



“The UN Norms: a necessary tool for Corporate Social Accountability or one shot too far?”

**Report on the side-event to the 61st Commission on Human Rights,
FES Geneva Office – German Forum Human Rights (FMR)**

12 April 2005

**Panel Discussion, Palais des Nations and Dinner Roundtable at the Hotel Epsom Manotel,
Geneva**

The background

The *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*¹ (hereafter referred to as the Norms) were drafted by a working group of the United Nations Sub-Commission on the Promotion and Protection of Human Rights between 1999 and 2003. They were subsequently approved by the Sub-Commission and transferred for further consideration to the Commission on Human Rights (CHR). The Norms apply existing international human rights standards applied to transnational corporations and other business enterprises. While the working group considered the Norms as legally binding standards distinct from other voluntary initiatives such as the *Global Compact*, the CHR still considers them as a draft proposal without legal standing.

To get more clarity regarding the existing instruments on corporate social accountability, the CHR has asked the Office of the High Commissioner for Human Rights (OHCHR) to elaborate a report on this matter. The Advance Edited Version of this report² was published on 15 February 2005 and can be seen as a platform for further discussion. The frontlines within the stakeholders – governments, civil society, business, trade unions, international organisations – are not clear at all: there is both vehement objection to the Norms as well as strong support.

The Panel Discussion

The panel discussion organized by the *Friedrich Ebert Stiftung Geneva Office* and the *German Forum Human Rights* gave representatives from NGOs, the business side and trade unions an opportunity to present their arguments, which resulted in a lively two-hour discussion around a hotly disputed topic.

Elisabeth Strohscheidt from the *German Forum Human Rights* had a clear answer to the discussion’s title *The UN Norms: a necessary tool for Corporate Social Accountability or one shot too far?*: “The Norms are a necessary tool, they do not go one shot too far, they are even overdue.” According to Strohscheidt, transnational corporations had a profound influence

¹ *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument)

² *Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*: <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.91.pdf>

which they could use for good or for bad. She argued that their rights had increased, for example concerning patent rights and bilateral trade agreements, and that these increased rights had to be matched now with increased duties.

In her opinion the “added value” of the Norms was that they are “comprehensive and universally applicable; they strengthen ILO labour standards and workers’ rights; they support sustainable development; they empower potential victims of human rights violations through a complaints mechanism and they can help in the prevention of conflicts.”

She also raised the question whether the ILO was the right place for the discussion of the Norms as NGOs were not represented in the ILO and other human rights aspects beyond workers’ rights – such as consumer protection and environment – are not addressed in this organization.

“The UN human rights system is inefficient,” she concluded, “and the Norms have made an attempt to implement what we already have concerning rules and standards.”

A clear rejection of the Norms was expressed by *Antje Gerstein* from the *Confederation of German Employers’ Associations (BDA)*. She had a clear answer to the discussion’s title as well and said: “The UN Norms are not one shot too far, but one shot in the wrong direction.”

Her main criticism of the Norms referred to the lack of acknowledgement of the states’ main responsibility for the protection and promotion of human rights: “There is no replacement for the responsibilities of states”, she said and added that human rights had to be protected through national laws.

Gerstein referred to pre-existing tools like the *OECD Guidelines*, the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* and the *Global Compact*, “which all contain rules regarding human rights”, although she admitted that those often abstract principles had to be filled with life by implementing them into national law. In her opinion the assumption, expressed in the OHCHR report, that larger companies have more responsibilities than smaller ones was dangerous as the size of a company should not be linked with the amount of its responsibility.

Gerstein underlined that there are examples of “good practise” such as two big German automobile companies in South Africa which engage in the fight against AIDS, or companies that fight against child labour in the sports industries.

While it quickly became clear that technical problems referring to the Norm’s provisions have to be further elaborated, other challenges appeared during the discussion: the conceptual background of the Norms was not yet evident. Those abstract issues were particularly addressed by *Dwight Justice* from the *International Confederation of Free Trade Unions (ICFTU)*. He hinted at the fact that there was no consensus and no clear definition of business’ complicity. The course of the boundaries between the governments’ responsibilities and business’ responsibilities concerning human rights were not clear. He asked “What do we want business to do? And how do we get them to do that? What is their expected behaviour?” He emphasized that the common ground of the whole discussion had to be defined in advance. Fundamental questions had to be answered including “How is the relationship between the states’ obligations and the obligations within the private sphere? And is this relationship clarified within the Norms? The answer is: No.” He added that *ICFTU* would not oppose a universal statement on business responsibilities, but that at the moment there were still too many questions to be answered.

