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Using “Norms” to Change International Law: UN Human Rights Laws Sneaking in through the Back Door?

Troy Rule *

For decades, multinational businesses have self-regulated their operations with respect to human rights, largely unfettered by international law.¹ In recent years, however, human rights groups have advocated that the United Nations (“UN”) create clear legal obligations for multinationals respecting their human rights-related conduct.² At least partly due to the substantial burden such obligations could place on international businesses, these efforts by human rights proponents have proven largely fruitless—until now.

On August 13, 2003, the UN Sub-commission on the Promotion and Protection of Human Rights adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (“Norms”).³ In March and April of this year, the fifty-three-

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¹ For instance, corporations have voluntarily joined the UN’s own “Global Compact.” See <www.unglobalcompact.org/portal> (visited Mar 28, 2004), for details on the Global Compact.

² Non-governmental organizations, on numerous occasions prior to last August, advocated a binding code of conduct for transnational corporations before the UN Sub-commission on the Promotion and Protection of Human Rights. For instance, these groups sought a code of conduct in August 2000 and again in April 2001, but the Sub-commission took no substantial action on either of those occasions. See UN Sub-commission on the Promotion and Protection of Human Rights, Press Release, 52d Sess (Aug 9, 2000), available online at <<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/A336F8C24BCA415CC1256937002D59E8?opendocument>> (visited Mar 28, 2004) and UN Commission on Human Rights, Press Release, *NGOs Addressing Commission on Human Rights Decri Effects of Globalization, Transnational Corporations*, 57th Sess (Apr 4, 2001), available online at <<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/996B46462C3504BCC1256A25002663F1?opendocument>> (visited Mar 28, 2004).

³ *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th Sess, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (Aug 26, 2003), available online at <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument)> (visited Mar 28, 2004). See also UN Sub-commission on the Promotion and Protection of Human

member UN Human Rights Commission will vote regarding whether to adopt the Norms into international law.⁴

At first glance, the Norms seem benign. The document is not directly binding against corporations and has been described by some of its drafters as a mere restatement of existing international human rights laws.⁵ A deeper look at the Norms, and the context in which they were drafted, however, reveals that they may be the first major stepping stone toward the adoption of an international, enforceable set of legal obligations binding on transnational corporations (“TNCs”).

This Development explores possible long-term effects of the Norms on international businesses by briefly (1) describing historical events leading up to the Norms, (2) summarizing the Norms’ controversial content and commentaries, (3) noting what organizations both for and against the Norms are saying about the document, and (4) analyzing the Norms from legal, economic, and political perspectives.

I. EVENTS LEADING UP TO THE NORMS

The Norms are not the first important UN document devoted to addressing international human rights issues. The UN General Assembly adopted the Universal Declaration of Human Rights in 1948 and has not looked back.⁶ For instance, the UN Commission on Human Rights has authority to investigate potential violations of international human rights laws by states, thus effectively aiding in the enforcement of those laws.⁷ About a decade ago, the UN also added a post for a High Commissioner for Human Rights. The High

Rights, Press Release, *Sub-commission Adopts Norms on Responsibilities of Transnational Corporations with Regard to Human Rights: Strongly Condemns All Acts, Methods and Practices of Terrorism; Recommends Establishing Year, Followed by Decade for World’s Minorities*, 55th Sess (Aug 13, 2003), available online at <<http://www.unog.ch/news2/documents/newsen/sc0322e.htm>> (visited Mar 28, 2004).

- ⁴ This Development was submitted prior to the UN Human Rights Commission’s vote, expected sometime in April 2004.
- ⁵ See David Weissbrodt’s position in the debate between David Weissbrodt and Thomas Niles, *UN’s Norms on Responsibilities of Transnational Corporations*, BBC World Service “Newshour” (Aug 13, 2003), available online at <<http://www.uscib.org/%5Cindex.asp?documentID=2729>> (visited Mar 28, 2004).
- ⁶ For a more exhaustive history of the foundation of international human rights law within the United Nations, see UN Department of Public Information, *Basic Facts about the United Nations* ch 4 (United Nations 2000).
- ⁷ See UN Department of Public Information, *The United Nations and Human Rights*, UN Doc DPI/1774/HR (Feb 1996), available online at <<http://www.un.org/rights/dpi1774e.htm>> (visited Mar 28, 2004).

