16</sup> Businesses can now come forward and explain what they are doing with regard to human rights. At the same time, they can describe the basic conditions that are needed to enable them to contribute effectively to economic well-being and development; respect for the rule of law would be one example. This lays the foundation for the inclusion of business in the UN human rights dialogue much as the Secretary-General's 1999 launching of the Global Compact brought business into wider UN discussions.

The business lawyer has a number of options in relation to the Norms. She or he can ignore them and hope for the best for their clients. Or, the Norms could serve as a checklist of issues that should be monitored by business.

There are a number of other corporate social responsibility codes and mechanisms that might prove



helpful in interpreting the Norms and advising particular clients. The social accountability standards SA 8000, the Ethical Trading Initiative, the Amnesty International Human Rights Principles, the OECD Guidelines for Multinational Business and the Global Reporting Initiative are some.

The Norms will almost certainly become a key element in future UN activities regarding the human rights impact of transnational business. Further, UN human rights bodies can be expected to increase significantly the attention they give to particularly egregious cases of human rights violations by corporations. Advising clients of this possibility would appear to be prudent.

Although a legally binding global compliance framework may be many years off, national enforcement of human rights standards on companies could accelerate change. In any event, in the words of Sir Geoffrey Chandler, 'good companies have nothing to fear from the UN Norms, but should welcome their comprehensive articulation of the values of society in the 21st century as a guide to corporate conduct and as the foundation for the development of universal yardsticks against which corporate conduct can be measured'.<sup>17</sup>

## Moving towards more precision

Of course, it will now be very important to begin to give more precision to the content and limits of corporate human rights obligations as set out in the Norms and provide the predictability required in legal obligations. The various existing international treaties and the other private-public codes and declarations will be useful. Particular attention can be given to the Global Reporting Initiative Guidelines, which have been developed through a multi-stakeholder process involving representatives of business. A similar process might be launched relating to the Norms with a view to including business as a partner in their further definition having in mind the ILO's tripartite structure of government, employers and labour.

## A challenge to the legal community

Individually, lawyers are clearly concerned by these Norms and their implementation. In addition, the legal profession collectively may well have its own important contribution to make: first, in seeing that the human rights elements of corporate social responsibility are widely known in the profession; secondly, in engaging lawyers from developed and developing countries in coming to grips with the

practical implementation of human rights standards by business; and, thirdly, in helping the United Nations to refine the scope and meaning of the Norms. Business lawyers are well placed to help bridge the gap between the concerns and objectives of human rights advocates and the realities and constraints of the commercial world. The International Bar Association could play an important role in this coming dialogue. ■

## Notes

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- 1 The Norms were approved by the United Nations Sub-Commission on the Promotion and Protection of Human Rights and are contained in UN doc E/CN.4/Sub.2/2003/12/Rev.2, the Commentary on the Norms is contained in UN doc E/CN.4/Sub.2/2003/38/Rev.2, and the relevant resolution is Resolution 2003/16 of 13 August 2003. See [www.unohchr.org](http://www.unohchr.org).
- 2 See Business & Human Rights Resource Centre, [www.business-humanrights.org](http://www.business-humanrights.org).
- 3 Guide for European Lawyers Advising on Corporate Social Responsibility Issues, Council of the Bars and Law Societies of the European Union, [www.cbbe.org](http://www.cbbe.org).
- 4 Thomas E McCarthy, 'Transnational Corporations and Human Rights', in Antonio Cassese (ed), *UN Law/Fundamental Rights* (Sijthoff & Noordhoff Alphen aan den Rijn, the Netherlands, 1979).
- 5 At that time known as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.
- 6 The drafting was led by University of Minnesota Law Professor David Weissbrodt and further information can be found on the University's website, <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.
- 7 Letter to the Editor of *Ethical Corporation* dated 2 September 2003, [www.ethicalcorp.com](http://www.ethicalcorp.com). Sir Geoffrey Chandler is Founder-Chair of Amnesty International's UK Business Group and former Director, Shell International.
- 8 See Business & Human Rights Resource Centre, [www.business-humanrights.org](http://www.business-humanrights.org).
- 9 IOE document circulated to the Seminar on UN Human Rights Guidelines for Companies, Geneva, 29-31 March 2001.
- 10 USCIB statement of 5 September 2003, [www.envoymessaging.com/uscib](http://www.envoymessaging.com/uscib). See also, USCIB talking points on the draft Norms, the USCIB status report on the draft human rights code of conduct and the commentary on USCIB talking points by Sir Geoffrey Chandler, [www.business-humanrights.org](http://www.business-humanrights.org).
- 11 *Ethical Corporation*, Analysis by Mallan Baker, 18 August 2003, [www.ethicalcorp.com](http://www.ethicalcorp.com).
- 12 UN doc E/CN.4/Sub.2/2003/38/Rev.2. See [www.unohchr.org](http://www.unohchr.org).
- 13 Paragraph 3 of the Norms states that transnationals and other business enterprises shall not engage in or benefit from 'war crimes, crimes against humanity, genocide, torture, forced disappearances, 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'.
- 14 See Baker, n 11 above.
- 15 Resolution 2003/16, para 5.
- 16 Eleventh preambular paragraph.
- 17 See n 7 above.