



**Dialogue** on  
**Globalization**

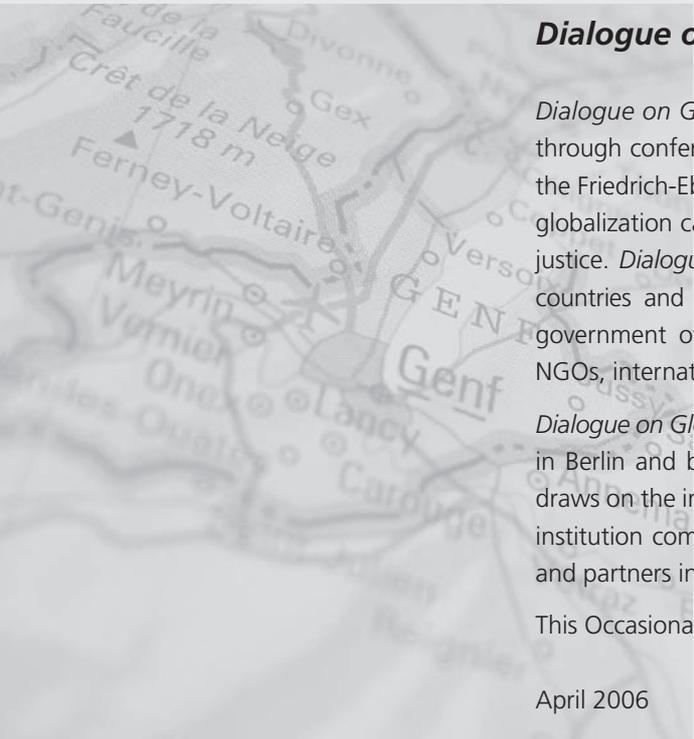
OCCASIONAL PAPERS

GENEVA

N° 22 / April 2006

Theodor Rathgeber

**UN Norms on the Responsibilities  
of Transnational Corporations**

A faded map of the Geneva region in Switzerland, showing various towns and geographical features like the Crêt de la Neige (1718 m).

## ***Dialogue on Globalization***

*Dialogue on Globalization* contributes to the international debate on globalization – through conferences, workshops and publications – as part of the international work of the Friedrich-Ebert-Stiftung (FES). *Dialogue on Globalization* is based on the premise that globalization can be shaped into a direction that promotes peace, democracy and social justice. *Dialogue on Globalization* addresses “movers and shakers” both in developing countries and in the industrialized parts of the world, i.e. politicians, trade unionists, government officials, businesspeople, and journalists as well as representatives from NGOs, international organizations, and academia.

*Dialogue on Globalization* is co-ordinated by the head office of the Friedrich-Ebert-Stiftung in Berlin and by the FES offices in New York and Geneva. The programme intensively draws on the international network of the Friedrich-Ebert-Stiftung – a German non-profit institution committed to the principles of social democracy – with offices, programmes and partners in more than 100 countries.

This Occasional Paper is published by the Geneva office of the Friedrich-Ebert-Stiftung.

April 2006

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ISSN 1614-0079

ISBN 3-89892-494-7

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## Preface

“Shaping globalization” has become a pivotal challenge in both national and international politics. In her address to the World Economic Forum at Davos in January 2006, the German Chancellor Angela Merkel professed her own commitment to this objective. In her view, one of the crucial questions to answer is: “What regulatory framework do we need for this changing world of ours?” It is a question that Theodor Rathgeber poses in his contribution “UN Norms on the Responsibilities of Transnational Corporations”. Transnational corporations are fundamental forces in the dynamic advance of globalization, and laments are heard far and wide about the collapsing political influence of national governments. A quest is therefore under way to apply international rules to multinational business and to reconcile the dynamics of the global economy to the norms and obligations of international law.

The UN Sub-Commission on the Promotion and Protection of Human Rights hazarded a solution with a draft document, submitted in 2003, for UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Basically these summarize existing norms drawn from the UN human rights system, the International Labour Organization (ILO) and some environmental pacts. The draft met with a divided response. While many NGOs, but also individual members of the corporate and trade union communities, welcomed its provisions as a step in the right direction, there was an outcry from international business organizations, who reject any further regulation as an unnecessary obstruction of economic activity. Reservations have also been expressed by those speaking for the state, who see the Norms as undermining the prerogative of state responsibility, and by trade unionists concerned that weaker mechanisms could erode the ILO’s existing monitoring procedures. When the UN Human Rights Commission held its meetings in 2005 agreement proved impossible. Instead, the Secretary General was urged to appoint a Special Representative and invite him to come up with a way forward for the relationship between business and human rights.

The Friedrich-Ebert-Stiftung has held a number of events in Geneva and Germany and published papers devoted to this debate about the “Norms”, hoping to advance clarification and a mediation of interests by providing a forum for dialogue. Our efforts persist through our support for the work of the UN Secretary General’s Special Representative Prof. John Ruggie (Harvard), in the belief that this will take us all a step further in answering that question about designing a regulatory framework for globalization.

Theodor Rathgeber has been involved in the discussion in many ways. In his present paper he again summarizes the essential arguments for attributing responsibilities for human rights to transnational corporations, seeking in particular to respond to the concerns of trade unionists, but also business representatives. He reminds us: “On the whole, past experience with voluntary codes indicates the need for a coherent approach that can subject the natural dynamics of global systems to minimum standards of human rights. The easiest way to organize a body of rules like this would be within an international institutional framework that can apply a minimum of democratic, transparent and participatory procedures to implementing the contractual instruments.”

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# 1

## Executive Summary

Corporate activities do not take place in a human rights vacuum. The Preamble to the Universal Declaration of Human Rights calls upon “every organ of society” to help fulfil human rights. The state is no longer necessarily held responsible for ensuring freedom and satisfying people’s basic needs. Meanwhile, transnational corporations are tangibly gaining power and influence. This inevitably poses a question about the responsibility they should bear for human rights.