Commissioner is responsible for much of the coordination and implementation of UN human rights programs.⁸

International discussion on human rights has proliferated in recent decades through the activities of other organizations as well. Amnesty International, founded in Great Britain by Peter Benenson in 1961, has emerged as an influential non-governmental advocate for human rights around the world.⁹ In the US, legal scholars have recently taken interest in the potential for private international human rights claims against TNCs under the Alien Tort Claims Act, a US law which was enacted in 1789 but largely ignored by courts until 2002, when the Ninth Circuit refused to dismiss a case filed under the Act.¹⁰

Despite these and other recent developments, however, TNCs have enjoyed a significant amount of latitude to govern and regulate their own human rights-related activities. Voluntarism and self-regulation have been the methods explicitly endorsed and employed by the UN for addressing human rights issues as they relate to business. The UN's self-regulation approach is perhaps embodied most in the Global Compact, which was established in 2000 upon a recommendation from UN Secretary-General Kofi Annan.¹¹ Even though the UN describes the Global Compact as a "direct initiative" of the Secretary-General, the nine principles which constitute the Compact are enforced purely through "public accountability, transparency and the enlightened self-interest of companies" who volunteer to participate in it.¹² The UN, in fact, proudly emphasizes that the Global Compact is "not a regulatory instrument—it does not 'police,' enforce or measure the behavior or actions of companies."¹³

Many non-governmental human rights organizations have been consistently dissatisfied with the progress made through the Global Compact and other self-regulation approaches taken by the UN. Even shortly after the UN launched the Global Compact, some human rights organizations continued to advocate that the UN enact an enforceable code to govern corporate human

⁸ Id.

⁹ See Amnesty International, *EI's First 40 Years*, available online at <<http://web.amnesty.org/pages/aboutai-timeline-eng>> (visited Mar 28, 2004).

¹⁰ See *Doe I v Unocal Corp*, 2002 US App Lexis 19263 (9th Cir 2002), referred to in Elliot Schrage, *Emerging Threat: Human Rights Claims*, Harv Bus Rev (Aug 2003), available online at <<http://www.nftc.org/default/usa%20engage/Schrage%20HBR.pdf>> (visited Mar 30, 2004). In February of 2003, the 9th Circuit ordered that the case be reheard by en banc court and that the original case not be cited as precedent in the interim. See *Doe v Unocal Corp*, 2003 US App Lexis 2716 (9th Cir 2003). For more discussion of the original court opinion, see also Alan Boyd, *Multinationals and Accountability*, Asia Times Online (Aug 19, 2003), available online at <http://www.atimes.com/atimes/Global_Economy/EH19Dj01.html> (visited Mar 28, 2004).

¹¹ See The Global Compact, *About the Global Compact*, available online at <<http://www.globalcompact.org.pk/aboutgc.htm>> (visited March 28, 2004).

¹² Id.

¹³ Id.

rights conduct.¹⁴ A few of these human rights groups have argued that, due to the lack of monitoring of Global Compact members, some member corporations abuse the program by using their Compact membership to deflect criticism about their operations and thereby continue to violate human rights.¹⁵ These critics claim that only the establishment of enforceable legal obligations binding on TNCs and other businesses will ensure adequate international human rights protection. The Norms seem to be, at least in part, the UN Sub-commission's response to these cries for further action.

