



The United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2

Briefing paper prepared by Adam McBeth
February 2004

Castan Centre for Human Rights Law
Faculty of Law, Monash University

The Castan Centre for Human Rights Law is conducting a major three-year research project into the legal dimensions of the relationship, both present and future, between corporations and human rights. The project is being run in conjunction with the centre's industry partners, Reputation Qest, Futureye and Premier Oil (UK), under the auspices of an Australian Research Council Linkage Grant. Part of the research will involve significant industry, NGO, government and community consultation and the project team would be happy to hear from organisations who might be interested in participating or learning more about the project.

Introduction: The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The Sub-Commission on the Promotion and Protection of Human Rights (part of the United Nations Commission on Human Rights) has formulated a set of principles outlining the responsibility of corporations for human rights and the role of governments in ensuring that such responsibility is upheld.

As far as possible, the Norms aim to reflect existing law and accepted standards, setting out obligations and expectations of human rights responsibility in a clear fashion. In essence, they gather existing obligations and standards from a raft of international agreements and express them in terms of their practical application to corporations. Although not currently a legally binding instrument, the Norms represent the most comprehensive attempt to date to codify the human rights responsibility of private commercial actors.

The final text of the Norms, together with commentary, was adopted by the Sub-Commission on 13 August 2003 and may be presented for consideration by the Commission on Human Rights in 2004. The Norms and accompanying commentary are annexed to this paper.

Why are the Norms needed?

These days it is self-evident to note that commerce is conducted at a global level and that many of its participants transcend national boundaries – the so-called transnational corporations ('TNCs'). It is similarly well established that human rights abuses can and do occur in the course of commercial activity, both directly, such as through poor labour practices, and indirectly, such as through the dislocation of local people or the contamination of waterways leading to serious health problems. In extreme cases, opponents of development and trade union activists are known to have been tortured or killed.

Reconciling the global nature of business and the local effects of human rights abuses necessarily requires some degree of international co-ordination, particularly a consistent and co-operative approach in both the home and host countries of TNCs. Under the existing piecemeal approach, some of the consequences include the following:

- An international corporate group based in an industrialised country can direct its foreign arm in a developing country to engage in practices that would be unthinkable in its home country;
- Victims can struggle to seek recourse against the enterprise because of problems of transnational jurisdiction and the corporate veil;
- Some countries lack the resources or the political will (possibly because of reliance on foreign investment) to implement effective human rights protection or remedies.

The Norms build upon previous measures to regulate the conduct of TNCs at an international level, such as the OECD Guidelines on Multinational Enterprises, which Australia has adopted and administers through the Foreign Investment Review Board. The Norms go beyond the previous approach of voluntary guidelines by stipulating binding obligations for the conduct of TNCs with regard to human rights. However, the Norms do not seek to create any *new* human rights standards. Rather, they extract some of the most important and relevant obligations from existing human rights conventions and express them in a way that makes the obligations of corporations clear, while confirming that corporate obligations are concurrent with state obligations.

If the Norms reflect existing international law, why is a new instrument necessary?

The international human rights obligations that the Norms draw upon are dispersed among the plethora of international conventions and customary law, much of which addresses the obligations of states and is not directly applicable to non-state actors such as corporations. However, this body of law, in granting certain entitlements to all human beings, certainly envisages respect for human rights on the part of non-state actors. In the absence of a comprehensive framework designed to clarify the human rights obligations of corporations in the scope of their ordinary operations, the ability to uphold human rights in the course of commerce is left to ad hoc approaches and interpretations of local authorities and the corporations themselves.

The Norms represent an essential development in international law in that they take rights and obligations that have always been intended, but express them in a form that can be readily understood and followed by the corporations themselves, can be understood and respected by affected people and non-governmental organisations (potentially preventing disputes as to the scope of any given entity's responsibility) and can be easily and consistently applied by governments.

What are the obligations?

The general obligation for TNCs is to promote, secure the fulfilment of, respect, ensure respect of and protect internationally recognised human rights "within their respective spheres of activity and influence" (paragraph 1 of the Norms). They are expected to incorporate the principles in all their activities, including in contracts and dealings with suppliers, licensees, contractors and the like (para 15). TNCs are also prohibited from supporting, encouraging or benefiting from human rights breaches as well as from directly committing them (paras 3, 11). Notwithstanding these broad obligations on TNCs, the primary responsibility for ensuring respect for human rights remains with the state (para 1), including the obligation to prevent abuses by private entities.