Justice finally emphasized the importance of the ILO in this context and particularly its complaints and supervision mechanisms.

Tanya van Meelis from the *Congress of South African Trade Unions (COSATU)* gave several examples of companies' "bad practises"³, which had destructive effects especially on the most vulnerable groups like indigenous people and the poor. She asked why a company should engage in human rights promotion and answered this question by saying that the only reason why a transnational corporation would undertake such an effort would be to improve its image. She doubted whether the Norms were an appropriate instrument to protect worker's rights. In her view, the Norms could not bring together the fundamentally different interests of business, governments and labour unions. Antje Gerstein picked up this point and said that in the creation of jobs the joint interest between business and labour unions could be found. She emphasized that the moral responsibilities of a company lay exactly here - in creating employment and thereby creating wealth for society.

John Morrison from the *Business Leaders Initiative on Human Rights (BLIHR)* hinted at the changed international environment: in 1948 the Universal Declaration of Human Rights defined people's rights within states with very powerful governments. Nowadays there were other powerful non-state actors like transnational corporations and the governments had weakened. "Into this vacuum the Norms have come, they try to fill this space." State responsibility, however, should definitely not be undermined by the Norms.

Morrison explained that the *BLIHR* was particularly concerned about the applicability and effectiveness of the Norms and emphasized that such practical issues had to be discussed. "We should not make the mistake to create a framework which is too sophisticated and cannot be fulfilled."

He furthermore saw the necessity for further clarification concerning the "legal aspects, moral aspects and the practical application of the Norms." He then reflected the central question whether companies should be made directly responsible for their behaviour ("direct complicity") or whether the way via the government's legislation – the indirect responsibility – should be maintained ("silent complicity"). He note that in failed states, there are higher expectations of the business community.

Morrison criticised the emphasis on "musts" and "must nots" in the Norms. In his opinion what transnational corporations "could do" and "should do" was missing. He asked how aspects of "consumer protection" and "environmental protection", which are also addressed in the Norms, fitted into the relationship between "human rights and business".

Morison pointed at the difficulties small and medium sized enterprises face concerning the Norms as SMEs do not have the financial possibilities for cost-intensive initiatives. He did not want to exclude them from taking responsibility, but hinted at the need to find a different approach for SMEs.

Morrison finished his statement with an emphasis on practical issues, saying that the methods of application and monitoring were very important. "The Norms have to be developed in the next two years. What works, what does not work?"

Clear support for the Norms came from **Tricia Feeney** from the NGO *Rights and Accountability in Development (RAID)* who stated that the international community was challenged by how to stop the abusive power of companies exploiting natural resources such as oil and minerals. "I share the feeling that the existing instruments are not delivering sufficient protection." National governments were often not able or even not willing to withstand companies' power and influence. She said that *RAID* supported the Norms although in their further development it should be assured that they do not duplicate existing rules and standards.

³ The most known example is probably the tragedy in Bhopal, India from 1984. Other examples are the mining industry in the Philippines, hydroelectric plants in Brazil, transnational corporations in Myanmar, the DR Congo etc.

A positive aspect in her eyes was the fact that there were some genuinely concerned companies. Some progress had been achieved with those transnational corporations who are aware of their responsibilities. “Nevertheless,” she said, “there is the necessity of having common minimum standards worldwide.” If OECD countries had stricter obligations than developing countries, transnational enterprises would threaten OECD countries’ governments to simply move to other countries with less rigid standards. This point was picked up later in the discussion by an NGO representative who argued that in a competitive environment in which multinational corporations operate it should be ensured that all actors are following the same rules. The Norms would therefore be to business’ own advantage. Feeney agreed that it would be in the interest of companies to get rid of free-riders. John Morrison suggested that companies therefore thought of the Norms as an opportunity instead of a risk.

Unanimously all panellists noted particular concerns about clarifying the concepts of “complicity” and business’ “spheres of activity and influence”.

