

Business and International Human Rights

■ by *Denise Lima**

Undoubtedly, there is a move from the traditional concept of human rights law based on the Universal Declaration of Human Rights (UDHR) to a new emergent paradigm. We are looking now at a “market-friendly paradigm of human rights.”¹

The focus on corporations has been provoked by examples of apparent human rights abuses: e.g. sweatshop labor in the footwear and apparel industries; environmental, health and cultural degradation driven by extractive companies; and personal integrity and freedoms abuses by security forces to protect the interests of corporations.²

As an example, human rights organizations have expressed increasing alarm about the situation in Burma. The International Trade Union Confederation has listed eleven multinational companies as being accused of providing support and legitimacy to the intolerable military regime. In this case, the state not only fails to protect human rights, but is itself the perpetrator of human rights violations, and therefore, companies may find that they are complicit if they work in concert with the state.

This article examines the current international human rights law applicable to multinational and transnational corporations. More specifically, the article focuses on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the “Norms”).³

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1 Baxi, U., 2005. Market Fundamentalisms: Business Ethics at the Altar of Human Rights. *Human Rights Law Review*, 5 (1), p.1.

2 Kinley, D. and Chambers, R., 2006. The UN Human Rights Norms for Corporations: The Private Implications of Public International Law. *Human Rights Law Review*, p. 449T.

3 Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2003, E/CN.4/Sub.2/2003/12/Rev.2 (2003), cited as the “Norms”.

What is clear is that at the present time the Norms do not have an immediate international impact. They are simply the first step towards regulation. Therefore, the article argues that there is a need to go further in that matter. Indeed, it is recommended that the UN General Assembly adopt the Norms, with support from governments.

I Emergence of Human Rights in Business Ethics

A. From the Traditional Conception

The UN has a considerable role in the development of human rights law. One of its major successes was undoubtedly the Universal Declaration of Human Rights (UDHR) adopted and proclaimed on 10 December 1948 by the General Assembly as “a common standard of achievement for all peoples and nations.” The UDHR had obviously an important impact on the international human rights movement. Indeed, it was the first time that basic civil, political, economic, social and cultural rights were spelled out at the international level. These rights have over time been accepted as fundamentals. The UDHR is a part of the International Bill of Human Rights. Likewise, while the international human rights movement has been strengthened with treaties and other instruments, the rule of human rights law is also on its way to establishment at the regional and national levels.

The bottom line is that governments have traditionally been the duty-bearers of international human rights obligations. As parties to international human rights treaties, states are bound to respect, to protect and to fulfill expectations regarding human rights.

Amongst those areas in the UN system of protections of human rights which need to be improved, there is a concern about corporate governance and business conduct. This is because the influence of corporations has grown as a result of globalization. The UN is now considering the scope of the roles and responsibilities of corporate actors with regard to human rights. There is however an increasing debate about the unclear practical link between business and human rights. One can admit that the traditional concept of human rights has moved towards a business concept of human rights. As Baxi (2005) has highlighted in the Future of Human Rights:

[there is] a contrast between the paradigm of the Universal Declaration of Human Rights (UDHR) and the emergent paradigm of the trade-related, market-friendly paradigm of human rights by which it was confronted.⁴

B. Emergence of an International Legal Framework

The UN is considering which human rights can and should apply to corporations and in what way. The Office of the UN High Commissioner of Human Rights (OHCHR) is a UN agency that has been requested by the UN Secretary-General to serve as “guardian” of the ten principles of

⁴ See Baxi, *supra* note 1.

human rights and to promote these principles in the business sector. Its work has focused on four areas as described below.

First, the High Commissioner has advocated the development of minimum human rights standards to be applicable to the corporate sector and the implementation of voluntary initiatives towards corporate social responsibility.

Second, the OHCHR is actively involved in the UN Global Compact, which is a voluntary initiative regarding strategic policy for businesses. The objective is to commit businesses to align their operations and strategies with the ten universally-accepted principles relating to human rights, labor, environment and anti-corruption. Indeed, by considering businesses to be a primary agent of globalization, their collaboration can benefit all economies and societies. At present, over 4700 corporate participants and stakeholders – many of them large transnational companies from over 130 countries – have signed onto the UN Global Compact. Obviously, this reflects the growing understanding that there is a need for businesses, together with governments, civil society, labor and the United Nations, to collaborate on common goals. Today, the UN Global Compact stands as the largest corporate citizenship and sustainability initiative in the world.