II. THE CONTENT AND SCOPE OF THE NORMS

The UN Sub-commission on the Promotion and Protection of Human Rights adopted the Norms on August 13, 2003.¹⁶ In terms of enforceability, the Norms represent the middle ground between voluntary programs like the Global Compact and the fully binding code of conduct envisioned by Amnesty and other human rights groups. Proponents of the Norms, who hope to persuade the Human Rights Commission to adopt the document in March 2004, assert that the Norms are not new law at all but are merely a summary of international human rights laws already in existence.¹⁷ On the other hand, international business organizations portray the Norms as "obligatory" and view them as the beginning of the end for the incumbent system of voluntarism and self-regulation.¹⁸

The Norms themselves are unclear regarding their potential legal impact on international business. At the conclusion of the document's preamble, the Sub-

¹⁴ See id. The Global Compact officially began on July 26, 2000. Non-governmental organizations first began aggressively advocating a code of conduct to regulate and monitor transnational corporations according to human rights norms and principles in a debate before the Sub-commission on the Promotion and Protection of Human Rights on August 9, 2000, see UN Sub-commission on the Promotion and Protection of Human Rights, Press Release, 52d Sess (cited in note 2). Further demands for such a code of conduct were reiterated before the Sub-commission in April 2001, see UN Commission on Human Rights, Press Release, *NGOs Addressing Commission on Human Rights Decry Effects of Globalization, Transnational Corporations* (cited in note 2).

¹⁵ For example, Bayer AG, a founding member of the Global Compact, has been accused of using its purportedly upstanding Compact membership to guard its public image while the company continued committing environmental and human rights atrocities. See Philipp Mimkes, *Bayer and the UN Global Compact: How and Why a Major Pharmaceutical and Chemical Company "Bluwashes" Its Image* (July 19, 2002), available online at <<http://www.corpwatch.org/campaigns/PCD.jsp?articleid=3129>> (visited Mar 28, 2004).

¹⁶ See UN Sub-commission on the Promotion and Protection of Human Rights, Press Release, *Sub-commission Adopts Norms* (cited in note 3).

¹⁷ See *UN's Norms on Responsibilities of Transnational Corporations*, BBC World Service "Newshour" (cited in note 5). David Weissbrodt was one of the primary drafters of the Norms; Thomas Niles heads the US Council for International Business.

¹⁸ See id (statement of Thomas Niles).

commission "urges that every effort be made so that [these norms] become generally known and respected."¹⁹ The Sub-commission then delineates several rights and ideals that they hope international businesses will respect. Among these rights and ideals are the right to equal opportunity, the right to security of persons, the rights of workers, consumer protection, and environmental protection.²⁰

The document's emphasis on urging voluntary acceptance of its listed "norms" changes sharply in Part H of the document, which describes "General Provisions of Implementation." Part H.16 states that "[t]ransnational corporations and other business enterprises shall be subject to periodic monitoring and verification by [the] United Nations, [and] other international and national mechanisms already in existence or yet to be created, regarding application of the Norms."²¹ The commentary on the Norms further elaborates on the broad reach and authority afforded by part H, noting potential use of the document as a compliance benchmark for investment initiatives and discussing the processing of claims for violations under it.²² The mention of such issues raises a suspicion that the drafters envision the Norms as more than merely a declaration of the Sub-commission's decision to embrace the promotion of human rights ideals among businesses.

The fifty-three-member UN Commission on Human Rights will have its first opportunity to vote on whether to adopt the Norms in March and April of 2004.²³ Organizations both for and against adoption of the Norms are preparing for what may be a heated debate leading up to the Commission's first chance to vote on their adoption. Groups on both sides have said that they view the Norms as a major step toward establishing legally binding human rights obligations applicable to TNCs. Many human rights advocates see the Norms as a valuable tool for broadening the human rights obligations of TNCs, anticipating that the Norms "will help those interested in expanding the scope of

¹⁹ UN Sub-commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations with Regard to Human Rights* (cited in note 3).

²⁰ Id.

²¹ Id at H.16.

²² UN Sub-commission on the Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Commentary on the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2, commentary to H.16 at 18 (Aug 26, 2003), available online at <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/293378ff2003ceb0c1256d7900310d90/\\$FILE/G0316018.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/293378ff2003ceb0c1256d7900310d90/$FILE/G0316018.pdf)> (visited Mar 30, 2004).