Another point of common criticism was the uncertainty concerning the complaints mechanism and the process of implementation of the Norms. How the monitoring and supervision of implementation should be guaranteed was even less evident. Those central and important issues have to be further developed.

There was furthermore a consensus that in failing or failed states the Norms and their idea of shared responsibility should by no means become a “welcomed opportunity” for weak governments to surrender their responsibilities and blame companies for their own neglect of human rights obligations.

The Dinner Roundtable

In the evening the *FES Geneva Office* had invited trade unionists (ICFTU, DGB [Germany], COSATU [South Africa], MTUC [Malaysia], HKCTU [Hong Kong], CUT [Brazil], CISL [Italy]) and NGO representatives (German Forum Menschenrechte, Amnesty International, Network UN Norms, International Commission of Jurists, Franciscans International, action aid, International Service for Human Rights) to a dinner roundtable. The aim of this event was to deepen some aspects of the discussion as well as to bring together trade unions and NGOs to bridge the gap between their different perspectives concerning this controversial topic.

One of the central questions was once again the relationship between government responsibility and business responsibility concerning human rights. Differing from the morning’s public panel, trade unionists and NGOs present were unanimous in their sentiment that corporations had their own obligations with regard to human rights. It was emphasized however that this responsibility did not affect states’ obligation to adopt necessary and effective legislation and other measures to restrain corporations.

Nonetheless, it was still unclear how the Norms can be implemented through binding mechanisms and enforced as well as the nature of monitoring and supervision techniques. The participants agreed that the complaints mechanism needs to be further developed in order to ensure that victims of human rights violations have open, easy and quick access to justice.

NGO participants suggested that the Norms were seen as standards and as standard-setters had the potential to gain fundamental meaning and power over time. The Norms could be used as a benchmark and means to create international jurisprudence to harmonize different legislations in different countries. The Norms formulate “a complementary role” for companies to support the governments. At the same time all existing jurisprudence will continue. The Norms will not replace any functioning international instrument, NGO representatives emphasized.

Speaking from the victim's perspective, it was clear to NGOs that the Norms "added certainly a plus". They argued that the Norms had already brought together NGOs, trade unionists, environmental organizations, development organizations and the business community. They had hereby achieved an important objective: to connect existing law on human rights with a dialogue on business' responsibilities.

An NGO representative said that even without enforcement mechanisms, it would "hurt" companies to be publicly blamed within the UN-system as multinational corporations were extremely concerned about their image and reputation. On the other hand there is the danger of companies abusing the Norms to create their own positive image with the help of their public relations departments without making substantial changes concerning their business behaviour.

Trade unionists had a different perspective on the Norms emphasizing worker's rights. One of their major arguments referred to the historical experience of trade unions that rights and standards for workers were the result of a long and hard-negotiated struggle. They are sceptical towards a report establishing Norms and are uneasy about how to deal with this. Consequently, trade unionists do not accept the UN Norms as a complementary basis offering opportunities to streamline transnational corporation's performances towards basic social and human rights. They are hesitant to consider any regulation beyond national laws and international covenants as relevant. Trade unionists highlighted the primacy of state's obligations under national and international law.

There is no common position yet. Some trade unionists present at the dinner had a more positive attitude towards the Norms and particularly the provisions concerning "Rights of workers". They recognized that there is the need for new mechanisms to put pressure on governments and companies.

It is important to trade unions to preserve established mechanisms like the ILO's system of jurisprudence. The ILO-standards are compulsory for those who signed, they emphasized. There is a clear supervisory and complaints mechanism. The *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* is an important instrument in this context. "We are pleased with the ILO's work and we are not willing to discuss something in the UN system without knowing what it is. We will not abandon a working machinery."

The discussion about the Norms is an open process at the elementary stage and much depends on the political will and interests of governments to promote and protect human rights and to develop the Norms. It had become obvious that there is a danger in the discussion to mix up legal, political, moral and practical aspects. NGO-representatives and trade unionists saw the need to formulate a common strategy. They all agreed that follow-up from this meeting between NGOs and trade unionists would be extremely useful.

For further information and developments after the side-event see:

<http://www.business-humanrights.org/Home>

<http://209.238.219.111/UN-Commission-resolution-business-human-rights-Apr-2005.doc>

*By Isabelle Maag,
rapporteur for the FES Geneva Office during the 61st session of the CHR 2005.*