Human Rights and Transnational Corporations: Beyond UN Norms?

A summary of discussion at the International Law Programme Discussion Group at Chatham House on 21 October 2004; participants included legal practitioners, legal academics, representatives of the business community, of NGOs, and of UK Government Departments.

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This was the second meeting of the International Law Discussion Group at Chatham House relating to the responsibilities of transnational corporations with regard to human rights. A summary of the first meeting can be found on the Chatham House website: www.chathamhouse.org.uk.

The draft United Nations norms, referred to in the title of the meeting, were discussed by the Commission on Human Rights in April this year, and while the Commission affirmed that the norms, as a draft proposal, had no legal standing, it confirmed the importance and priority it accorded to the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights.

A. Is the content of the standards set out in the draft Norms acceptable and workable and if so, is there a value in a new document in some form or are existing standards sufficient?

It was explained that the Business Leaders’ Initiative on Human Rights (a three-year initiative started in May 2003, involving ABB Ltd, Barclays PLC, National Grid Transco PLC, the Novartis Foundation for Sustainable Development, Novo Nordisk A/S, MTV Networks Europe, The Body Shop International PLC, Hewlett-Packard Company, Statoil and GAP) was in the process of initiating an evidence-based sectoral approach to understanding the content of the Norms. The BLIHR had recently made a submission to the Office of the UN High Commissioner for Human Rights.

(i) Is the content of the Norms acceptable?

The speaker maintained that the inclusion of the full spectrum of civil, political, economic and social and cultural rights was generally acceptable to the participating businesses, though the BLIHR considered the economic, social and cultural rights to be rather squeezed in under article 12 of the Norms. The inclusion of labour rights was also welcomed, with reference to the International Labour Organisation core Conventions. However, that was not without its challenges: ILO “core” Convention No. 98 on collective bargaining was a challenge for those working in, for example, the USA and China. Even in the UK, domestic legislation falls slightly short of the international standard. Many companies were also worried by the inclusion of the living wage concept in the Norms. A further difficulty arose from the difference of opinion within the UN itself: the ILO wrote a letter (when the Norms were being discussed in Geneva) distancing itself from certain aspects of the Norms. Furthermore, there are different regional perspectives, such as the US Council for International Business, which does not fully subscribe to the inclusion of economic, social and political or labour rights.

Universality and indivisibility of human rights. It was considered a great advantage to have a single framework to bring the three strands of (i) civil and political, (ii) labour rights and (iii) economic, social and cultural rights, together. It was also considered that human rights gives a back-bone to corporate social responsibility which is losing its credibility because of its subjectivity, philanthropic approach, and the wooliness of the culturally relative approach.
However, other areas of the Norms presented questions. Should **Environmental Protection** be in a human rights document? Human rights were human centric, whereas some environmental protection needs such as ‘biodiversity’ did not only relate to servicing human needs. The presence of the precautionary principle here raised questions. Similarly with **Consumer protection:** the Global Reporting Initiative (“GRI”) deals with consumer protection far in advance of the Norms.

**Monitoring and reporting.** Progressive companies like the progress being made by the GRI and see great opportunity in the GRI strengthening its own indicators, perhaps moving some of its social indicators into the human rights area. BLIHR have carried out a mapping exercise between the content of the Norms and the GRI indicators, and found much convergence between them. There is interest in bringing the two together.

(iii) **Is the content of the Norms workable?**

BLIHR are at an early stage in testing the workability of the content of the Norms. There is clearly a lack of knowledge about what does and does not work from the business perspective, and there are very few human rights based tools. Even for the Global Compact, for example, most of the learning concerns only environmental and labour rights principles. Some experience suggests that the Norms are workable: The **Ethical Trading Initiative**, based in London, focuses on labour rights within the supply chain in the retail sector. Some businesses do not understand that many of these principles have to be applied holistically across their business. It is well-known that some companies which have relatively good supply chain records, do not roll out collective bargaining ILO convention 98 for their shop staff.

