

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

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A. Introduction: Setting the Stage

The United Nations Sub-Commission for the Promotion and Protection of Human Rights unanimously approved the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”¹ (the Norms) on 13 August 2003.² Together with the interpretative Commentary³, the Norms constitute an authoritative guide to corporate social responsibility. They are the first set of comprehensive international human rights norms specifically aimed at and applying to transnational corporations and other business entities (companies). They set out the responsibilities of companies with regard to human rights and labor rights, and provide guidelines for companies in conflict zones. They prohibit bribery and provide obligations with regard to consumer protection and the environment. General provisions of implementation include the obligation to provide reparation for a failure to comply with the Norms.

The Norms represent a further significant step by the international community to involve companies in international standard setting. One of their predecessors in-

¹ Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003, available at: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/64155e7e8141b38cc1256d63002c55e8?OpenDocument>.

² Res. 2003/16 of 13 August 2003, in: Draft report of the Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, Draft Provisional Agenda and Adoption of the Report, of 14 August 2003.

³ Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/38/Rev.2 of 26 August 2003, available at: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/293378ff2003ceb0c1256d7900310d90?OpenDocument>.

side the United Nations (UN) was the UN Code of Conduct for Transnational Corporations⁴, which was never fully adopted and which was stymied both by the North-South conflict and the Cold War. The project proved too ambitious in trying to set up an overarching regulation of the activities of transnational corporations and their relationships with host governments. A more recent attempt to bring world business in line with international human rights, labor rights and environmental concerns was the Global Compact, an initiative of Secretary General Kofi Annan proposed at the 1999 Annual Meeting of the World Economic Forum.⁵ This initiative has been entirely voluntary and is thus often criticized as deficient. The far more detailed Norms, which are intended to evolve into a binding instrument, are seen as complementary to the Global Compact, as acknowledged by the Global Compact Office. Outside the UN, a plethora of divergent approaches to create and enforce corporate social responsibility has emerged in the last decades and especially in recent years. These include declarations of international organizations like the ILO⁶, OECD⁷ and the European Union⁸; corporate codes of conduct in national legislation⁹; initiatives of non-governmental organizations (NGOs)¹⁰; civil society

⁴ Proposed text of the draft code of conduct on transnational corporations, last version: UN Doc. E/1990/94 of 12 June 1990; see also United Nations Draft International Code of Conduct on Transnational Corporations, ILM, vol. 23, 1984, 626.

⁵ Secretary-General Kofi Annan, Address at the World Economic Forum in Davos of 31 January 1999, UN Doc. SG/SM/6448 (1999); The Global Compact, available at: <http://www.unglobalcompact.org/Portal/>.

⁶ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, ILM, vol. 17, 1978, 422, amended version available at: <http://www.ilo.org/public/english/standards/norms/sources/mne>.

⁷ OECD Guidelines for Multinational Enterprises, ILM, vol. 15, 1976, 967, updated version available at: http://www.oecd.org/department/0,2688,en_2649_34889-1-1-1-1-1,00.html.

⁸ European Commission, Green Paper: Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366 final of 18 July 2001, available at: http://europa.eu.int/eurlex/en/com/gpr/2001/com2001_0366en01.pdf.

⁹ Australian Corporate Code of Conduct Bill 2000, The Parliament of the Commonwealth of Australia, The Senate (Senator Bourne), A Bill for an Act to impose standards for the conduct of Australian corporations which undertake business activities in other countries, and for related purposes, available at: <http://www.natural-resources.org/minerals/generalforum/csr/docs/csr/Australia%20Corporate%20Code%20Bill%202000.pdf>.