Past attempts to make transnational corporations and other businesses operating in the international arena accountable on the basis of voluntary rules, codes of conduct and guidelines have not proven very helpful, especially to those who have suffered the negative consequences of business activities without participating directly in company processes. So far there has also been a lack of effective mechanisms for implementation, monitoring and imposing sanctions. Moreover, a coherent regulatory system requires an international institutional framework to ensure a minimum of democratic, transparent and participatory procedures.

The “UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” adopted by the UN Sub-Commission in 2003 are, in terms of chronology and content, the most up-to-date and comprehensive attempt to gear business activities to human rights standards in the era of globalization. The 23 Articles contained in the Norms are by and large derived from existing standards, some binding under international law, complemented by a monitoring system, periodic evaluation, a complaints procedure and compensation for damages incurred. It synthesizes all the rules hitherto devised for corporate responsibility in the field of human rights, systematising them in a single, universally valid corpus.

Discussions about the UN Norms have brought together a broad spectrum of social players: governments, trade unions, non-governmental organizations and other civil society groups working in human rights, the environment, consumer protection and development co-operation, victims and their associations, international institutions and transnational corporations. To put it mildly, not all these players are equally happy about the role attributed to them by the UN Norms.

Nevertheless the UN Norms will remain the framework of reference for discussion about how a combination of corporate commitment, legal requirements, ethical aspirations and monitoring procedures could function in practice. The future of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights essentially depends on the ability of stakeholders and victims to mobilize along with the non-state bodies that defend their interests.

# 2. Introduction

Corporate activities do not take place in a human rights vacuum. In fact, the Preamble to the Universal Declaration of Human Rights calls upon “every organ of society” to help fulfil human rights. However, for many years after its proclamation this recognition that all organs bore a share of responsibility did not lead to any particular practical consequences. After all, “the state” could be relied upon, as the central authority in society, to secure freedom, protect people from fear and overcome poverty. Now, with a fundamentally market-driven model of society gaining ground faster and faster, this has radically changed.

In conceptual terms, the state is no longer necessarily assumed to be responsible for ensuring freedom and satisfying people’s basic needs, but rather for creating a framework in which functional systems within society can regulate themselves. Liberalization, deregulation and privatization are shorthand for various key processes that have induced a reappraisal of the state’s tasks and forced the state, as a pivotal component of societal management, onto the defensive, notably in economic processes which exhibit a high degree of self-organization.

At the same time, the expansion of global networking has led over the last 15 or 20 years not only to a growing number of transnational corporations, but also to an expansion of their power and influence. Some now wield more power than many nation-states, exerting an undeniable impact on the lives of a great many people far beyond those on their payroll. Basically the only thing about this which is “private” is the distribution of profit.

As a result the state is nowadays held less liable for social processes, with a tendency to accord it only a subsidiary share of responsibility. It is increasingly difficult to set basic ground rules for the nation-state framework, to guarantee fundamental rights and to impose legal penalties for the risks and losses incurred by business activity. Under these circumstances, corporate responsibility in the human rights sense operates within a grey zone between minimal statutory requirements, voluntary commitments and moral orientations. In the context of globalization and denationalization, companies are called upon nowadays, if not before, to take consistent action of their own to protect and promote human rights.

Wherever business is conducted, it affects almost all aspects of human life, and hence human rights, sometimes with lethal consequences for things like core labour standards, health, the environment, food security, gender equality, children’s rights, and rights to the land or the use of natural resources in the case of indigenous peoples. The one-sided corporate focus on costs and productivity, elevated to an absolute principle, lets all too often the human dignity and human rights of these concerned become relegated to a marginal feature of company policy.

The overwhelming majority of companies wish to go about their business lawfully and preferably without offence. That does not mean, however, that they regard social and environmental responsibility as fundamentally relevant to corporate policy. Lower wages or an extra-long working day will influence company decisions about where to locate manufacturing, sales and services. When production sites are moved outside the country where the company has its headquarters, it is less clear how far the company feels bound by the law of the land in which its facilities operate. In grey zones like this, violations of human rights become cost benefits, and governments see it as a competitive advantage in the global arena if they attract a company to their territory or persuade it to stay.

We are bound to ask how feasible it is to treat globally operating companies, whose activities patently take place, as legally accountable subjects. How can the responsibilities which transnational corporations bear in a globalized world be enshrined in legal codes? Should these matters perhaps be left to the market, to commercial practice or the much-vaunted power of the consumer? Experience to date, which is outlined below, raises doubts about the effectiveness of such self-regulating mechanisms.

Even the efforts to make transnational and other globally operating companies assume responsibilities on the basis of voluntary *codes of conduct* or guidelines have not turned out to be very helpful, especially for victims outside the immediate remit of company operations. This is where the protection gap is particularly apparent. On the whole, past experience with voluntary codes indicates the need for a coherent approach that can subject the natural dynamics of global systems to minimum standards of human rights. The easiest way to organize a body of rules like this would be within an international institutional framework that can apply a minimum of democratic, transparent and participatory<sup>1</sup> procedures to implementing the contractual instruments. At present, in the author's view, the United Nations is the most promising candidate to provide this institutional regulatory competence, despite the justified criticism it has received.

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1 For both stakeholders and shareholders.

# 3. (De-)regulating global economic activity: a recent history

In 1974 the UN Commission on Transnational Corporations began observing the impact of business activities on people and economic life in host (i.e. developing) countries and on international economic relations. Over the years the Commission also provided technical support for the developing countries where such companies operate. The Commission produced a draft Code of Conduct on Transnational Corporations, and UN members started to negotiate around this in 1977. Since 1990 the process has been incorporated within a larger working group at the United Nations and has, to all intents and purposes, sunk into oblivion.

In that same year, 1977, the ILO published its *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*. But the ILO's breakthrough did not come until 1998 with its *Declaration on Fundamental Principles and Rights at Work*. This embraces the key work-related human rights norms, such as the prohibition of forced and child labour, the ban on discrimination, and the freedoms of association and negotiation<sup>2</sup>. It provides essential tools for addressing and resolving conflicts in the work environment. However, it offers no protection to local communities who are directly or indirectly hit by the business activities of transnational corporations in the form of environmental pollution, disease, changes in local patterns of income and consumption, or impacts on the community fabric, including traditional land rights.