Third, the UN Commission on Human Rights created in 2005 with resolution 2005/69, the office of the Special Representative of the Secretary-General on the Issue of Transnational Corporations and Other Business Enterprises,⁵ and this mandate has been extended by the Human Rights Council. The work of the Special Representative consists of convening a consultation annually with business executives to discuss human rights challenges. The first consultation was convened in 2005 to consider existing initiatives and standards relevant to the extractive sector.⁶ In 2007, another consultation took place with representatives from the financial sector.⁷

Finally, the OHCHR assists the working group on the working methods of transnational corporations of the Sub-commission on the promotion and protection of human rights. The working group was responsible for drafting the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and accompanying Commentary.

II. The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights

A. Particularities of the Norms

The Norms have been compiled and drafted as a statement of the human rights obligations of transnational corporations. It consist of twenty-three

⁵ The appointment of Professor John Ruggie of the Kennedy School of Government at Harvard University was made on 27 July 2005.

⁶ Commission on Human Rights, Report of the UN High Commissioner on Human Rights on the sector consultation entitled "Human Rights and the Extractive Sector", 10-11 November 2005, E/CN.4/2006/92.

⁷ Human Rights Council, Report of the UN High Commissioner on Human Rights on the Sector Consultation Entitled "Human rights and the Financial Sector", 16 February 2007, A/HRC/4/99.

“paragraphs,” rather than “articles,” as stated in the Commentary on the Norms, and provide the scope of general and specific obligations. It covers equality of opportunity and non-discriminatory treatment; the right to the security of persons; labor rights; respect for national sovereignty and human rights; consumer protection; economic, social and cultural rights; and environmental protection.

The Norms follow a basic international law format, but what makes the Norms and their Commentary so particular is that corporations are the duty-bearers. This is because even if there is generally no evident correlation between corporations’ behavior and human rights abuses, it is quite right to suggest that corporations may be able to assist in generating respect for international human rights.

Importantly, the Norms have adopted a catch-all approach. Indeed, transnational corporations are the central duty-bearer, but the Norms also cover all businesses that have relations with transnational corporations

The Norms also make clear that States retain the primary responsibility to respect, protect and attain human rights. It also assumes that all responsibilities relating to human rights that are applicable to states extend also to corporations.⁸

The first paragraph of the Norms details the general obligations of transnational corporations and other business obligations to respect, protect and fulfill expectations regarding human rights “within their respective spheres of activity and influence.” The notion of “sphere of activity and influence” is used to distinguish between different spheres of responsibilities, but is not typical of the wording in other human rights instruments.⁹

According to the Commentary, the Norms describe five types of obligations. First, it includes the obligation to use “due diligence” so that “their activities do not contribute directly or indirectly to human abuses.” Second, corporations “may not directly or indirectly benefit from abuses of which they were aware or ought to have been aware.” Third, corporations shall “avoid complicity in human rights abuses.” Fourth, they shall “refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights.” Fifth, corporations “shall use their influence in order to help promote and ensure respect for human rights.”¹⁰

Clearly, the Norms have adopted a “belt and brace” approach to introduce the notion of complicity in human rights abuses. Indeed, a corporation could now be liable for the actions of third parties.¹¹

8 Baxi, *supra* note 1, at 18.

9 Kinley and Chambers, *supra* note 2, at 452.

10 Baxi *supra* note 1, at 11.

11 Kinley and Chambers, *supra* note 2, at 455.

B. Criticisms and Issues

When the final version of the Norms was adopted by the Sub-Commission in 2003 and submitted to the Commission, it had become a controversial subject that faced opposition from business alliances, including the International Chamber of Commerce and the International Organization of Employers, and from national governments including those of the United States, the United Kingdom and Australia. On the other hand, some non-governmental organizations, academics and human rights advocates supported the adoption of the Norms.¹²

One of the arguments against the Norms was their procedural legitimacy; however, since the Commission has twice considered the Norms, it is not appropriate to discuss the manner of their making at such a late stage.¹³

According to the “one size fits all” argument, it has been argued that the Norms are not a precise instrument that companies can use as a guide. According to that view, the Norms cannot create a universally applicable standard for human rights due to differences between industries. However, it has been generally argued that the Norms present a holistic approach by covering human rights relevant to all business sectors.¹⁴

Some have argued that the vagueness of the Norms leaves corporations vulnerable to arbitrary criticism. However, it should be kept in mind that the Norms are a basic instrument of international human rights law and simply provide a general framework. Indeed, it is states’ duty to articulate the specifics when creating domestic legislation. Therefore, it is unnecessary to draw attention to this criticism.¹⁵