¹⁰ E.g. amnesty international, Human Rights Guidelines for Companies, available at: <http://www.amnesty.org.uk/business/pubs/hrgc.shtml>.

groups¹¹, trade unions¹² and employer associations¹³; codes of conduct adopted by individual transnational corporations¹⁴, as well as socially responsible investment mechanisms.¹⁵

Several trends seem to have made human rights an important issue for companies: the emergence of an integrated global economy, increasing privatization and growing consumer awareness. In addition, some companies have been implicated in human rights abuses such as employing child laborers, discriminating against certain groups of employees, failing to provide safe and healthy working conditions or just and favorable conditions of work, attempting to repress independent trade unions, discouraging workers' right to bargain collectively and dumping toxic waste.¹⁶ As explained in the preamble to the Norms, a fundamental rationale for drafting the Norms was that companies had increased their power and that with power should come responsibility.¹⁷ The growing might and transnational reach of many large businesses had allowed at least some to escape national regulation; such businesses thus required international attention.¹⁸ In short, the greater the size and international reach of companies, the greater the need for applicable international human rights standards.¹⁹

¹¹ Declaration of Human Duties and Responsibilities, available at: <http://www.cdp-hrc.uottawa.ca/publicat/valencia/valenc1.html>.

¹² E.g. Basic Code of Conduct covering Labor Practices adopted by the International Confederation of Free Trade Unions, available at: <http://www.icftu.org/displaydocument.asp?Index=991209513&Language=EN>.

¹³ E.g. Workplace Code of Conduct initiated by Fair Labor Association for the Apparel Industry Partnership, available at: <http://www.fairlabor.org/index.html>.

¹⁴ E.g. Shell International Petroleum Company, Statement of General Business Principles, in: *Business and Human Rights - A Management Primer* (1999).

¹⁵ E.g. Social Investment Forum, available at: <http://www.socialinvest.org/>.

¹⁶ Sub-Commission for the Promotion and Protection of Human Rights, Fifty-fourth session, Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises, E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 of 24 May 2002, para. 4, 5.

¹⁷ See also Sub-Commission for the Promotion and Protection of Human Rights, Fifty-second session, Report of the sessional working group on the working methods and activities of transnational corporations on its second session, E/CN.4/Sub.2/2000/12, of 28 August 2000, para. 26.

¹⁸ Sub-Commission (note 16), para. 17.

¹⁹ Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session, Principles relating to the human rights conduct of companies, E/CN.4/Sub.2/2000/WG.2/WP.1 of 25 May 2000, para. 5.

The Norms have been mostly welcomed by all interested parties, since they clarify the expectations and responsibilities of all companies regarding human rights and shed light on the contested and confusing field of corporate social responsibility.²⁰ In so doing, however, the Norms overturn two paradigms that have to date dominated the discourse on corporate social responsibility: namely that all initiatives should be voluntary and that there is no 'one size fits all' model to cope with the different situations facing businesses, for example, in the extractive sector and the apparel industry. The International Organization of Employers, the International Chamber of Commerce and some other business representatives have criticized the Norms for these shifts in policy. They assert the traditional view in international law that the promotion and protection of human rights is a task and obligation reserved for national governments.²¹

B. The drafting history

I. The Sub-Commission

The Sub-Commission on the Promotion and Protection of Human Rights is the main subsidiary body of the UN Commission on Human Rights. The Sub-Commission consists of twenty-six independent human right experts acting in their personal capacity, whereas the Commission on Human Rights is a political body composed of fifty-three States. The Sub-Commission's functions are to undertake studies, particularly in light of the Universal Declaration of Human Rights, and to make recommendations to the Commission, as well as to perform any other functions that the Council or the Commission entrusts to it.²²

²⁰ E.g. Nongovernmental organizations welcome the new U.N. norms on transnational business, press statement of 13 August 2003, available at: <http://web.amnesty.org/library/Index/ENGPOL300132003>.

²¹ Joint views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights of 22 July 2003, available at: <http://www.uscib.org/docs/Joint%20ICC-IOE%20Statement%20July%202003.pdf>; BBC World Service „Newshour“, UN's Norms on Responsibility of Transnational Corporations, 13 August 2003, interview with D. Weissbrodt, Member of the Sub-Commission, and Thomas Niles, President of the U.S. Council for International Business, available at: <http://www.uscib.org/%5Cindex.asp?documentID=2729>.