In the 1980s concepts geared to deregulation informed debates about the desirable economic and social order. The consequences of this approach did not, however, turn out to be very convincing. In the 1990s there were again growing calls to regulate business, and in particular transnational corporations. They were prompted above all by experience with companies in the mining industries, who were accused of seriously abusing human rights in the areas where they extracted resources. There were also rumours of companies becoming embroiled in belligerent conflicts or exploiting inadequate state control resulting from lack of capacity or political will<sup>3</sup>.

This led to discussion forums and initiatives around the discourse on “*corporate social responsibility*”. Initially they promised voluntary improvements to workers’ health and safety by means of self-imposed codes of conduct. It was a first step by companies towards social responsibility, above all in sectors such as trade, textiles, sportswear, and the mining and chemicals industries. But the limitations of self-regulation in this form were soon evident. The very fact that so many codes

**The discourse on “corporate social responsibility” initially promised voluntary improvements to workers’ health and safety.**

<sup>2</sup> The Declaration is also binding on ILO member countries which have not ratified it.

<sup>3</sup> E.g. mining and prospecting for natural gas and oil in Papua, the Philippines, Nigeria, Myanmar and Siberia, the chemical disaster in Bhopal (India), hydroelectric power and dams in Brazil, and the plundering of resources in the Democratic Republic of Congo. Cf. also the hearing in the German Bundestag held by the Parliamentary Committee on Human Rights and Humanitarian Assistance on 22 September 2004 (15<sup>th</sup> legislature) on corporate responsibility for human rights within the context of violence-driven economies in Africa.

are only applied in-house makes it impossible to verify plausibly how companies are complying<sup>4</sup>.

Alternatives were sought in the form of binding rules which would apply globally. In 1999, for example, the European Parliament called for a *European Code of Conduct*<sup>5</sup> for internationally active companies based in Europe who were operating in developing countries. In 2002 the Parliament repeated its call. This time they had set their sights on legally binding rules for European companies and compulsory environmental and social reporting<sup>6</sup>. That same year the European Commission set up a *Multi-Stakeholder Forum on Corporate Social Responsibility*. The participants were companies, associations, trade unions, non-governmental organizations and the European Commission.

In 2000 the OECD (*Organization for Economic Co-operation and Development*) published the second, revised edition of its *Guidelines for Multinational Enterprises*<sup>7</sup>, taking on board the responsibility of suppliers. The Guidelines offer recommendations on matters such as the environment and corruption and contain a discreet reference to human rights. However, while they offer recommendations on investment and taxation in third countries, they do not echo any demands to support the development process in developing countries in a positive, sustainable way.

Companies may choose for themselves whether to implement these Guidelines, although the consensus among OECD member governments (and, indeed, other countries) is to limit the voluntary dimension indirectly. The signatory states undertake to ensure compliance with the Guidelines and to set up “national contact points”. This establishes a mechanism for the filing of complaints which is a major strength of the OECD Guidelines compared with other codes.

In the last five years the OECD has received about 100 complaints. However, the governments with whom these complaints were lodged have been diffident about resolving the cases reported. It is a major exception for national contact points to conduct their own research into conflict resolution. In fact, experience with the OECD Guidelines suggests that it usually takes public pressure to remind the company concerned about the correspondent principles, and where these cases will end is an open question. Moreover, the OECD Guidelines are not very convincing in their impact when a gap between more stringent rules in an OECD member country and less stringent ones in developing countries is identified as a competitive market advantage for the unobserved exploitation of more promising profits.

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4 Altogether there are hundreds of voluntary codes of conduct, even though this seems meagre compared with 65,000 transnational and 750,000 small and medium-sized companies. An overview of the broadest international initiatives can be found in Annexes II and III of the February 2005 report on the responsibilities of transnational corporations by the Office of the UN High Commissioner for Human Rights.

5 With minimum social standards, greater transparency and a binding status for corporate social responsibility.

6 In response to and as a comment on the European Commission's Green Paper of 2001. In its Green Paper and in its Communication on Corporate Social Responsibility the Commission argues that voluntary codes of conduct cannot be a substitute for legally binding national and international provisions and can merely complement them.

7 The OECD Guidelines were first adopted in 1976. The version published in 2000 lists principles and practices for corporate activity: employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation.

8 At the World Economic Forum in Davos.

**A significant step was initiated by Kofi Annan in 1999 in the form of the Global Compact.**

The next significant step towards lending a little more bite to business guidelines for transnationals was initiated by UN Secretary General Kofi Annan in 1999 in the form of the *Global Compact*<sup>8</sup>, which was officially launched in 2000. The Global Compact essentially proposes principles, drawn from key international standards<sup>9</sup>, relating to human rights, industrial relations, the environment and corruption. Again, signing up to this framework remains voluntary, the hope being that enough, preferably reputable, companies will eventually exert a magnetic effect on others, even the “black sheep”.

Constructed as a forum for learning and dialogue, which offers examples of *best practice* on responsible corporate activities, the Global Compact does not, however, seek to exert a regulatory function complete with monitoring mechanisms or punishments for violations. Presumably this relative lack of coercion from the dispute settlement perspective has proven a major factor in the comparative popularity of the Compact, which has been joined by more than 50 countries and over 2,000 companies to date.

Looking back, it appears that all the discussion about codes of conduct did at least prepare the ground for thinking about regulatory mechanisms which might help to improve the climate for human rights and enhance justice. This applies in particular where business activity triggers violations and produces victims, but where the state fails to establish a system of guidelines or where these are deliberately not applied<sup>10</sup>. If we consider what voluntary codes have achieved in the past, we also cannot help concluding – notably from experience with internal self-auditing<sup>11</sup> – that there is a close correlation between efficacy and credibility of a mechanism and the disclosure of its procedure for reviewing company practices or performing continuous monitoring. Progress is also needed on complaints procedures which will allow those concerned to report infringements of the code in confidence and to obtain remedy. Moreover, the codes that have been devised in the past omit the formulation of a duty of accountability not only to shareholders, but also to stakeholders, i.e. anyone affected by company activity. This is of particular relevance for the many companies who consciously exploit violations of human rights to their own advantage or are at least prepared to tolerate them.