In addition to the general obligations, the Norms identify a number of specific obligations, which include the following:

- Equal opportunity and non-discrimination (para 2);
- Prohibition on participating in or benefiting from international crimes against the person, including war crimes, torture and forced labour, among others (para 3);
- Ensuring security arrangements comply with human rights standards (para 4);
- Prohibition on forced labour (para 5) and exploitative child labour (para 6);
- Provision of a safe and healthy workplace (para 7) and adequate wages (para 8);
- Freedom of association and collective bargaining (para 9);
- Respect for local laws (para 10);
- Prohibition on giving, receiving or benefiting from bribes (para 11);
- Contribution to the realisation of the rights to development, adequate food and water, health, housing, education and free speech, among others (para 12);
- Fair business practices and product safety (para 13);
- Preservation of the environment (para 14).

If any of these obligations are breached, TNCs would be obliged to provide reparation to adversely affected persons or communities through compensation or rehabilitation for damage done (para 18).

Why are international minimum standards desirable for corporations?

As long as there is no enforceable common standard for corporate behaviour, it will be open to rogue corporations to create an artificial competitive advantage by using forced, underpaid or child labour or skimping on health, safety and environmental protection. Eliminating such opportunism will bring those corporations back to a level playing field with the vast majority of corporations that abide by reasonable standards.

Common minimum standards would also provide an objective indicator for corporations to measure and adapt their own behaviour, as well as a measurement for stakeholders and civil society groups to apply. This would clearly be desirable for corporations in preference to the potentially arbitrary targeting of campaigns by NGOs against certain corporations and the resultant damage such campaigns can do to corporate standing. The existence of an objective set of standards could be used by corporations both as a tool for legitimate improvement in corporate behaviour and to rebut unfounded claims of human rights and environmental abuses.

Furthermore, commonly applicable standards allow corporations to be confident that their business partners are not engaging in activities that might violate human rights and expose them to legal liability or reputational damage.

Would the Norms require a radical change in the way Australian corporations operate?

Importantly, the Norms only relate to human rights obligations within a corporation's *sphere of activity and influence*. In other words, the obligations are only relevant to the way in which a corporation already conducts its business. A sphere of activity and influence will include people directly involved a corporation's operations, such as employees and customers, as well as those affected by them, such as people living in the area or downstream of an operation that might cause pollution. The sphere will also include actions that the corporation has significant influence over, such as the standards observed by a supplier or distributor, but only to the extent that the corporation in question is actually able to influence that business partner.

As such, the Norms will not require corporations to become "human rights police" or to become the purveyors of good deeds throughout the community. Rather, they will be required to apply human rights standards to the business operations that they already undertake.

The Castan Centre for Human Rights Law, as part of its three-year Australian Research Council project on the legal human rights responsibilities of transnational corporations, interviewed a number of transnational corporations as to their perceptions of their human rights responsibilities and the actions they were taking to meet those responsibilities. The vast majority of the corporations interviewed reported genuine efforts to meet most of the responsibilities set out in the Norms, and in many cases exceed them. More surprising was the number of interviewed corporations that said they favoured the imposition of enforceable human rights obligations for corporations, some on the basis of ensuring a level playing field by removing the artificial competitive advantage of rogue corporations, while others were attracted by the prospect of being able to have confidence in the standards observed by their suppliers and business partners, thereby reducing their own exposure to risk.

In the light of these facts, the Norms will likely bring far more benefits for Australian corporations than negative effects.

How would the Norms be implemented?

As noted above, TNCs would be required to publicise and implement the Norms in their internal operations and in their external business dealings. Compliance with the Norms would be monitored by national governments, international organisations and/or NGOs (para 16). These monitoring mechanisms would include a complaints procedure and must be transparent and independent. National courts would assume responsibility for the adjudication of disputes and for the determination of reparations in the absence of agreement (para 18).

While the precise mechanisms of the monitoring system are yet to be determined, they might include an obligation for periodic reporting to a relevant authority, similar to financial and environmental reporting requirements already in place in Australia, possibly supported by inspections, such as those already occurring in Australia for workplace health and safety. The associated complaints procedure might resemble existing mediation or Ombudsman models.

What stage are the Norms at?

Having been adopted by the Sub-Commission for the Promotion and Protection of Human Rights in August 2003, the Norms are now likely to be presented to the United Nations Commission on Human Rights at its 2004 session. As the Commission is made up of government representatives, in contrast to the independent experts who constitute the Sub-Commission, further engagement and consultation with governments, corporations and other stakeholders is important in order to have an informed debate on the Norms at the Commission.

What would the Australian government need to do?

As the Norms are largely designed to give effect to existing international human rights law in the commercial sphere, they would advance Australia's interests in the protection of human rights and respect for the international rule of law. To the extent that the Norms would promote a level playing field between corporations, Australian corporations that already comply with the content of the Norms would benefit from the removal of the artificial competitive advantage of other corporations built on exploitation and a poor human rights record.