²³ See *UN Panel Advances Human Rights Norms for Companies*, 24 USCIB E-Newsletter No 7 (Sept 2003), available online at <http://www.envoynews.com/uscib/e_article000181242.cfm> (visited Mar 28, 2004).

legal obligations in this area.”²⁴ International business organizations, seemingly in an effort to incite greater opposition to the Norms, portray the document as a “radical innovation” in human rights policy that would impose obligations on private businesses which are “much more extensive than those placed on states by the various UN human rights treaties.”²⁵

III. THE POTENTIAL IMPACT OF THE NORMS

The Norms, if adopted by the UN Human Rights Commission, would have a short-term impact on TNCs and other businesses in at least two ways. First, by providing a convenient, accessible summary of international human rights laws within a single document, the Norms would arguably make it easier for states to bring international human rights claims against businesses. Of course, it is unclear whether this extra convenience would actually result in substantially more claims against TNCs. The enforcement of international human rights laws against corporations will probably remain logistically difficult even with adoption of the Norms, especially for less severe offenses. The current enforcement system, which relies on claims proactively brought by individual nations against non-complying TNCs, has been fraught with jurisdictional loopholes and political conflict, and improved awareness or access to laws already in place would likely not do much to ameliorate these problems.²⁶

Even so, the Norms would create several monitoring, evaluation, and reporting obligations for businesses and would subject businesses to monitoring by a UN-appointed enforcement group. The Norms are a dramatic and influential digression from the self-regulation approach of recent decades. The vagueness in Part H of the Norms and its accompanying commentary leaves many questions unanswered regarding UN enforcement of the Norms. This vagueness appears to be one of business groups’ greatest concerns relating to the document. One spokesman for international business expressed this wariness in a BBC radio broadcast last August, warning that the various provisions in the

²⁴ Melinda Ching, *Amnesty International Oral Statement*, AI Index No POL 30/012/2003, Hearings before the UN Sub-commission on the Promotion and Protection of Human Rights (Aug 8, 2003), available online at <<http://web.amnesty.org/library/index/ENGPOL300122003>> (visited Mar 30, 2004).

²⁵ Timothy E. Deal, *The Human Rights Responsibilities of International Business*, Address at the Frank Hawkins Kenan Institute of Private Enterprise Seminar, *Are Human Rights the Business of Business?* (Dec 10, 2003), available online at <<http://www.uscib.org/index.asp?DocumentID=2794>> (visited Mar 28, 2004).

²⁶ For example, the families of thousands who suffered injury when a Union Carbide pesticide plant in Bhopal, India exploded have gone more than nineteen years without obtaining a full recovery, at least partly because Union Carbide quickly left the country after the disaster and no longer has valuable assets in India. See *Bano v Union Carbide*, 2004 US App LEXIS 5003 (2d Cir Mar 17, 2004).

document "are not voluntary, they are obligatory in some way, and it's not at all clear . . . who would enforce them, and how they would be enforced."²⁷

In the long run, the additional reporting, self-monitoring, and compliance costs that businesses would incur under part H of the Norms could slow the pace of industrial development in underdeveloped countries. Still, many underdeveloped nations with membership in the UN Human Rights Commission are among the strongest supporters of the Norms.²⁸ This suggests that these countries actually anticipate a positive net effect from the document's provisions. Developing countries that support the Norms likely believe that the document would have a beneficial impact for their citizens roughly analogous to that of minimum wage laws and employee protection statutes in the US: the Norms would increase pressure on TNCs to provide greater compensation, better working conditions, and more extensive human rights protections for workers in developing countries than would result in market equilibrium. However, the imposition of such a "market floor" on international labor markets through the Norms could reduce the incentive for TNCs to expand their operations in some third-world countries, potentially leaving such countries worse off than before.²⁹

Additional insight into possible long-term effects from the Norms can be found through examining the context surrounding the document's emergence. Historically, one major impediment to the establishment of worldwide human rights obligations binding on businesses has been that international laws are conventionally aimed at non-state actors (such as TNCs) only in narrowly prescribed areas such as piracy and slavery. Some have argued, however, that this state-focused limitation in international law "has been breaking down for years."³⁰ From this perspective, adoption of the Norms would contribute to the erosion of the conventional state-focused approach by expanding the class of parties reachable through international law.