**The codes that have been devised in the past omit the formulation of a duty of accountability.**

In 1998 a working group set up by the UN Sub-Commission on the Protection and Promotion of Human Rights began drafting an idea for a broad international mechanism that would overcome shortcomings, identified by victims of human rights violations, in monitoring, implementation and sanctions. Adopted by the UN Sub-Commission in 2003, *these UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*<sup>12</sup> have been on the agenda of the UN Human Rights Commission since 2004. In

<sup>9</sup> Universal Declaration of Human Rights, ILO Declaration on Fundamental Principles and Rights at Work (1998) the Rio Declaration on Environment and Development (1992).

<sup>10</sup> According to the OECD in 2000 75.7% of the 148 voluntary codes of conduct they studied called for “adequate” working conditions; 65.5% called for compliance with the law; 60.8% banned discrimination or harassment at the workplace; 43.3% prohibited child labour; 31.8% made reference to hours worked. Only 29.7% referred to the right of association; 25% explicitly mentioned human rights and about 10% mentioned the ILO’s core labour standards.

<sup>11</sup> Multi-stakeholder initiatives like the *Fair Labour Association* (FLA), *Ethical Trading Initiative* (ETI) or *Fair Wear Foundation* (FWF) offer independent audits.

<sup>12</sup> UN Document no. E/CN.4/Sub.2/2003/12/Rev.2.

terms of both chronology and content, these UN Norms reflect the most up-to-date and comprehensive approach for gearing business activity to human rights standards in the globalization era<sup>13</sup>.

The UN Norms – rather like the *Global Compact* – are composed by and large of existing standards, some of which are already binding under international law<sup>14</sup>, complemented by an independent monitoring system, periodic reviews, a complaints procedure and compensation for damage. Quite apart from the binding status of some of the incorporated standards, the UN Norms as a whole are to be developed in the medium term into a binding standard on corporate responsibility. The draft provides that primary responsibility for compliance with the UN Norms will remain with the state, whereas companies are obliged to respect basic human rights within their sphere of activity or influence, which includes suppliers and sub-contractors. If this is established as a universal standard, companies will even be bound to comply with it when national legislation lags behind international law.

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<sup>13</sup> The General Secretary of Amnesty International, Irene Khan, told the World Economic Forum in Davos in 2004 that the time had come for binding international standards to regulate companies. The 23 norms in the Sub-Commission's draft were debated at several public hearings organized by the working group and also at public sessions with the participation of non-governmental organizations, academics, businesses, associations and trade unions.

<sup>14</sup> Human rights, industrial, environmental and consumer legislation and combating corruption.

# 4. Considerations on legal dogmatic aspects

There is no foreseeable likelihood, even in the era of globalization, that the state will be stripped of its function as guarantor of a peaceful world order in accordance with international law. However, this paper began by observing a tendency for the triangulation points of classical state responsibility under international law to shift, with other powerful actors entering the stage as forces in global relations. International law has itself reflected this change and established mechanisms in the world arena which go beyond the treaties and alliances agreed between states. Non-state agencies are appearing as parties to such treaties, acquiring the status of legal subjects in this field (see below). Some of these non-state agencies are able to influence the organization and orientation of a society with a force similar to that of the state. Although the primacy of the state is untouched when it comes to protecting and promoting human rights, the human rights obligations of these other agencies need to be examined and codified.

International law has responded again and again to the emergence of new legal subjects, devising innovative standards to deal with them: the refugee flows after the First World War that led to an independent corpus of international refugee law, human rights as a basis for securing peace and development, the incorporation of armed opposition groups into international humanitarian law, the growing influence of transnational companies on societies and states, or complaints procedures with the UN's various technical committees for the victims of human rights violations, granting individuals a procedural status as subjects within international law. Despite all these innovations, the distinction between state and other, non-state actors has not been eliminated.

At the same time, the responsibility for implementing human rights has never resided exclusively with states, even if they are accorded a specific role as guarantors because nominally they hold a monopoly on legitimate public authority. The above-mentioned Preamble to the Universal Declaration of Human Rights includes "every organ of society" in this process. We find similar formulations in the later, internationally binding UN Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.

The Declaration on Human Rights Defenders, or rather "*on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*", adopted in 1998, also strengthens the hand of non-state agents in their human rights activities. The Declaration – and in this it resembles the UN Norms – draws in many respects on standards already enshrined in other human rights pacts, but places them in a systematic context to ensure that their function – the protection of human rights with the aid of committed individuals and groups – is effective and transparent in achieving their purpose. The UN Norms also reiterate the primary responsibility of states for implementing human rights (Art.1), and this also means ensuring that

**The responsibility for implementing human rights has never resided exclusively with states.**

**There is nothing new about the notion of “responsibility” as a fundamental normative category for the actions attributed to businesses within society.**

transnational companies and other businesses respect those rights. In other words, corporate entities are not accorded a position similar to that of states, but they are expected to assume responsibility for respecting human rights independently of states.

There is nothing new about the notion of “responsibility” as a fundamental normative category for the actions (or omissions) attributed to businesses within society. In the German-speaking world, authors such as Oswald Nell-Breuning, Fritz Vilmar and Karl-Otto Sattler have developed ideas around a fundamental postulate aimed at humane, democratic business practice<sup>15</sup>. All economic structures and processes should be governed by democratic decision-making instead of “autocratic procedures”. Both the employees, who are directly dependent on the production site, and the state, which is legitimized by democratic means, should have their say in the company’s structure and basic orientation. Otto Brenner, for many years chairman of the metalworkers’ trade union in Germany, IG Metall, argued in the debate about workers’ participatory rights during his term of office that people’s freedom and security would be incomplete as long as working life was one-sidedly ruled by owners’ alone.