One valid concern would be related to new concepts as to the separate responsibilities of the state and the corporations, or the notion of complicity. However, the reasoning justifying this approach is that the Norms cover situations where a state fails in its human rights duties or even where the state is itself the perpetrator of human rights violations.¹⁶

The argument of “privatizing human rights” is often used by those who have attacked the Norms. According to this view, the Norms represent a shift of human rights responsibilities onto the private sector. This argument is not relevant since the Norms proclaim that the states still have the primary responsibility for the protection and promotion of human rights.¹⁷

Importantly, it has been argued that the Norms should not extend the definition of human rights by including social, economic and cultural rights since they are not traditional human rights. One must admit that these matters are considerably important to states and corporations, and that business activities are most likely to have a direct impact in these areas

¹² *Id.*, at 457-458.

¹³ *Id.*, at 462.

¹⁴ *Id.*, at 466.

¹⁵ *Id.*, at 467.

¹⁶ *Id.*, at 468.

¹⁷ *Id.*, at 480.

rather than on civil and political rights. As a safeguard against arbitrary criticism, the burden of proof is shared between those who make the claims and the corporations who have been accused of violating human rights. It is relevant to highlight that these rights have been implemented in most countries' domestic laws, at least in Western countries. The only complexity lies in identifying both the holders of these rights and those who have the duty to protect the collective rights to development and to a healthy environment which are included in cultural rights. Nevertheless, these rights are an integral part of international law and are undeniably related to corporate activities. It is quite wrong to suggest that business is negatively involved in economic development and environment, but it is necessary to balance the protection of individual rights and the positive impact that business activities can have on communities at large. What is really proposed by the Norms is that corporations must be engaged in the attainment of the end goal for the international community – “sustainable development.”¹⁸

III. The Next Step?

A. Legal Effect of the Norms

In recent years, the voluntary initiatives to make corporations legally accountable for their human rights abuses have not been effective enough. Therefore, the Norms seek to establish a legal framework in this area or, at least, they are the first step towards a legal framework.¹⁹

The most important legal impact is obviously that the Norms place corporations at the center. This requires the international legal community to recognize commercial, for-profit entities as actors in international law. There is no room to argue against such recognition, but it is true that lacking a central body, the difficulty is that only states can establish whether or not an entity has international legal personality. However, the behavior of states seems to demonstrate an emerging recognition of some form of legal personality for transnational companies in public international law.²⁰

Regrettably, the Norms have no binding legal effect, since they were compiled by the Sub-Commission which does not have the ability to enact new international law. Indeed, the Norms have a “declaratory effect.” They may however reinforce rights contained in international law. The bottom line is therefore that the Norms should be implemented and enforced within domestic human rights law. In any event, they might have an impact on domestic law.²¹

B. Need a Development into Positive Law

International law can only be created through a treaty or customary international law. At the moment no treaty incorporates the Norms nor is there such emerging development in customary international law. As

¹⁸ *Id.*, at 473.

¹⁹ *Id.*, at 490.

²⁰ *Id.*, at 479.

²¹ *Id.*, at 482.

a result, the Norms cannot now be considered to constitute a part of international law.

The Norms might become a general practice accepted as law by states. This means that states could engage in the implementation of the Norms through any mechanism of enforcement. The complexity lays in the diversity of practice, but the Norms might acquire legal authority as customary international law if followed in business practice or used as an instrument of interpreting existing treaty law.

Finally, to conclude, it is recommended that the Norms be adopted by the UN and, therefore be developed into positive law. Indeed, they could have an immediate international legal effect if they were to be adopted by the UN General Assembly with an effective implementation procedure.

It is evident that business alliances do not want an international standard establishing corporate accountability for human rights abuses and therefore they are advancing many criticisms of the Norms. Nevertheless, such regulation is very much in the interest of corporations, states and communities at large. Indeed, it will help interconnect nations and business entities through a common interest.

Considering this fact, it cannot be concluded that the Norms are not the appropriate instrument through which to develop an international framework for corporate accountability for human rights abuses; they are not the final word but are a giant first step.

At present, as stated by Kinley and Chambers:

Ultimately and ideally, therefore, we are looking for a mature instrument of public international law to emerge, after appropriate modification and amendment, from the presently neophyte Norms.²²

To sum up this article, it seems that the Norms do not create corporate accountability for human rights abuses, but at the very least, they have provoked interest and marked out the boundaries for future debate.

²² *Id.*, at 495.