²² Commission on Human Rights, Res. on the Prevention of Discrimination and the Protection of Minorities, Report of the Commission on Human Rights in 1949 (Fifth Session), E/1371 (1949), para. 13, sect. A. Regarding the expansion of the Sub-Commission's mandate, see Asbjorn Eide, The Sub-Commission of Discrimination and Protection of Minorities, in: *The United Nations and Human Rights*, 211, 213-226 (Philip Alston ed., 1992).

II. Topics of debate within the Working Group

The Sub-Commission established a sessional working group for a three-year period to examine the working methods and activities of transnational corporations.²³ The mandate was extended in 2001 for another three-year period.²⁴ The working group was initially intended only to consider developing a code of conduct for transnational corporations. There was considerable divergence of views on this topic, since some participants saw the need to embrace powerful national business entities as well.²⁵ A compromise was reached wherein the Norms address both transnational corporations as well as other business enterprises, but the latter only insofar as either they have any relationship with the former, the impact of their activities is not entirely local, or the activities involve violations of the right to security.²⁶ Another topic of debate was whether it was appropriate to pursue binding requirements or whether an entirely voluntary approach would better serve the purpose of bringing business in line with human rights concerns. In the working group's eyes, the experience with the Global Compact had proven that voluntary initiatives were simply not enough. Of about 75,000 transnational corporations, only 1,000 had joined the Global Compact. Worse, some may have done so merely for public relations purposes and their participation does not seem to have had any real impact on their business behavior.²⁷

III. The Norms as restatement of the current law

The process leading to the adoption of the Norms was inclusive and the consultation was broad. The Norms were drafted after comments and recommendations

²³ Res. 1998/8 of 20 August 1998.

²⁴ Res. 2001/2 of 15 August 2001.

²⁵ Sub-Commission (note 17), para. 27, 34-36.

²⁶ The term „transnational corporation“ refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries -whatever their legal form, whether in their home country or country of activity and whether taken individually or collectively. See Norms (note 1), I. Definitions, para. 20.

The phrase „other business enterprise“ includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be 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 indicated in paragraphs 3 and 4. See Norms (note 1), I. Definitions, para. 21.

²⁷ BBC World Service (note 21); Sub-Commission (note 16), para. 20, 21.

from a wide range of stakeholders, including governments, NGOs and the business community, had been received. The Norms reflect, interpret and elaborate primarily upon legally binding treaties and non-binding guidelines adopted by international organizations such as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy²⁸ as well as the OECD Guidelines for Multinational Enterprises.²⁹ In addition, the Norms draw on documents that reflect already existing international practice in this area such as industry and commodity group initiatives, framework agreements between transnationals and workers' organizations, self-imposed company codes of conduct and NGO or union model guidelines.³⁰ The Norms thus represent a restatement of existing international human rights law, humanitarian law, international labor law, environmental law, anti-corruption law and consumer protection law that already does or should apply to companies' conduct.³¹ The Norms are envisaged as an evolving document, meant to change with the standards as they develop over time.³² The essential aims of the Norms were to help governments identify what types of legislation they should enact and what enforcement mechanisms they should implement to ensure that the Norms had a positive influence; they were further designed to encourage companies to implement the Norms and to lay the groundwork for a binding international standard setting process.³³

IV. Human rights obligations of non-State actors

At the outset of the drafting procedure, the working group debated several issues of dogma with respect to the human rights obligations of non-state actors that are partly reflected in the Norms' preamble and substantive part. The experts stressed that States possess the principal responsibility to assure the implementation of human rights and that business should not be asked to assume the role of States. Nevertheless, the Universal Declaration of Human Rights proclaimed a common standard of achievement for all peoples and all nations, to the end that governments, other organs of society (including transnational corporations and other business enterprises) and individuals shall strive, by teaching and education, to promote

²⁸ ILO Tripartite Declaration (note 6).

