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Business and Human Rights: Towards legal accountability

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Introduction

Over the past decade companies have begun to look seriously at human rights issues. Some companies - often under pressure from the public - have adopted policies in relation to human rights. Hundreds of companies have joined the UN's Global Compact and thus committed themselves to human rights principles.

The initiatives taken so far, however, for the most part rely on the voluntary compliance of companies. Self-regulation through codes of conduct and learning through 'best practice' evaluations are typical. Governments too - increasingly aware of the need to ensure companies headquartered in their country act decently abroad - have focused on voluntary initiatives: creating roundtable or 'stakeholder' discussions, or adopting voluntary principles for conduct in specific sectors. Even activists have looked primarily to non-coercive means - public campaigning, boycotts, ethical investment etc.

Voluntary initiatives are important. Companies are more likely to act in a certain way if they have agreed themselves that the course of action is correct. Increasingly, however, the various parties involved in the debate recognise that voluntary commitments alone are insufficient. There is a role for legal regulation and - when the subject matter is human rights - there is in particular a role for international human rights law.

In my talk today I want to look at three questions:

· Why are voluntary efforts to hold companies accountable in relation to human rights insufficient?

· The degree to which existing international law already creates legal obligations on companies, and

· Ways to strengthen the legal accountability of companies on human rights issues

Failures of voluntarism - need for law

Why is law relevant? Why are voluntary initiatives insufficient? Why should law play a role?

National law already applies

The first point to make is that companies are already subject to many laws that, in effect if not in name, regulate companies in relation to human rights. Anti-discrimination and equal opportunity laws, laws protecting unions and the right to organise, laws punishing companies that commit egregious environmental harm - all of these laws can be seen as protecting human rights.

Of course, the problem - in an era of global economic integration - is that the degree to which such laws are found or enforced varies enormously from country to country (taken up below).

Power must be constrained by law

A second point in defence of law is to recall that a primary purpose of law is to place constraints on the exercise of power - this is particularly true of human rights law, conceived originally to protect the individual against the abuse of state power. Although the case is often overstated, it is undeniable that companies wield considerable power and influence. The actions of business have a profound effect - for better or worse - on individuals. It is not surprising then that - as with other powerful institutions - there are efforts underway to constrain that power.

Law has a deterrent effect

Third, the law acts as a deterrent. Legal regimes - in contrast to voluntary codes or self-regulation - emphasise principles of accountability and redress. Breaches of the law are punished; people whose rights are violated are entitled to damages or other forms of restitution.

Voluntary initiatives tend to have much softer accountability mechanisms, or, indeed, none at all. For example, companies that enter the UN Global Compact are required to commit themselves to human rights principles, but the Compact includes no mechanism for monitoring whether they do so.

In short, companies will take more seriously claims grounded in law. The potential penalties for non-compliance and the risk of being labelled as law-breakers create risks that cannot be ignored. Moreover, the efforts of advocates, civil society groups, and workers to ensure corporate accountability will be strengthened - and seen as more legitimate -- if grounded in legal obligations.

But why international law?

Having made the case for law, however, it may not be obvious why international law is relevant. If we accept that legal regulation is necessary and appropriate, shouldn't we leave it up to national governments and national legislation?

Backstops national law

The short answer to that question is "Yes". In this area, as in many others, international law cannot replace national law. Even if clear international legal rules were developed to bind companies to respect rights, we would still depend for their enforcement on national courts and agencies. This is why the first point to emphasise is the need to strengthen national law.

Benchmark for national efforts

Properly understood, international law in this area would complement - not replace - enforcement at national level. International human rights standards would provide a benchmark against which national legal systems could be assessed.

Universal acceptance

However, the greatest value of international human rights law is its universal relevance and - to an extent often under-estimated by companies - near universal acceptance. TNCs operate globally. So do many NGOs. They need, therefore, ethical standards of global relevance. What better ethical standard than international human rights? These are principles signed onto - in one form or another - by all governments.

Where a company adopts its own code - no matter how good it is - it will always be open to challenge on the grounds that it reflects just one ethical viewpoint.

Law complements voluntary initiatives

In stressing the case for law, I do not want to leave the impression that voluntary commitments or self-regulation have no role to play. On the contrary, initiatives like the UN Global Compact are of some value. And even in the absence of law, company commitments allow campaigners opportunities for lobbying companies.

In the absence of a legal framework, however, voluntarism alone will not take us that far. Without a global "bottom line", that's enforceable against all sizeable companies, self-regulation will remain contested.