By analogy to this, the approach might be updated exactly from a trade union perspective to suggest that the structure and basic orientation of globally active corporations should be determined in part by human rights standards to ensure that the impacts and structural ties incurred by the company are not confined to an absolute quest for profit. Of course, making profit is one of the essential purposes of a business. However, like every other component of society, companies have links with the state and at least with a local community. It is justifiable, therefore, to ask what positive or negative contribution they can make to ensuring freedom, protecting people from fear and overcoming poverty.

Counterpoised against this coherent approach we still – and all the more visibly in a globalized economic and political context – observe a highly concentrated structure of corporate ownership with the concomitant exclusive corporate rights of disposal and an unbridled monopoly on investment. Companies and industrial federations have accordingly been defining more rights for themselves and anchored these in binding contracts to govern commercial activity. In the North American Free Trade Area (NAFTA), companies can sue states in an “investor-to-state” procedure for losses they sustain or profits they fail to secure. Under international trade and tax law strict rules for commercial conduct have long been customary to ensure unhampered access to all the resources required in the production process.

Social and human rights obligations on the part of companies have not, by contrast, been defined in anything like as binding a format. In highly concentrated structures of ownership like this, the concept of corporate responsibility is above all manifested in production and trading and to some extent in product liability. Other impacts of business activity will at most appear as variable factors in decisions about factory locations or production, and can be adapted as required. Liability

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<sup>15</sup> In this context we shall exclude Marxist and state socialist variations on this theme.

for any negative effects of business activity on human beings or nature, on the other hand, is essentially borne by society in the country where they occur<sup>16</sup>. Again, by analogy with discourse about business democracy, the stakeholders who are thus affected should also be granted ‘countervailing power’ (John Kenneth Galbraith); i.e. unconditional opportunities to file complaints and launch legal proceedings. This would not act as a guarantee, but it is at least a vital option for redressing the asymmetry between societal structures determined by corporate and site-related decisions and moral appeals to comply with human rights and environmental standards. Even then, companies would be a long way removed from the magnitude and quality of the task which states must undertake in protecting, securing and respecting human rights.

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16 It could actually be in the company’s interests to have its own sphere of influence organized in a way that ruled out discrimination, child labour or the labour of prisoners so that there was no benefit to be derived from violating human rights. Besides, treaties such as the ILO Conventions on Non-Discrimination and Freedom of Association apply to all corporate entities, even if their nation-state has not formally ratified.

# 5. The nature of the UN Norms

**It is above all this system of monitoring, reporting and complaints procedures that goes well beyond the previous codes of conduct.**

The 23 articles contained in the UN Norms are based on a broad understanding of human rights which incorporates the Civil and Social Covenants. The Norms include the ban on discrimination (Article 2), the right to security of persons (Articles 3 and 4)<sup>17</sup>, the rights of workers (Articles 5 to 9), consumer and environmental protection (Articles 13 and 14) and respect for national sovereignty and other human rights (Articles 10 to 12), all tailored to corporate activities and spheres of influence. The Norms are completed by detailed commentaries on the various Articles.

These UN Norms also contain implementation mechanisms and provide for both internal and external monitoring (Articles 15 to 19). Transnational enterprises are called upon to report periodically about the implementation of the Norms in their sphere of influence. This procedure has been drawn from the UN treaty system, which imposes a duty to report on states. In addition to this, the UN Norms envisage a settlement procedure and make provision for complaints and for reparations or restitution to the victims of human rights violations. If no agreement can be reached, courts may be called upon to rule. It is above all this system of monitoring, reporting and complaints procedures that goes well beyond the previous codes of conduct.

The UN Norms do not themselves define an institutional mechanism for evaluation and appraisal. Monitoring and reporting compliance with the UN Norms is above all considered to be the responsibility of companies. They should first and foremost implement the UN Norms and subject the implementation process to periodic evaluation by means of as yet undefined international and national mechanisms. States are, however, invited to establish the requisite framework and to implement the UN Norms as benchmarks in a national code.

Not one of these Norms is in itself new. What we are witnessing here is the systematic compilation of rights derived from legally binding UN Conventions, non-binding declarations and voluntary agreements<sup>18</sup>. Attention has also been given to business codes of conduct, NGO guidelines and framework agreements between transnational corporations and global trade unions. This is the sum total of currently existing rules on the human rights responsibilities of businesses, ordered within a corpus that aspires to universal validity.

<sup>17</sup> Including bans on participating in war activities, torture, disappearances, forced labour and the exploitation of children (cf. Article 3) and duties to promote human rights.

<sup>18</sup> Such as the Rio Declaration of 1992, the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises, the OECD's Guidelines for Multinational Enterprises and the Global Compact.

**The advantage of the UN Norms is that they systematise past experience founded on a coherent approach and universal validity.**

The advantage of the UN Norms compared with earlier company guidelines is that they systematise past experience founded on a coherent approach and universal validity. This postulate of universal validity is all the more forceful as the latest UN Summit in September 2005<sup>19</sup> has already deleted voluntary corporate responsibility not only for human rights and environmental standards, but also with regard to assisting sustainable development.

Critics of various complexions have argued that the summary listing and juxtaposition of agreements which are already binding to different degrees could encourage companies to use the UN Norms to bypass internationally binding Conventions such as those of the ILO, but the author believes these fears are unjustified. For one thing, the listing of assorted agreements should be interpreted as a summary and an outline of the present state of the art with regard to elements constituting a violation of human rights. For another, this document seeks to systematize, and the UN Norms act as a complement to individual instruments within the human rights canon without detriment to any specific procedure. The UN Norms are a kind of benchmark for negotiations on a future standard<sup>20</sup>.

Besides this systemizing function, the Norms provide novel added value due to the explicit postulate that businesses bear responsibility for human rights within their sphere of activity and influence. The term “respective sphere of influence” reflects the fact that a transnational corporation usually exerts an influence that stretches well beyond its basic business activity and hence bears a broader responsibility than a small, domestic company or a local factory.