²⁹ OECD Guidelines (note 7).

³⁰ Sub-Commission (note 16), para. 25.

³¹ *Id.*, para. 24.

³² *Id.*, para. 22.

³³ Sub-Commission (note 17), para. 33.

respect for human rights and fundamental freedoms.³⁴ David Weissbrodt, an American academic entrusted with primary responsibility for drafting the Norms, added that the documents establishing the so-called International Bill of Rights³⁵ indicated that persons had both rights and responsibilities. Legal persons, including companies, had human rights obligations insofar as non-state actors could be said to have international legal obligations. Companies were, from one perspective, legal constructs allowed to exist by virtue of State action. Accordingly, a State should neither create nor tolerate a body that violates international human rights norms to which the State has given its approval. The experts also debated another theory³⁶ that recognizes a firm as a legal concept, a set of specialized agreements among persons. A firm, however, only acted through persons, whose fiduciary and other obligations constrained their acts. Hence, to the extent that firms were comprised of individuals and those individuals were bound by human rights treaties and other instruments, companies were effectively bound by the same provisions. Lastly, it was noted during the drafting procedure that some international treaties, such as those dealing with corruption, focus on the (international criminal) responsibility of corporations.³⁷

These dogmatic debates go to the very heart of the human rights doctrine. Traditionally, human rights were perceived as a contract between the sovereign State and its inhabitants. They were understood as a shield against State intervention in the private sphere (*Abwehrrechte*), as claim-rights to participation (*Teilhaberechte*) and later as claim-rights to State protection (*Schutzrechte*). It should be recalled, however, that human rights were understood differently by humanism and natural law theory.³⁸ Today, faced with a shift in power from the once dominant nation-State to other entities, such as transnational corporations and international and supranational organizations, one should ask if the state-oriented perception of human rights is still adequate to deal with current issues of human rights violations.

³⁴ Universal Declaration of Human Rights, GA Res. 217 (III) of 10 December 1948, preamble.

³⁵ Universal Declaration of Human Rights (*id.*); International Covenant on Economic, Social and Cultural Rights (16 December 1966, GA Res. 22000 A (XXI), 21 UN GAOR Supp. 16 at 49 (entered into force 3 January 1976)); and International Covenant on Civil and Political Rights (16 December 1966, GA Res. 2200 A (XXI), 21 UN GAOR Supp. 16 at 52, (entered into force 23 March 1976)).

³⁶ Ronald Harry Coase, *The Firm, the Market, and the Law* (1988).

³⁷ Sub-Commission for the Promotion and Protection of Human Rights, Fifty-second session, Principles relating to the human rights conduct of companies, Working paper prepared by Mr. D. Weissbrodt, E/CN.4/Sub.2/2000/WG.2/WP.1 of 25 May 2000, para. 11-14.

³⁸ Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. III/1, 2.ed, 221 (1998); see also John Locke, *Zwei Abhandlungen über die Regierungen*, 203 (W. Euchner ed., *Der Naturzustand*, 1977).

The working group agreed by consensus to adopt the Norms and submitted them to the Sub-Commission.³⁹

C. The most significant features of the Norms

I. Preamble

The Norms are introduced by a preamble followed by eight sections and definitions of key terms. In the preamble, the drafters recall, as mentioned, the Universal Declaration of Human Rights as a logical starting point. The Declaration sets forth a common standard of achievement to the end that governments and other organs of society, like companies, shall strive to promote respect for human rights and freedoms. However, it is not only transnational corporations and other business enterprises that are called upon by the preamble: in an eye-catching paragraph, their officers and workers are also said to be obliged to respect generally recognized responsibilities and norms. These are in turn enumerated in a long, extensive list of international treaties and other instruments covering human rights and labor rights, humanitarian law, environmental law and international criminal law. The Norms are to contribute to the making and development of international law concerning these obligations and responsibilities.