Amnesty International's experience

Amnesty International's own experience of working on human rights issues with governments has repeatedly demonstrated the importance of law. All of our work in relation to governments, however, is grounded in the fact that there is a framework of international law which creates minimum obligations.

For many years we have asked companies to voluntarily support basic human rights principles, and we will continue to do so. We have seen, however, that this is insufficient.

· First, only the most enlightened companies have agreed to include references to human rights in their own codes of conduct. Less than 40 have done so.

· Second, we have found that some companies exploit the absence of clear agreement on a legal bottom-line to argue that they are not required to respect human rights principles.

· Third, leaving the debate in the realm of voluntary commitments has, in practice, too often let governments off the hook. As discussed below, governments have clear obligations to ensure companies respect human rights. Dialogues on human rights and the private sector that leave out the role of law altogether play into the hands of governments who are failing to live up to these obligations.

International law and companies

Instruments like the Universal Declaration of Human Rights were drafted with a view to placing constraints on states, and state agents. And international law traditionally set rules

among states, not private actors.

Increasingly however, international legal standards - including those protecting human rights -- are being applied to other actors. Armed groups, international financial institutions, individuals who commit crimes against humanity, and companies are coming within the scope of international human rights principles.

These agreements, nevertheless, can have a legal effect on companies. Such an impact might arise in two ways:

Indirect obligations

States have a duty to protect human rights and in consequence must ensure that private actors, including companies, do not abuse them. This duty on states gives rise to indirect obligations on companies.

Human rights used to be thought of us giving rise to negative obligations - do not torture, do not imprison unfairly, do not interfere with privacy, free speech etc. In such a conception, the focus was on violations by the state and its agents.

Today it is widely recognised that obligations in regard to human rights include taking positive action - to train police so that they do not torture (and punish those who do), to invest in courts and legal aid to ensure fair trials, etc. It follows naturally that positive action to protect rights includes protection against abuses emanating from private actors. Companies are very significant private actors and in fulfilling its duty to protect rights the state will need to put in place laws that impact on companies.

Direct obligations

International law can place direct legal obligations on companies, which might be enforced internationally when states are unable or unwilling to take action themselves.

Though less strong than indirect obligations, there is some basis for extending direct legal obligations to companies. For example, the Preamble to the UDHR states that "every individual and every organ of society" should promote respect for human rights. [Also the ILO Tripartite Declaration (of Principles Concerning Multinational Enterprises and Social Policy), adopted in 1977, states that companies "should respect the Universal Declaration of Human Rights and the corresponding International Covenants [on civil and political rights, and on economic, social and cultural rights]" The OECD Guidelines for Multinational Enterprises, originally prepared in 1976 and revised in 2000, provide that MNEs should "respect the human rights of those affected by their activities consistent with the host government's international legal obligations and commitments."]

The precise legal effect of these various declarations has not been conclusively determined. It is the case, however, that increasingly advocates are citing such standards in national courts to establish liability where the scope of national law is in doubt.

It is also the case that individual company officers might be criminally liable under international law if responsible for crimes against humanity (e.g. systematic or widespread policies of murder, slavery and trafficking, torture, or forced and arbitrary displacement of people).

Perhaps more significantly, a trend towards establishing clear and direct legal obligations is emerging. A Working Group of the UN Sub-Commission for the Protection and Promotion of Human Rights has prepared draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The draft states clearly that:

" transnational corporations and other business enterprises, their officers and their workers have human rights obligations and responsibilities".

Further, in Article 1 the draft provides support for the notion of both indirect and direct obligations on companies:

"States have the primary responsibility to respect, ensure respect for, prevent abuses of, and promote human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the to respect, ensure respect for, prevent abuses of, and promote human rights recognized in international as well as national law."

Amnesty believes both direct and indirect obligations should be strengthened and, to this end, makes the following recommendations:

Strengthening legal accountability – key steps

1. **Emphasise obligations on national governments.**

Primary responsibility for protecting human rights lies with national governments; after all, it is they who have signed up to international treaties and, in the end, only governments can establish and operate the institutions needed to give full effect to human rights.

The most important means to ensure companies respect human rights remains effective domestic legislation - laws and regulations that protect workers' rights, the environment, health and safety in the workplace, and that prohibit discrimination, the use of forced or child labour, or interference with people's family or community life. Such laws, moreover, will be pointless in the absence of well managed and resourced agencies to monitor implementation and take action to punish and remedy breaches of the law.