The **Global Reporting Initiative** in Amsterdam provides an overlap between their social indicators and the content of the Norms. Its definition of human rights is largely restricted to civil and political rights; economic, social and cultural rights comes under the social indicators. The **Danish Institute of Human Rights** in Copenhagen have been working on a **human rights compliance assessment tool** which covers most of the content of the UN Norms, but looks at minimum standards, particularly at compliance issues.

Other initiatives relate to some of the content of the Norms (the **Voluntary Principles on Security and Human Rights**, which relate to the extractor sector, mainly in the field of civil and political rights and the **Equator Principles following from the IFC guidelines**).

BLIHR have recently **mapped out the content of the Norms in a matrix** (to be found at the back of their first report “Building Understanding”). Many companies have indicated that this is very useful in allowing them to map out their activities around the world within the content of the Norms. Furthermore, the matrix has the advantage of categorising these responsibilities as either ‘minimum’ (compliance (legally) driven), ‘expected’ (not purely voluntary, as driven by market and market forces, largely sectorally based) or ‘desirable’ (dependent on leadership) behaviour.

However, obstacles arise with some concepts, such as “sphere of influence” and “non-complicity” on which the Norms sit (and which also form the first two principles of the Global Compact).

(iii) **Is there value in a new document, or are existing standards sufficient?**

The existing Norms are good at signposting existing UN Conventions on human rights. But is something legally binding required? When a business is entering a country where a government is either unwilling or unable to protect human rights there is a difficult question as to what the fulfilment of human rights would mean for the business. Human rights have traditionally been the role of government. Do non-state actors have direct human rights responsibility? This is a confusing situation for businesses. Legal advisers will tell them that only governments can commit human rights abuses. Other human rights lawyers, however, point to the International Criminal Court and other developments, saying that the progressive end of human rights points to increasing human rights responsibilities of non-state actors.
Furthermore, it seems that some of the worries that governments have about giving non-state actors direct human rights responsibilities are unrelated to business and have to do with terrorists, community groups, freedom fighters etc. But BLIHR is on the progressive end of the discussion. Businesses should behave within the spirit of existing human rights law.

B. What practical and acceptable processes could be devised to ensure the implementation of international standards for transnational corporations?

Another speaker addressed this question. As a preliminary point, it was suggested that an inherent trap in this question related to the fact that any plausible solution would depend on what one thought needed to be fixed in the first place. Thus, the more sceptical one was that something needed radically to be fixed, the more sceptical one would be about how realistic any suggested proposals were.

The first step was to look at what obligations it was said needed to be imposed on companies. Creative solutions could then be looked for, away from false polarisations between, for example, voluntary and mandatory approaches. The real issue, it was suggested, was what were the various points of entry for the law? The following distinct points of entry were suggested: contractual terms, articles of association of companies, binding national laws to constrain companies from the outside.

It was also noted that despite some difficult questions about which particular human rights ought to be treated as directly applicable to companies, the idea that human rights cannot apply to entities such as companies is not one followed by the UK. The Human Rights Act 1998 which binds “public authorities” (s.6(1)) carefully states that human rights obligations relate to any person certain of whose functions are “functions of a public nature” (s.6(3)(b)). That suggests a starting point by way of analogy that could, at a minimum, be stretched to cover multinationals that can be said to be carrying out public functions.

A more difficult issue was what could be taken to be the content and scope of obligations for human rights. It was suggested that four distinct kinds of potential obligations could be seen to be at play in the Norms and elsewhere. These were not necessarily binding obligations at present, but could be transposed into the law.

(a) An obligation not to damage

The basic obligations not to damage which were found in the Norms and elsewhere were health and safety obligations, obligations not to discriminate, and obligations not to prejudice labour in their organising efforts.