II. General obligations

The first section, entitled 'General obligations', reflects the principal approach of the Norms, and all other sections should be read in its light. It emphasizes the fundamental responsibility of states to promote and protect human rights as well as to ensure that businesses respect human rights. Within their respective spheres of activity and influence, companies have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law. Although the Norms establish a common base-line against which companies' activities are to be measured, this section provides for some flexibility as to the degree of responsibility incumbent on a particular transnational corporation or business enterprise, depending on its sphere of activity and influence. Obviously determining the scope of influence of a company in a given case and its corresponding degree of responsibility to comply with certain human rights obligations will be quite difficult and give rise to much debate. As the Commentary explains, the Norms are meant to apply in every country in which a business is engaged.⁴⁰ Furthermore, six different sets of obligations can be deduced

³⁹ Res. 2003/16 (note 2).

⁴⁰ Sub-Commission (note 3), para. 1 a.

from the general obligations: companies shall have the responsibility: 1) to use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses and 2) to ensure that they do not benefit directly or indirectly from those abuses; 3) to refrain from undermining efforts to promote and ensure respect for human rights; 4) to use their influence to promote respect for human rights; 5) to assess their human rights impacts; 6) to avoid complicity in human rights abuses.⁴¹

III. Right to equal opportunity and non-discriminatory treatment

The second section deals with the right to equal opportunity and non-discriminatory treatment, a core right for workers. The Norms insist that companies shall comply in all their policies with the relevant national and international law and other instruments in order to eliminate discrimination based on the status of the individual unrelated to any inherent job requirements. The list of prohibited reasons for discrimination is extensive: race, color, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age (except for the greater protection of children), health, marital status, sexual orientation, capacity to bear children, etc. It reflects the sorts of discrimination that workers are likely to be exposed to if their employers fail to ensure a working environment that does not tolerate discrimination. Affirmative action measures are not considered discriminatory.

IV. Right to security of persons

Section three, entitled 'Right to security of persons', deals with international crimes against the person. Companies shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, nor in extra judicial, summary or arbitrary executions, nor other violations of humanitarian law and other international crimes against the person. At first glance, a reader might wonder whether this section has any practical relevance whatsoever. It seems inconceivable that transnational corporations or other business enterprises would engage in such crimes. One only has to recall, however, the determinations of the Military Tribunals after World War II. In the Zyklon B Gas case, for example, the supplier of the gas used to kill concentration camp inmates was convicted for complicity in international crimes.⁴² Likewise, in the I.G. Farben case, leading officers of the corporation were convicted because

⁴¹ *Id.*, para. 1 b.

⁴² *United Kingdom v. Tesch et al.* (Zyklon B Gas Case), Law Reports of Trials of War Criminals 93, 102 (1947).

they used that corporation as an instrument to commit violations of humanitarian law.⁴³ Unfortunately, recent examples of corporate implication in crimes against the person may also be cited in many of the forced disappearances of trade unionists in Central and Southern America.⁴⁴ The Commentary provides for additional possibilities: namely the production and supply of military, security and police products and services for the purpose of human rights abuses, as well as the production or sale of weapons declared illegal under international law.⁴⁵

The crucial topic of security arrangements is also treated under section three. Anyone entering into such agreements with the addressees is to observe international human rights norms and professional standards of best practice. The relevant norms shall be included in the contracts and the contracts made public. Security shall be only provided for preventive and defensive services. Any use of force must be necessary and proportional to the threat. Particular emphasis is given to respecting the right to freedom of association and peaceful assembly.