Another added bonus is the provision for a complaints mechanism for victims, which may be interpreted as an attempt to weigh up past experience. Mechanisms for complaining about corporate activities are nothing new. Rebukes at shareholders’ meetings, consumer boycotts or recommendations to a company from an ombudsperson are already familiar. Complaints procedures are also used by the World Bank, the ILO, the OECD and NAFTA. Corporate accountability is a demand of the Aarhus Convention on the Environment (2003) and the Framework Convention on Tobacco Control from the World Health Organization (WHO, 2003). At national level we might mention the *Alien Tort Claims Act*<sup>21</sup> in the United States. The UN Norms have distilled and ordered all this experience, above all improving the legal status of victims of human rights violations.

Another new feature of the legal rights of victims accorded under the UN Norms is that not only those directly involved in the production process are entitled to file a complaint or initiate legal proceedings, but anyone potentially affected by business activity. Although the revised ILO Declaration on Multinational Enterprises of 2000 incorporated corporate responsibility for human rights standards, it restricted the scope of this to actions which were a direct part of the production

19 To review the implementation to date of the Millennium Development Goals which have been set for 2015.

20 The history of the Universal Declaration of Human Rights provides a good illustration of the impact which a statement of intent can have in a favourable context, leading to binding standards under international law, in this case the Civil and Social Covenants.

21 This law clears a path for suing a US company for damages in an American court for breaches of human rights or environment standards committed abroad.

process within the transnational company. This approach rules large stakeholder groups who suffer the consequences of harmful activities out of the running, as the examples in the next section show.

The monitoring procedure envisaged in the UN Norms ultimately acquires practical significance in the context of the complaints procedure. In this respect it carries greater weight than other procedures that do not envisage consequences of this kind. Although the UN Norms, following the usual principle in international law, are primarily a tool for regulating activities and resolving disputes, they also envisage reparation as a last resort. The monitoring procedure also provides an opportunity to prevent violent conflicts, for example over resources. This aspect deserves acknowledgement, not at least because companies also regard the combination of security and trade as an essential pre-condition for development.

Finally, discussion around the UN Norms brought together a wide range of forces in society: governments, trade unions, non-governmental organizations and other civil society associations from the fields of human rights, the environment, consumer protection and development co-operation, stakeholders and their organizations, international institutions and several multinationals. This feature is a further bonus compared with other regulatory mechanisms.

**The UN Norms are not exactly welcomed with open arms, but they are rated as a potential tool that can help to regulate the grey zones of transnational business.**

The receptiveness for the UN Norms shown by the few companies which have so far expressed their commitment<sup>22</sup> is founded on discussions conducted for some time about the ethical orientations and social commitment of companies in the global integration process. The UN Norms are not exactly welcomed with open arms in this context, but they are rated as a potential tool that can help to regulate the grey zones of transnational business and therefore worth a trial. The benefits to companies are linked to various expectations:

- Internationally uniform criteria for responsibility in their own sphere of business and influence mean that companies are less likely to be sued by victims than they would if standards varied, making proceedings relatively arbitrary and difficult to predict.
- The UN Norms apply to all businesses that operate in an international landscape and not just to transnational corporations. They overcome the (competitive) disadvantage implied by previous codes of conduct and guidelines, aimed primarily at TNCs.
- The image of the sector will be less dented by black sheep if the federation is committed to minimum standards, e.g. in the garment, shoe or toy industry. In fact, companies that are particularly committed to human rights enhance the reputation of the entire sector<sup>23</sup>.
- The transparency and clarity of the Norms imposes certain limitations on the potential for corruption in either direction.

<sup>22</sup> Such as *ABB, Barclays Bank, MTV Europe, National Grid Transco, Novartis, Novo Nordisk and Body Shop International*.

<sup>23</sup> According to the *Interfaith Center on Corporate Responsibility* in New York there were about 75 companies in the United States and Western Europe who had explicitly included human rights in their corporate policy by September 2004, including Ford Motor Company, McDonald's, Reebok and Walt Disney.

- It is not only in democratic theory that minimum social and human rights standards in market behaviour help stabilize social relations and thereby create more favourable conditions for medium- and long-term business. Of course, on the other hand there are companies keen to make fast profit from war-like situations, such as around the African Great Lakes<sup>24</sup>.
- The visibly growing market for ethical investments, for example by the pension funds of the major churches, offers a competitive advantage to companies who can demonstrate their commitment to fair trade, decent production conditions and the protection and promotion of human rights. There are even specialized ratings agencies devoted to this increasingly lucrative market.

The UN Norms provide an appropriate toolbox for developing business policy in these directions.

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<sup>24</sup> Cf. footnote 4.

# 6 The changing roles of social players

The UN Norms address a wide spectrum of social actors in order to secure the protection and promotion of human rights. The Norms take on board the changing role of these social forces in the wake of globalization, broadening the landscape of legally recognized defenders of human dignity and freedom. However, not all these players feel equally at ease with the modified role ascribed to them. Within the camp that basically welcomes corporate responsibility for protecting and promoting human rights there are those, including some trade unionists, who have expressed reservations about the UN Norms.

Their concerns are in some cases derived from a corporate philosophy. In the context of the ILO standards the trade unions are an institutionalized player, the only one on the side of the claimant. The same applies to the *International Framework Agreements* between trade unions and corporate groups, where the unions are the immediate negotiating partners in the field of minimum social standards<sup>25</sup>. This unique role would change with the UN Norms. The trade unions would continue to be a key advocate of the claimant's position, but no longer the only one. They would no longer necessarily be pivotal in implementing the norms or in monitoring compliance.

**Trade union critics do not have faith in the idea that other social forces can be mobilized in a similar manner to defend the UN Norms.**

Moreover, trade union sceptics recall the long history of organized struggle to achieve today's minimum standards for company workers. The ILO Conventions are anchored within labour movement traditions and its organized disputes. Trade union critics do not have faith in the idea that other social forces can be mobilized in a similar manner to defend the UN Norms.

This is due in part to the experience that it takes at least as much effort to build a network out of works council representatives from within the same globally active group of companies in order to assert such Conventions. The German Trade Union Federation (DGB) has so far held two training seminars on the OECD Guidelines<sup>26</sup>. In other words, if well-trained specialists skilled in the virtues of solidarity find it difficult to apply relatively binding instruments jointly within a multinational, how much harder is it going to prove to forge loose-knit groups of stakeholders and victims who often exist side by side or emerge spontaneously into a counterpart for transnational corporations, without any wedges being driven between them?