The United Nations can play a key role in reminding governments of their responsibilities in these areas. However, it should not be left to the UN. Companies and associations of business, individual governments (especially from powerful countries), international financial institutions, international trade and economic organisations like the OECD and G8 - all could play an important role in persuading and assisting states to develop the capacity and willingness to ensure a good legal framework is in place regulating company behaviour. Such actors have not shied away from pointing out the weaknesses of, for example, banking regulation, commercial law, or the functioning of courts in relation to disputes over investment. Similar attention ought to be given to how national legal systems protect individuals against abuse of their rights by private companies.

2. **Support the development of international law.**

As discussed above, there is some basis in existing international law for extending direct legal obligations to companies in relation to human rights. International law is not only for states. And human rights obligations can extend to non-official actors. Multinational companies already have rights and benefits under international law, and it is natural that they assume certain obligations.

In the short term, the UN, governments and companies should support the work of the UN Sub-Commission (the expert body referred to above) to agree draft Norms on the Responsibilities of Transnational Corporations. This text ought to be agreed in the near future. When it is AI will lobby to ensure it receives the endorsement of governments and companies. Some business associations, including the International Chamber of Commerce, have spoken negatively of the draft Norms. The draft Norms set out basic minimum guarantees in relation

to human rights - they emerge after extensive consultation, including with people active in the private sector. Companies claiming to be leaders in relation to human rights should endorse this process and throw their weight behind the draft Norms. The UN Global Compact should also support the Sub-Commission initiative. Indeed, when agreed, the Norms could provide a sensible way of putting flesh on the rather vague references to human rights principles in the Global Compact.

3. **Strengthen the UN monitoring function**

Some of the voluntary standards referred to above do include reporting obligations, and even, in some cases, a procedure that permits complaints to be brought. There is no specific international procedure, however, dedicated to the oversight of companies in relation to human rights. The UN Global Compact does not include a monitoring function to assess whether companies who sign up to the Compact abide by its principles. The UN bodies that monitor the implementation of human rights treaties are confined to scrutinising state behaviour. Procedures under the OECD Guidelines or the ILO Tripartite Declaration are not specific to human rights (as they include numerous environmental and social principles).

Amnesty International believes that the United Nations needs to put in place a mechanism that would allow for public scrutiny of companies' human rights performance. Of course, no mechanism could hope to report on the hundreds of thousands of large companies in the world, nor even on the several thousand transnational corporations. It would be possible, nevertheless, for criteria to be drawn up to ensure this mechanism dealt with the most important and egregious allegations of corporate abuse of human rights. The person or group appointed might report annually to the UN Commission on Human Rights on efforts to ensure companies respect human rights. She/he/they would be empowered to meet and receive information from companies, governments and NGOs, and to undertake field visits. The mandate might include researching and making recommendations on ways of strengthening legal accountability including through national and international law. The analysis provided could be an excellent means of clarifying international legal principles.

4. **Develop clear rules on complicity**

It is governments and political authorities who are still responsible for most human rights violations. In many cases a company's human rights record will come under scrutiny as a result of the company's association with a repressive government. Companies signing up to the UN's Global Compact make a pledge not to be "complicit" in human rights abuses. Many of the high profile court cases against companies alleging human rights abuse do, in fact, turn on the degree to which the company was complicit in abuses committed by political authorities.

The meaning of "complicity", however, is not self-evident. The charge of "complicity" arises across a range of situations, from when companies do business in countries where there is systematic human rights abuse, to where there is evidence that a company actively colludes with those in power to repress rights. In between are situations where a company might benefit from human rights abuses (e.g., the banning of trade union activity) even though it did not actively support such policies, and where a company's contractual association with the government may make it liable for abuses arising in the course of the joint venture.

Companies can legitimately demand that notions of legal complicity be clearly distinguished from a charge of moral complicity. At present, there are no clear international legal rules on when private actors might be held complicit in human rights abuses committed by political authorities. Court cases in the United States have drawn on principles from domestic and international criminal law, as well as relevant principles of vicarious liability arising in civil law.

Efforts should be undertaken to adopt principles/guidelines that would spell out in as much detail as possible when private actors like companies might be held complicit in law for abuses committed by political authorities. This might be accomplished through a meeting of

states, companies, international lawyers, and NGOs - perhaps convened under UN auspices. If agreed, such principles would be very useful for national courts and could act as a guide allowing for a coherent development of law in this area.