V. Rights of workers

The next section stipulates the rights of workers in relation to companies in accordance with national and international law: i.e. no forced or compulsory labor; no economic exploitation of children; the right to a safe and healthy working environment as well as to remuneration that ensures an adequate living for workers and their families with a view towards progressive improvement; and finally, the core workers' rights⁴⁶ of freedom of association and collective bargaining, together with the right to establish and join organizations of the worker's free choosing. In the accompanying Commentary, reference is made to the relevant international instruments, primarily those of the International Labour Organisation. Details include the requirement to disclose information about health and safety standards relevant to the local activities of the companies⁴⁷ as well as to make provision for

⁴³ *United States v. Carl Krauch et al.* (The Farben Case), Vol. VIII, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 1140 (1952).

⁴⁴ See e.g. amnesty international, Defend Labour Rights, action focus on Guatemala, available at: <http://www.amnesty.org/ailib/intcam/tunion/1998/guatem.htm>.

⁴⁵ Sub-Commission (note 3), para. 3 a, b.

⁴⁶ According to the ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up of 18 June 1998, the fundamental rights are freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.

⁴⁷ Sub-Commission (note 3), para. 7 b.

emergencies, accidents and remedies for the injured.⁴⁸ This section also addresses issues of working time, overtime and holidays (with the possibility of adjustment according to the different needs of the industries, officers or workers concerned);⁴⁹ ways and means of paying wages and benefits;⁵⁰ the right of workers to strike and to submit grievances⁵¹ as well as the settlement of disputes over collective bargaining agreements.⁵² Companies are expected to take particular care in countries that have not fully implemented international standards regarding freedom of association, the right to organize and the right to bargain collectively in order to protect the rights of workers.⁵³

VI. Respect for national sovereignty and human rights

Section five, entitled "Respect for national sovereignty and human rights", addresses the sometimes difficult relationship between transnational corporations and other business enterprises with (host) governments as well as human rights issues of the second and third generation. Companies are to recognize and respect applicable norms of both international and national law, regulations and policies, including development objectives. Within the limits of their resources and capabilities, companies are expected to encourage social progress and development, especially in poor and developing countries.⁵⁴ The Norms demand considerably less than the International Covenant on Economic, Social and Cultural Rights, which obliges States Parties to take steps to the maximum of their available resources with a view to achieving progressively the full realization of these rights. The drafters thereby took into consideration the different roles that economic entities and States, respectively play in promoting human rights. Furthermore, companies shall respect the right to development and contribute to sustainable development.⁵⁵ Transnational corporations and other business enterprises, most likely the extractive sector, are expected to take extra precautions regarding the rights and interests of local com-

⁴⁸ *Id.*, 7 c, d.

⁴⁹ *Id.*, 7 f.

⁵⁰ *Id.*, 8 a-e.

⁵¹ *Id.*, 9 b.

⁵² *Id.*, 9 d.

⁵³ *Id.*, 9 e.

⁵⁴ *Id.*, 10 a.

⁵⁵ *Id.*, 10 b.

munities and indigenous peoples.⁵⁶ Lastly, the Commentary states that intellectual property rights should be used in a manner that contributes to innovation, transfer of technology and social and economic welfare.

Other issues dealt with in this section are corruption and complicity in human rights abuses. Interestingly, the drafters do not comment on the issue of complicity, though this obligation has some firm underpinnings in international law.⁵⁷

Furthermore, companies shall respect human rights, contribute to their realization and refrain from actions that obstruct or impede their realization. Of special interest to transnational corporations and other business enterprises should be the right 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; as well as freedom of opinion and expression. The Commentary refers to the relevant standards developed by the Committee on Economic, Social and Cultural Rights and by the Human Rights Committee.

VII. Consumer protection

Section six, "Obligations with regard to consumer protection", deals with international regulations, standards and best practices of competition and anti-trust matters as well as of advertising practices. Transnational corporations and other business enterprises are obliged to ensure safety and quality of goods and services and to observe the precautionary principle. According to the Commentary, one company obligation is to avoid variations in the quality of products that would have a detrimental effect for consumers, especially in States lacking specific regulation.⁵⁸

VIII. Environmental protection

The final substantive section is devoted to "Obligations with regard to environmental protection". Companies are to observe national and international law, regulations, policies and standards as to the protection of the environment, public health and safety, bioethics and the precautionary principle. They shall respect the right to a clean and healthy environment in the light of the relationship between the environment and human rights, and they shall pursue the wider goal of sustainable

⁵⁶ *Id.*, 10 c.