Compared with the ILO Conventions, these critical trade unionists tend, therefore, to class the UN Norms at best as "soft law" with no more clout than a recommendation. Besides, they fear that the UN Norms might undermine some established ILO procedures. Rather than wasting energies defending and implementing a vague

<sup>25</sup> Like between the German car manufacturer BMW and the International Metalworkers Federation. In the sector covered by the German trade union IG Metall there were 17 agreements of this kind in October 2005. Daimler-Chrysler and Faber-Castell have also set up framework agreements. These have both also signed up to the UN Global Compact.

<sup>26</sup> According to the Chairwoman of a DGB region.

new instrument, there are some, including representatives of the International Confederation of Free Trade Unions, who suggest it would make more sense to strengthen the nation-state again with all its legal and political powers to define society.

This argument that the nation-state should be reinforced in its capacity to protect and promote human rights is not easily dismissed. However, wielding it against the UN Norms overlooks, first of all, the fact that the UN Norms attempt to make up for the weakness of nation-states by granting international force to these rights while leaving it to nation-states to establish a framework for the domestic implementation of the UN Norms. To the extent that transnational corporations in particular are to be bound by human rights, this should actually reinforce regulation by nation-states.

On the other hand, this tenor of argument is simply losing touch with reality. Non-trade-union conflicts over the consequences of globally active business have now developed notable dynamics of their own, indicating the sizeable potential for mobilizing other social forces. Much of this is aimed at creating social conditions to protect human rights and enhance a life rooted in social security and cultural self-determination, for example by defending the local community fabric, ensuring livelihoods in the informal economy, and asserting environmental and consumer rights. Unlike the ILO Conventions, application of the UN Norms would treat all stakeholders equally as legal subjects.

Moreover, if organized protest against violations of human rights has changed, this has not only taken place outside the trade union movement. Some unions in the United States – such as the *Teamsters* in the transport sector, *Unite Here* in garments and catering and the *SEIU* in services – have consciously begun transforming their strategies to reflect the style of social movements, displaying greater similarity with Greenpeace than with a classical union like IG Metall. When the SEIU was fighting for better working conditions for cleaners in Los Angeles in the late 1980s, it backed its strikes and negotiations with media-savvy critical information for clients, suppliers and shareholders. The SEIU is still committed to closer collaboration with civil society groupings.

When *Volkswagen* decided in 1996 that it was going to close a freight centre in Delaware, the *Teamsters* organized a boycott of VW dealers. VW was forced to re-open the centre. In Germany we have witnessed similar methods by the service trade union *ver.di*, which mobilized critical consumer opinion during its dispute with the discount store *Lidl* over an in-house union and improved working conditions. The potential for social mobilization off the well-trodden trade union track is evidently greater and more powerful than some federations assume.

Many examples of publicly effective social mobilization by a whole range of associations against the unwillingness of governments and businesses even to merely satisfy national laws, however, highlight one particular factor: state policies tend to reflect the interests of big companies rather than the rights of their citizens, justifying this in terms of a superior “national interest” in entrepreneurial activity. In such scenarios the state’s genuine responsibility for compliance with human rights takes a back seat, a striking echo of TNC reticence. It is hardly surprising,

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then, if developing countries are not necessarily staunch advocates of the UN Norms, but have expressed concerns of their own. They fear that in the international competition to attract industry, the UN Norms – like social clauses – might detract from their location appeal.

But for real or potential victims the UN Norms are precisely the basis they need if they are not going to be played off against one another like pawns on a chessboard. The indigenous *Cofán* community in Ecuador have been fighting their case against *Texaco* on the basis of the Alien Tort Claims Act with the support of a regional indigenous umbrella organization<sup>27</sup> and environmentalists. In 1992, after prospecting for 20 years, *Texaco* left behind an ecological, social and cultural wasteland. Pollution from pipeline leaks alone caused twice as much damage as the sinking of the *Exxon Valdez*, which is seen as the biggest oil disaster in the history of the United States. The court proceedings – an early judgment ruled against the *Cofanes* – are also intended to counter-act an agreement between the government of Ecuador and *Texaco* in which the State of Ecuador renounced its claims to broad compensation for rehabilitating the contaminated area and sealing the sources of pollution. The *Cofanes* and their supporters called for a boycott of *Texaco* that met with a response in countries as far away as Norway<sup>28</sup>.

Similar conflicts and campaigns that have involved national tribunals and international human rights institutions<sup>29</sup> likewise indicate that calls for reparation after violations of human rights are going unanswered. One illustration of this is the poison gas disaster in the Indian town of Bhopal in 1984, caused by the *Union Carbide Corporation* (later *Dow Chemicals*). The accident left thousands dead. An Indian court promised survivors a few meagre alms by way of compensation from the Indian government, but the polluter walked away unpunished. In another example from India, small farmers have taken on the *Coca Cola* Group, which draws huge quantities of groundwater to make fizzy drinks and is depriving farmers of their right to clean drinking water. Dams constructed in Brazil, e.g. to assist aluminium production by the Canadian company *ALCAN* (in the state of *Minas Gerais*), violate the right of the local community to the healthy environment that sustains their livelihoods and, derived from that, to adequate housing and food. The Canadian mining operation *Glamis Gold* is threatening the existence of indigenous communities in Guatemala (Department of *San Marcos*) by mining for gold, which entails enormous water consumption and also the use of cyanide. In Brazil the global cellulose group *Aracruz Celulose* is attacking the land and community rights of the indigenous *Guaraní* and *Tupinikin* (state of *Espírito Santo*) by creating plantations of eucalyptus to make paper. The use of genetic engineering in agriculture, especially in developing countries, with unforetold risks to the right to food and the destruction of production methods adapted to local conditions, has also provoked vociferous calls for an international regulatory body to deal with conflicts of this kind, in particular to defend local stakeholders within the corporate sphere of influence.