Initially, Australia should lend its support to the concept of the Norms. Australia should promote the Norms at the international level through its membership of relevant UN bodies, particularly the Commission on Human Rights, and its diplomatic relations with other countries. It should also promote them at the domestic level through public education, particularly of Australian corporations that operate overseas. Such corporate education regarding human rights should occur regardless of the Norms, given Australia's pre-existing obligation to protect human rights to the extent of its jurisdiction.

When the adoption process for the Norms is further advanced, Australia will need to take action to give effect to the Norms with respect to foreign-based TNCs operating in Australia and Australian-based TNCs operating overseas, as well as other business enterprises covered by the Norms with a connection to Australia. This action will primarily take the form of the establishment of monitoring and complaints mechanisms described above. It would also be desirable to legislate to incorporate the obligations set out in the Norms into Australian law, including jurisdiction for the Federal Court or Federal Magistrates' Service to settle disputes finally and determine reparations.

What are the arguments against the Norms?

The International Organisation of Employers and the International Chamber of Commerce oppose the adoption of the Norms, citing the following reasons* :

- They duplicate existing international instruments and divert attention and resources from national implementation of such instruments;
- They include assertions of company obligations in doubtful contexts;
- They are counterproductive to the UN's ongoing efforts to encourage companies to support and observe human rights norms by participating in the Global Compact; and
- They risk inviting a negative reaction from business, at a time when companies are increasingly engaging in voluntary initiatives to promote responsible business conduct.

Duplication

This paper has noted that the Norms are essentially a restatement of existing obligations. To that extent, TNCs have nothing to fear. The need for the Norms to render those obligations readily accessible and enforceable was noted above. The diversion of attention and resources from other corporate responsibility initiatives is of no consequence to the extent that the Norms would, once in place, constitute an evolutionary progression from foregoing initiatives, such as the OECD Guidelines and the UN Global Compact, although those and other mechanisms can be complementary to the Norms and play a useful role in their implementation (such as the dispute settlement mechanism under the OECD Guidelines). The Norms also constitute a far clearer statement of TNC human rights obligations than its predecessors.

Doubtful context of obligations

As noted above, the application of the responsibilities set out in the Norms to a corporation's sphere of activity and influence, or the course of its everyday operations, makes this criticism difficult to sustain.

Inconsistent with the Global Compact

The Global Compact sets out nine principles of good corporate citizenship to be adopted by corporations on a voluntary basis and implemented in the course of the corporation's business. The first two of those principles are that businesses should "support and respect the protection of internationally proclaimed human rights within their sphere of influence" and "make sure that they are not complicit in human rights abuses". The remarkable similarity to the substance of the Norms is clear. The Global Compact therefore plays an important introductory role to the expectations of the Norms and international human rights law in general, providing a mechanism for corporations to adjust to the concepts that are elaborated in the Norms (bearing in mind that the Norms are still some years from becoming a legally binding instrument, if indeed that status is ever achieved). The succinct principles of the Global Compact also make it a useful management tool that will be complementary to the more specific Norms.

Negative business reaction

A criticism such as this from the IOE and the ICC tends towards a self-fulfilling prophecy. The Castan Centre's research has revealed that an informed business community is likely to be far more supportive of enforceable human rights obligations for corporations than might have been assumed, partly because of the benefits that such certainty brings for business.

* These arguments are taken directly from the joint statement of the IOE and IOC dated 22 July 2003 entitled, *Joint views of the IOE and IOC on the draft norms on the responsibilities of transnational corporations and other business entities with regard to human rights*.

Who supports the Norms?

The Norms enjoy broad international support, including from non-governmental organisations such as Amnesty International, Oxfam and Human Rights Watch and from eminent legal groups such as the International Commission of Jurists and the Lawyers' Committee for Human Rights, not to mention the Sub-Commission on the Promotion and Protection of Human Rights, itself constituted of extremely eminent experts in the field of international law and human rights. The Castan Centre for Human Rights Law, as an academic institution, is pleased to add its support to that list.

Castan Centre contacts

The Castan Centre for Human Rights Law welcomes input and discussion from industry, government, NGOs and other interested parties on the subject of multinational corporations and human rights and other related topics.

The Castan Centre website is located at:
<http://www.law.monash.edu.au/castancentre>
Castan Centre telephone: (03) 9905-3327

Contact details:

Dr Sarah Joseph
Associate Director of the Castan Centre for Human Rights Law
Email: sarah.joseph@law.monash.edu.au

Professor David Kinley
Director of the Castan Centre for Human Rights Law
Email: david.kinley@law.monash.edu.au