⁵⁷ Andrew Clapham/ Scott Jerbi, Categories of Corporate Complicity in Human Rights Abuses, 24 *Hastings Journal of International and Comparative Law Review*, 339 (2001); William Schabas, Enforcing humanitarian international law: Catching the accomplices, 42 *Revue Internationale de la Croix-Rouge*, 439 (2001).

⁵⁸ Sub-Commission (note 3), para. 13 c.

development. Moreover, they are expected to assess the impact of their activities and be fully accountable for any negative environmental consequences.

IX. Implementation mechanisms

The last section, concerned with “General provisions of implementation”, is particularly important, since the Norms’ effectiveness depends on their proper implementation. First, transnational corporations and other business enterprises are required to adopt, disseminate and implement their own internal rules of operation in compliance with the Norms. Second, they must periodically report to all stakeholders on their implementation. Third, they shall incorporate the Norms into all their business dealings or cease doing business with that business partner. Companies are expected to provide, at the very least, for the prompt implementation of the protections set forth in the Norms. This means that companies are initially obliged only to undertake steps to achieving progressively the full realization of other human rights, mostly of the second and third generation.

A key aspect of effective implementation is self-assessment and monitoring. Companies shall be subject to periodic monitoring by UN and other international or national mechanisms already in existence or yet to be created. The monitoring shall be transparent and inclusive, taking into account input from stakeholders, particularly NGOs. Receipt of complaints of violations of the Norms shall also be possible. The Commentary specifies that the UN human rights treaty bodies should create additional corresponding reporting requirements for States and that they should consider the Norms when adopting General Comments or Recommendations. It is also suggested that the Norms be used as a bench-mark for procurement requirements for the UN and their specialized agencies. These implementation mechanisms promise to be fairly effective if adopted. Country reporters and thematic procedures of the Commission on Human Rights as well as groups of experts and special reporters constitute further means of monitoring compliance with the Norms. The experts are to collect information and then allow transnational corporations or other business enterprises concerned to respond to allegations made. Eventually, effective measures shall be taken in cases of violations of the Norms. All other stakeholders, including the companies themselves, are invited to develop innovative and efficient methods of implementation.

States are only addressed in the Norms once. They shall establish and reinforce the necessary legal and administrative framework for ensuring that transnational corporations and other business enterprises abide by human rights obligations and thus live up to their own obligations under international law.

The paragraph that will probably trigger the most opposition and anxiety in the business community concerns reparation. Companies shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms. Forms of reparation may include restitution, compensation and rehabilitation for any damage done or property taken. In determining damages and criminal sanctions as well as in all other respects, national courts and international tribunals are to apply the Norms pursuant to their respective laws. To the author's knowledge, the U.S. Alien Tort Claims Act (ATCA) is the only national law that so far provides for damages for the violation of international human rights law.⁵⁹ The paragraph also clearly indicates that criminal sanctions of the addressees are another means of implementation. Criminal sanctioning of legal persons is known to countries of the Anglo-American legal system and to an increasing number of continental European countries, but not to German law.⁶⁰ Imposing international criminal responsibility on legal persons for violations of international criminal law was also considered at the drafting of the Rome Statute of the International Criminal Court⁶¹, but States could not agree on that issue for various reasons.⁶²

The section ends with a savings clause, and the Norms as a whole conclude by defining "transnational corporations and other business enterprises" and the terms "stakeholder" and "human rights".⁶³

⁵⁹ 28 United States Code § 1350: „(t)he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.“ The latest and most authoritative judgment, though not on the substance of the case, was rendered by the US Court of Appeals for the Ninth District in *Doe I et al. v. Unocal* of 18 September 2002. There is an abundant literature on the subject, see e.g. Craig Forcese, ATCA's Achilles Heel: Corporate Complicity, *International Law and the Alien Tort Claims Act*, 26 *Yale Journal of International Law* 487 (2001).

