

Realising corporate accountability

Why the United Nations human rights norms for business are necessary



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The substantial growth in economic power and the general influence of corporations over the past 13 years is undeniable.

In 1990, the private sector accounted for only 25 per cent of investment into the developing world, with the other 75 per cent of investment comprising of foreign aid. By 1996, 75 per cent of investment was delivered by the private sector.¹ In 1991, 19 countries had greater revenues than General Motors and three corporations were among the top 28 economic entities. In 2000, only seven countries had greater revenues than General Motors and there were 15 corporations among the top 28 economic entities.²

Much literature has been published in the past decade about the growth of voluntary, non-binding corporate responsibility initiatives. However, until recently there has been little interest in the international regulation of transnational corporations (TNCs), aside from a few non-governmental organisations (NGOs), activist lawyers and backbench parliamentarians.

The *UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* (UN Norms for Business)³ identify human rights obligations applicable to business, drawn from existing adopted UN instruments. It is a unique instrument because it attempts to cover the field of human rights obligations, and because it is the first newly initiated, truly international attempt to impose binding human rights obligations on TNCs since the 1970s. In April 2004, the UN Commission on Human Rights requested the Office of the High Commissioner for Human Rights to report on the scope and legal status of all existing initiatives and standards on business responsibilities with regard to human rights, including the UN Norms for Business.⁴

Is the only social responsibility of corporations that of profit?

Stephen Matthews, deputy chairman of the Australian Shareholders Association thinks so,⁵ as do many at the conservative think-tank, the Institute of Public Affairs.⁶ They advocate the “amorality” of profits made by corporations.⁷

While it is acknowledged that profit maximisation is certainly central to the endeavour of business activity, is it possible for corporations to ignore human rights abuses within their sphere of influence? What, if any, are the human rights obligations of TNCs and other business enterprises under international law?

All corporations and other business enterprises are “organs of society”, as referred to in the preamble each of the documents in the *International Bill of Rights*⁸ and “it has been widely accepted since the Second World War . . . that other actors, including individuals and companies, participate in the international legal system”.⁹

It follows that, at a minimum, corporations have the same responsibilities as the rest of us with regard to respecting the human rights of others. There is, however, a strong argument to suggest that corporations, and particularly TNCs, have human rights obligations over and above those of the individual. There is “no conceptual obstacle [that] prevents states from requiring companies to abide by legally binding international human rights obligations”, as the “polluter pays” principle in maritime law proves¹⁰ and “one can see a conscious and gradual evolution of international law towards clear, binding norms that are directly applicable to companies”.¹¹

Government regulation

A perusal of the corporations law statutes of Australia, the UK and the US would lead most to the conclusion that social issues such as human rights have no legitimate role to play in the regulation of corporations.¹²

Particular aspects of the corporate form, such as separate legal personality, limited liability and the corporate veil make it difficult to hold corporations liable for criminal or civil wrongs committed, particularly those committed extra-territorially. In common law jurisdictions such as Australia, the US and the UK, firstly the tortious or criminal act must come under the jurisdiction of the court,¹³ and second, the concept of *forum non conveniens*¹⁴ must be overcome.

However, the fact is that “all domestic legal systems recognize [sic] that corporations can be held accountable for harm they cause to others”.¹⁵ A look at other laws that impact on corporations, make it clear that corporations and other business enterprises within Australia and other jurisdictions can be, and are, held liable for numerous crimes and torts.¹⁶

Since 2000 there have been unsuccessful attempts in Australia, the US and the UK to introduce legislation that requires corporations and their subsidiaries to meet international human rights obligations when operating extra-territorially.¹⁷ The existing US *Alien Torts Claims Act* 1789 (US) (ATCA) also focuses on compliance with norms of international law. Despite the potential of the ATCA to hold

corporations accountable for human rights abuses committed outside the US, it has yet to find judgment against a single corporation.¹⁸

Voluntary initiatives

The increased emphasis on corporate responsibility in the 1990s has seen a proliferation of codes of conduct,¹⁹ although it is generally large corporations with a high public profile and a tendency to rely heavily on their corporate image that see the advantage of signing up to these codes.²⁰ Many of these codes consider human rights and social standards, although the quality, detail and content vary enormously between codes.²¹

While voluntary initiatives have the potential to positively impact on corporations behaviour with regard to human rights, it has become clear that in reality, without some form of regulation, voluntary codes will generally have a minimal impact on corporate behaviour.²²

What do the UN Human Rights Norms for Business add?

Professor David Weissbrodt, primary author of the UN Norms for Business, described the need for, and aims of, the norms as:

“International human rights guarantees are universal, interdependent, and indivisible.”

There is a recognised need for a more comprehensive, more specific, more authoritative set of guidelines at the international level. The aim of these guidelines is to provide a clear statement of what the international community regards as the human rights responsibilities of business, drawing on existing standards”.²³

It has been noted that the UN Norms for Business “bear the potential to go beyond all existing international instruments for corporate responsibility in terms of their legal binding character”.²⁴ The document can be viewed as binding in the sense that it applies human rights law under ratified conventions to the activities of TNCs and other business enterprises.

Due to the thorough consultative and drafting process that included many corporations, governments, NGOs, UN agencies and other interested parties, and finally resulted in the UN Norms for

Business, it is difficult to fault their validity on the basis of lack of participation from any side.²⁵ The exhaustive and varied list of codes and initiatives referred to in the various drafts of the commentary are also an important consideration as to whether the document is imposing realistic obligations on TNCs and other business enterprises.²⁶

However, the UN Norms for Business have their critics. The International Chamber of Commerce and the International Organisation of Employers oppose the adoption of the UN Norms for Business believing that any human rights standards applying to corporations should be voluntary and developed by businesses themselves, and that a one-size-fits-all approach will stifle corporate innovation.²⁷ Further opponents argue "that [the UN Norms for Business] will simply provide yet another false debate where campaign groups who don't have to work out how to make the guidelines work in practice will embrace them".²⁸

While some criticism is valid, such as the lack of clarity regarding some obligations and the lack of clear implementation procedures,²⁹ much of the criticism appears to reflect corporate self-interest and an unjustified fear of regulation.

Alone, the UN Norms for Business do not satisfy the need for concrete solutions to the many problems that TNCs and other businesses encounter, and there is no suggestion that this is their purpose. However, calls from industry for importance to be placed on processes and procedures, can be answered through complimentary initiatives such as the UN Global Compact learning forum.³⁰

The UN Norms for Business marks a significant shift in the context of international corporate accountability. The high water mark for corporate self-regulation and voluntary initiatives occurred in the 1990s. The international community's interest in regulating TNCs and other business enterprises is partially borne of the assertion that some principles, such as human rights, need to be given the primacy they deserve, and are developing to encompass private actor obligations. Importantly, this shift is also reflective of the importance which corporations themselves are putting on good corporate citizenship, increasingly acknowledging their social and environmental obligations through voluntary initiatives. This has allowed for a space in which international and national human rights regulation and voluntary initiatives can compliment each other.

The UN Norms for Business is a timely and important document. This is evident in its potential to create an atmosphere in which TNCs are obliged to acknowledge greater accountability for human rights violations within their sphere of influence. ■

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