



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights "

Mr. Dzidek Kedzia
Chief, Research and Right to Development Branch
Office of the High Commissioner for Human Rights
1211 Geneva 10

26 October 2004

**Submission to the United Nations
Office of the High Commissioner for Human Rights
on
Business and Human Rights**

The International Commission of Jurists (ICJ) welcomes the opportunity to make a submission on the *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (the "Norms") following Decision 2004/116 at the 60th session of the UN Commission on Human Rights.

The ICJ is a global network of judges and lawyers, with more than 50 years of expertise in international law, rule of law and human rights and their practical application, including the extent to which non-state actors are bound, indirectly or directly, by international human rights and humanitarian law.

We welcome the decision of the UN Commission on Human Rights, for the first time, to give importance and priority to the responsibility of business corporations with regard to human rights. There is a need to move towards clearer and stronger global regulation of companies to prevent some of their activities leading to human rights violations.

Primary Obligation of States to Uphold Human Rights

International human rights law places the primary responsibility to implement and ensure protection of human rights on states. States are obliged to respect, protect and fulfil human rights. When non-state actors commit acts that are harmful to human rights, states are obliged under international law to take action to prevent and stop the violations and to provide victims with appropriate remedies and relief. States therefore have a duty to

ensure that human rights are respected by private corporations. They must create the legal and institutional framework to enforce this obligation.

The Norms elaborated by the Sub-Commission clearly reaffirm the primary duty of states under human rights law. The value of the Norms lies in having codified in one document the specific human rights that apply to companies. They provide a benchmark and make clear by which standard states must measure the behaviour of companies. For the first time, the duty of states to exercise "due diligence" in relation to companies is spelt out in human rights language.

Need for Direct Obligations on Companies

Frequently however, states are unable or unwilling to enforce human rights guarantees against companies. Some host states are too weak economically and politically in relation to transnational corporations in particular, and have no effective possibility to hold companies to account. Some states lack effective control over all or certain parts of the country, or are unable to regulate companies effectively because of other legal or political obstacles. In these situations international standards have started to, and must further develop, criteria that define the *direct responsibility* of companies under human rights law.

It is sometimes contended that human rights only bind states and not non-state actors and can therefore not be imposed on private companies. There are, however, no legal or conceptual arguments that prevent companies having direct responsibilities for human rights violations. It is clear that states may decide at an international level to recognise rights and duties of non-state actors. The Universal Declaration of Human Rights itself affirms the duty of everyone, not only states, to uphold human rights; international humanitarian law binds armed opposition groups; non-state actors can commit crimes under international law, such as slavery, crimes against humanity, genocide or war crimes - to name but the most obvious examples.

States are, of course, the primary actors of international law. Only states can create international law. But they can confer rights and obligations on individuals and companies if they so choose. This does not mean that companies are or should be bound by human rights law in the same comprehensive manner as states. Not all human rights can, by their nature, apply to companies. Some that can apply may have to be adapted to the particular characteristics of companies. The extent of companies'

responsibility needs to be more clearly defined. It is complementary to the primary duty of states.

Existing Soft Law Standards on Companies' Direct Responsibilities

Companies have already been conferred rights under international law. In bilateral investment agreements, for example, they have international standing to enforce their rights against states. In some appropriate cases they have been able to assert their right to enjoy a limited range of human rights found in international human rights treaties.

The area of direct corporate responsibility has been rapidly developing in recent years and member states of several international organisations have already concluded that companies *should* respect human rights principles. The *OECD Guidelines for Multinational Enterprises* and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* are significant because they are authoritative, if limited, high-level statements by governments that businesses have a responsibility to uphold certain human rights. These instruments explicitly accept the direct responsibility of companies. Similarly, labour standards, i.e. the human rights of workers, are directly binding on companies as employers in the tripartite ILO system. UN human rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights have also emphasised the responsibilities of private companies in their General Comments.¹

The Norms bring together these existing standards of soft law. They do not create or seek to create new international law, but collate disparate standards into one document. They do not create detailed and operational regulations that can be used to determine the specific actions of companies. Rather, they define in broad terms the human rights framework that applies to the activities of companies.

Need for Binding and Common Rules on Corporate Accountability

The ICJ believes that a mix of voluntary business initiatives and binding international legal rules are needed to guide the human rights behaviour of companies and ensure effective, global accountability. Recent years have witnessed a large number of codes of conduct and other voluntary commitments by individual companies and industries. Many of these initiatives are valuable and have been an essential step on the road to compliance: they

¹ See, e.g., General Comment No 12 on the right to adequate food, (1999), para 20.

contribute to building a consensus around some rights; create experience with implementation by management of human rights standards, and help to build a culture of compliance. Some codes have set higher standards than human rights, which only set out minimum rights.