Perhaps the most interesting potential impact of the Norms, however, is implicated in the title of the Sub-commission document itself. What did the document's drafters hope to gain by referring to a compilation of existing

²⁷ See *UN's Norms on Responsibilities of Transnational Corporations*, BBC World Service "Newshour" (cited in note 5).

²⁸ See Boyd, *Multinationals and Accountability*, Online Asia Times (cited in note 10).

²⁹ Opponents to the Norms have emphasized this possibility. See Deal, *The Human Rights Responsibilities of International Business* (cited in note 25) (arguing that the Norms would "create a deterrent to foreign investment" and thus "virtually eliminate the very investment that is the best hope for economic development and improved human rights" in underdeveloped countries).

³⁰ *Human Rights Norms Good for Business*, Oxford Analytica Daily Brief (Aug 27, 2003), available online at <<http://www.oxanstore.com/displayfree.php?NewsItemID=93946>> (visited Mar 28, 2004).

human rights *laws* as a list of *norms*? Possibly, past failures to obtain UN-enforced human rights laws against businesses may have brought human rights groups to a realization that a different strategy would be required for them to reach this goal. One plausible alternative strategy, which is arguably visible in the Norms, involves attempting to stimulate or accelerate desired changes in societal norms in order to accelerate the pace of corresponding changes in the law.³¹

The past difficulties that human rights groups have encountered in trying to obtain binding UN-enforced human rights obligations are at least partially due to the fact that such laws were at odds with the goals of many international businesses. TNCs that participate in programs such as the Global Compact often place themselves at a comparative cost disadvantage vis-à-vis businesses that are less focused on such issues. From the perspective of many other TNCs, the additional cost of providing employee protections to overseas workers—workers who are more than willing to work without them—often outweighs any monetary or other benefit attainable through providing those protections. In addition, given the reluctance of many businesses to fully embrace human rights ideals in their operations, the UN's costs of effectively enforcing business-oriented human rights laws are potentially prohibitive.

In light of these circumstances, some legal scholars note that changes in international human rights laws relating to business would stand a far better chance of success if the human rights values—or social norms—of businesses were to somehow change first.³² A change in global attitudes or social norms regarding the duties of businesses with respect to human rights would certainly make policies that codify such norms more politically feasible. The cost of enforcing such international human rights protections would also decrease if businesses could be trusted more to legitimately monitor themselves. The Norms, from this perspective, might be viewed as a tool for accelerating global corporate acceptance of social norms respecting human rights in hopes that such norms would eventually become sufficiently widespread to provide a foundation for laws that businesses willingly accept and observe.

Whether adopted or not, the Norms will undoubtedly draw greater international attention to human rights issues as they relate to business. Of course, only time will tell regarding what ultimate effect the Norms will have on global values pertaining to business and human rights, or whether those effects

³¹ This strategy of using social norms to accelerate legal changes may be particularly relevant when viewed in the context of a growing literature on ways that laws affect social norms. As a starting point for examining this literature, see generally Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 *Ind L J* 1231 (2000).

³² See David Kinley, *Human Rights, Globalization and the Rule of Law: Friends, Foes, or Family?*, 7 *UCLA J Int'l L & Foreign Aff* 239, 259–60 (2002–03).

on global social norms will facilitate a change in international law. In the meantime, as the Human Rights Commission's first opportunity to formally discuss the Norms approaches, it appears that another potentially long, difficult battle for human rights activists and businesses in this area of international law has begun.

IV. CONCLUSION

The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights are an effort by human rights groups to gently move closer to establishing international human rights laws enforceable directly against multinational businesses. Both advocates of and opponents to the Norms agree that the norms are a major step toward the formation of such laws. Due to ambiguities in the document itself, it is unclear how the Norms would be implemented. In the short run, the adoption of the Norms would likely have only mild effects on international businesses, since enforcing them will be difficult both logistically and politically. Ultimately, adoption of the Norms could expand the class of persons directly subject to international law, reduce incentives for business investment in some underdeveloped countries, and accelerate changes in corporate "norms" regarding human rights issues through both increased public pressure and improved enforcement of existing human rights laws.