27 CONFENIAE, *Confederación de las Nacionalidades Indígenas de la Amazonia Ecuatoriana*.

28 The *Tagaeri* and *Talomenani* in Ecuador, who are at risk from oil projects by *ELF* and *Pérez Compaq*, are also looking to consumers for support.

29 E.g. the American counterpart to the UN Human Rights Commission, the *Interamerican Commission on Human Rights*; attached to the Organization of American States.

Nevertheless, the question about who the key social players will be in the universal application of the UN Norms remains unanswered. It is true that organizational platforms similar to those of the labour movement still need to evolve for implementing the UN Norms. Campaign groups critical of neo-liberalism and counter-movements opposed to a global transformation structured around liberal market principles, such as *attac* in Europe, are only just beginning to cluster and organize victims of human rights violations and turn this into a powerful network. There have been other encouraging examples, like the *Business Leader Initiative* launched by *Human Rights Watch*. Under the patronage of Mary Robinson, the former UN High Commissioner for Human Rights, the initiative has for the last two years been running pilot projects to test practicable rules of conduct. Moderate success has been scored, too, by the *Clean Clothes Campaign*. This aims not only at achieving better conditions for workers in developing countries, but also promoting environment-friendly production methods.

In all these instances, stakeholders have come together, organized and articulated their demands, sometimes on the basis of international human rights or ILO conventions, sometimes using regional agreements. But not all these instruments apply equally in all countries. This is a fundamental flaw that the UN Norms can help to remedy, considerably strengthening the hand of human rights victims in the corporate sphere of influence.

**Organizational platforms similar to those of the labour movement still need to evolve for implementing the UN Norms.**

# 7 Outlook

Negotiations around the UN Norms are continuing at the United Nations, with further consultations still to be conducted. In August 2005 UN Secretary General Kofi Annan appointed John Ruggie<sup>30</sup> as his Special Representative on business and human rights. John Ruggie has been asked to examine how standards of corporate responsibility and accountability apply to human rights over the next two years and to submit some proven examples of best practice.

Most international business federations continue emphatically to oppose further discussion of the UN Norms, preferring voluntary company commitments. But a minority of companies have volunteered – unlike the federations – to participate in testing the UN Norms and thereby to explore practicable and effective rules.

Many governments in the industrialized world, including the European Union, also seem to prefer the more non-committal Global Compact to the UN Norms, regardless of the lip service they have paid, for example in the Final Declaration on Sustainable Development in Johannesburg in 2002. However, pressure is growing along with the suffering and problems caused by TNC activities, and it is safe to predict that stakeholders and victims will leave no stone unturned in organizing their ranks to resolve their distress. The UN Norms provide direction for asserting existing standards and recognized language in the field of corporate responsibility.

**It is safe to predict that stakeholders and victims will leave no stone unturned in organizing their ranks to resolve their distress.**

Non-governmental organizations in particular are pressing ahead with their efforts to take critical stock of the situation and also to indicate positive experience, for example, with how the mix of entrepreneurial initiative, legal obligations, ethical requirements and monitoring procedures can function in practice. The prospects for the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights will essentially depend, therefore, on the capacity of stakeholders, victims and their associations to mobilize.

Not that the UN Norms will take care of themselves. There are a few questions to thrash out. The norms architecture we have so far does not tell us what concrete constellation will be adopted for monitoring implementation of the Norms, especially in the international context. It is also not yet clear which international bodies are to be involved, and to what extent, if a company does transgress and no government is able or willing to take action against it. Article 18 of the UN Norms refers only vaguely to such an occurrence. The International Criminal Court has to date only been able to intervene in a few, particularly serious human rights violations, such as genocide. Other options would include an independent monitoring system borrowed from a UN treaty organ or the reporting and complaints procedures at the ILO.

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<sup>30</sup> Professor at Harvard University and key architect of the Global Compact.

The design of the periodic monitoring and complaints mechanisms is also as yet undetermined. There is concrete experience here with the reporting and evaluation mechanisms used within the UN treaty system, which could usefully be complemented by national review and compensation procedures. Drawing on the call made to European companies by the European Parliament, another conceivable option would be a system of compulsory reporting, with the future Human Rights Council a candidate for monitoring it. Answers are still needed to other questions, such as how sanctions should be imposed, or whether complaints can be filed anonymously. Some technical clarification is required as to different degrees of corporate responsibility and state assertiveness, to what extent the workforce, social milieu and environment fall within the company's sphere of influence, and differentiated levels of corporate complicity.

The answers to these questions cannot be confined simply to the judicial textbooks of international law. They must be formulated as a process that embraces political and economic activity with human rights as their foundation. The experience is already there in the UN system. The Office of the High Commissioner for Human Rights (OHCHR) began in 2003 to try harmonizing and clustering the rules and recommendations issued by international institutions on protecting and promoting human rights for states and UN bodies. Technical support and expertise could likewise be provided for adjusting national norms to the standards enshrined in the UN Norms and developing procedures for their stringent implementation and evaluation.

In this quest for a binding system that goes beyond the Global Compact as a learning forum for global business responsibility and the voluntary application of codes of conduct, we might be encouraged by the guidelines adopted by the FAO in September 2004 for implementing the right to food as a way mark for national and international development policy. This is another step towards a legally binding approach to asserting human rights, in this case the right to food.

Regardless of the open questions, we can claim this much: the discussion now under way about the institutional promotion of human rights as the third pillar of the UN system has kept protecting people from the negative consequences of business activity on the agenda, along with legal guarantees for reparation. In the debate about how exactly this should be tackled, the complaints procedure envisaged in the UN Norms has a key role to play, as it is only with the aid of such mechanisms that irregularities or omissions in corporate practice are normally uncovered. It seems equally evident that developing regulatory procedures and institutions calls for transparency, leading in turn to the involvement of as many players and victims as possible. The United Nations currently offer the best framework for maintaining transparency about the discussion and its outcomes. After all, one effect of this is to reinstate the primacy of the political dimension in the regulation of societal conflicts.

**The answers cannot be confined simply to the judicial textbooks of international law. They must be formulated as a process that embraces political and economic activity with human rights as their foundation.**

**The complaints procedure envisaged in the UN Norms has a key role to play.**

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