⁶⁰ See e.g. Hans de Doelder/ Klaus Tiedemann (ed.), *La criminalisation du comportement collectif – Criminal liability of corporations* (1996); Albin Eser/ Barbara Huber/ Karin Cornils (ed.), *Einzelverantwortung und Mitverantwortung im Strafrecht* (1998).

⁶¹ Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF. 183/ (1989), entered into force 1 July 2002 (92 Parties, 139 Signatories).

⁶² Andrew Clapham, The Question of Jurisdiction Under International Criminal Law Over Legal Persons, in: *Liability of Multinational Corporations under International Law*, 139 (Menno Kamminga/ Saman Zia-Zarifi eds., 2000).

⁶³ The phrases „human rights“ and „international human rights“ include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labor law and other relevant instruments adopted within the UN system. See Norms (note 1), I Definitions, para. 23.

D. Outlook

The Sub-Commission approved the Norms by consensus and submitted them to the Commission on Human Rights for consideration and adoption⁶⁴ at its next session in March 2004. It recommended that all interested parties be invited to submit comments to the Commission and the Sub-Commission.⁶⁵ After having received the comments, establishment of an open-ended working group should be considered to review the Norms and the Commentary.⁶⁶ It is difficult to predict whether the Commission will follow the Sub-Commission's recommendations and endorse the Norms and Commentary with the political approval of UN member States. It has frequently been a long and tortuous road between initial actions by the Sub-Commission and the eventual adoption of a new standard by another UN body or agency. There are, however, important instances in which initiatives of the Sub-Commission resulted in the adoption of declarations and even international treaties.⁶⁷ Given the context in which the Norms were drafted and the divergent ongoing efforts of the international community to bring business in line with human rights concerns, it seems likely that the Norms will eventually be adopted as a means to streamline the human rights expectations and obligations of transnational corporations and other business enterprises.

Regardless of the outcome of this process, the Norms should already have considerable effect. The Sub-Commission has authorized the working group that drafted the Norms and Commentary to receive information from governments, NGOs, business enterprises, individuals and other sources concerning possible negative impacts of the activities of transnational corporations and other business enterprises on human rights, particularly as these affect the implementation of the Norms. Furthermore, companies will be invited to comment on allegations made against them within a reasonable time.⁶⁸ The working group will then draft comments and recommendations and transmit them to the appropriate company as well as to governments or other sources of information.⁶⁹ Even if transnational cor-

⁶⁴ Sub-Commission (note 2), Res. 2003/16, para. 1 and 2.

⁶⁵ *Id.*, para. 3.

⁶⁶ *Id.*, para. 4.

⁶⁷ E.g. Declaration (GA Res. 1904 (XVIII) (1963) 52-56), and subsequently Convention, on the Elimination of all Forms of Racial Discrimination (GA Res. 2106 A (XX) (1965), 56-69; Eide (note 22), 242-245.

⁶⁸ Sub-Commission (note 2), para. 5.

⁶⁹ *Id.*, para. 6. The Sub-Commission is known for pushing the limits of its mandate, see Eide (note 22), 213-226.

porations and other business enterprises are not legally bound by the Norms, there will be considerable pressure to comply with the Norms, since individual companies will be exposed to world public opinion - their customers - in the respected forum of the UN. A drawback of this mandate will be the working group's limited time and resources. It should be seen as one venue among many to protect the rights of workers, customers, local and indigenous peoples against human rights abuses by transnational corporations and other business enterprises.

Although the business community will have to bear the costs of implementing mechanisms to ensure compliance with the Norms, a stable and regulated society is a prerequisite for the successful operation of a company. The costs should accordingly be seen as a good investment that will pay for themselves in the form of higher future revenues.