However, the weaknesses of voluntary codes of conduct are clear: most are not supervised by an independent body and cannot meet the demand of the public for transparent and legal accountability; they differ greatly in the human rights standards they accept (many, for example do not accept freedom of association and the right to collective bargaining); their human rights clauses are often too general; they do not give any form of standing, remedy or relief to individuals or groups of individuals whose human rights are abused. We must recognise the limits of voluntarism and pursue a complementary route towards legal responsibility, offered by the Sub-Commission's Norms.

If accountability is to be taken seriously, it requires remedies for victims of violations and effective redress and implementation of the rules. In the end, voluntary codes offer victims charity, which can be granted or withheld at will. Binding rules give rights to victims. All must accept binding rules and not only those who choose to follow them. Common, binding rules will not be selective with standards and will need to reflect all the human rights recognised by the international community.

A uniform, common standard is needed, a yardstick by which companies can assess their own rules and their actions. This common, minimum standard will create a level-playing field for all companies, while leaving ample scope for the more enlightened and progressive companies to adopt higher standards. It is better to develop clear, binding obligations, instead of continuing on the path of pure voluntarism and confusion.

Human Rights as the Common Binding Standard

There is a clear advantage in using human rights as the common minimum standard. Human rights standards rise above the array of different existing rules and regulations found in labour standards, criminal law, health and safety standards, corporate law and others, even though many of these reflect human rights obligations. Human Rights are the most fundamental rights of the person. As the International Council on Human Rights Policy has written, international human rights law "is the only existing internationally-agreed expression of the minimum conditions that

everyone should enjoy if they are to live with dignity as human beings".²

With the effective implementation of voluntary codes of conduct and the Norms, considerable progress will have been made towards the emerging human rights accountability of business. The Norms and other instruments are already being tested by some companies. Applying them in practice in specific situations will help to clarify their content and pave the way further to understanding in what ways companies can and must respect human rights.

The United Nations as the Legitimate Forum for New International Human Rights Norms

The United Nations is the most appropriate and legitimate forum to develop such common, international rules. The United Nations is the guardian of international human rights and international law, and is the most appropriate institution to develop such an international instrument. The United Nations also plays the role of a forum and is able to bring together all the different stakeholders from different sectors of society and different parts of the world. This ability to consult widely was evident during the preparation of the Norms, which are the product of broad multi-stakeholder process including companies, governments, legal and business experts and non-governmental organisations.

Future Tasks

The ICJ considers that the Commission on Human Rights should continue the process of study, clarification and discussion started this year. Some concepts in the Norms require more development to be sufficiently clear, practical and able to help regulate the actions of companies. The ICJ believes that two areas identified in the Norms are in particular need of clarification:

1) The concepts of "sphere of influence" and "complicity":

As stated above, companies will exercise their human rights obligations in practical ways that differ to governments. Companies should only be responsible for violations that come within their "sphere of influence" - within which they have sufficient knowledge and control to justify being held accountable. Companies may also be "complicit" in human rights violations committed by governments or other actors such as armed opposition groups. These concepts need

² International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, Geneva, February 2002, at p 15.

considerable more legal clarity. It is necessary to define more clearly the conditions under which companies can be held to account, the parameters that define the concepts of "sphere of influence" and "complicity". Existing concepts of tort law, criminal law and other relevant areas of law will help in elaborating the legal meaning of these concepts.

2) Procedural questions, such as extra-territorial or universal jurisdiction, the doctrine of the corporate veil and the doctrine of *forum non conveniens*:

States on whose territory violations are committed (host governments) are often unable or unwilling to enforce their legislation and there is no foreign or international mechanism to counter this deficit. A first step could be to establish effective extra-territorial reach of legislation or universal jurisdiction for some of the most flagrant human rights violations committed in other countries. To develop these possibilities, it is necessary to map existing systems and to analyse comparative and international law in this field. It is also necessary to identify the obstacles in national legal procedures that prevent victims or others holding companies accountable for their actions. These obstacles that should be studied include the difficulties of piercing the "corporate veil", the *forum non-conveniens* rule, the high cost of litigation, the fact that in most cases only a person or group that has suffered direct harm can bring proceedings against a corporation and the long delays in most litigation.

The ICJ encourages a process of further exploration of the legal and other issues that need clarification. It will need both input from independent experts who are able to end confusion about points of law and an open and transparent series of consultations involving all stakeholders, including business, governments, civil society, trade unions, UN agencies. This process will need resources from the UN system and the continuing coordination and engagement of the OHCHR.