Within the domain of obligations not to damage, there is a problem about the scope of legitimate influence of companies. For example, on the question of refraining from forcible eviction from land: if the government carries out the evictions, is this a government responsibility, or still a business responsibility? There are different views. Another such issue relates to security forces used to protect investments.

(b) An obligation to provide, at internationally recognised minimal levels

The best example of this is the obligation to provide a minimum wage. The problem here is whether this includes an obligation to provide, for example, adequate housing (as mentioned in the Norms), or an obligation to satisfy the dietary needs of employees, or others that are affected by the operation of the business?

(c) An obligation not to impede the progress of people or institutions affected by what the company does

This obligation sometimes raises the harshest issues of scope / limits of responsibilities. One of these has to do with the obligation not to impede sustainable development. Sustainable development includes the need to remove internal obstacles to the ability of a society to renew its resources, and thereby become less dependent on external providers.
One of the areas that is a problem for corporations relates to local capacity building: the problem of helping states, or at least not impeding their progress, in their own attempts at local regulation. One of the striking features of investment agreements made between multinationals and various States is the demand that the States in which investment occurs refrain (for periods of up to 40 to 70 years) from enacting any new substantial regulation affecting the project. These agreements are purporting to limit the ability of host governments to regulate core matters of social, revenue, and planning. This leads to the question of what this is doing to the ability to manage sustainable development.

(d) An obligation to improve

The obligation to improve can also be deduced from the Norms. Rather than an obligation not to impede progress, this is a much more positive obligation: e.g. paragraph 12 of the Norms: "to contribute to their realisation [ie. of social and economic rights]...". This means contributing to progressively better levels of, for instance, health and safety, dietary concerns, and housing concerns, that are identified by bodies that interpret the obligations on States by, for example, the Covenant on Economic Social and Cultural Rights. The question is how far that is translatable to corporations.

While some corporations are willing to accept an obligation to improve, others are unwilling to acknowledge anything beyond the obligations not to damage, to provide minimum standards, and not impede.

In discussion it was pointed out that the sketching of the four types of obligations above disclosed potential conflicts, such as when a company might have to move people from their lands in order to build a pipeline. On the one hand they were providing jobs while on the other they were under an obligation not to dispossess people of land, and this dichotomy brought out the point that governments alone were suited to making such allocations of priorities and not companies.

In response, a different situation was mentioned: a company needed to close an unprofitable factory, the closure of which would result in great unemployment and suffering in a particular region. It was suggested that under the law as it currently stands, directors’ duties to promote the interests of the company would not take the human cost into account. However, if human rights duties were incorporated into the fiduciary duties of companies, there might be an unresolvable conflict between those duties on a director. It was suggested that this could be resolved by providing a margin within which directors could make humanitarian decisions, which closed at the point at which such decisions would cause substantial damage to the core interests of the company. Thus, the human rights responsibility of the company in such a case was narrower than that of the state, but was a realistic and attractive option in face of weak governments unwilling or unable to protect human rights.

What is necessary to give legal force to some of these disparate requirements?

The option is either (i) external obligations on companies and/or (ii) a network of obligations inside the company. The first is properly a regulatory demand. The second is a corporate governance requirement that the internal workings of the company be answerable to one another, and that directors be answerable to the company as part of their fiduciary duties in respect of certain additional rights. The latter is thus a part of the general discussion relating to corporate governance: that directors be required to do the right thing for their stakeholders, a wider group than its shareholders; it would increase the directors’ fiduciary duties to the company, going beyond the simple focus on profit.

Modes of possible implementation

These could include:
(i) **Direct prohibitions or orders** either via statutes or treaties which can either bind individuals inside the company towards the outside world (as when directors of companies are made criminally liable), or they can bind companies as entities.

(ii) **Requirements by States that companies include in their articles of association** duties on personnel and those answerable to the company in a fiduciary way to obey fundamental and relevant human rights. British Petroleum was cited as an example of a company which regularly has as part of its working documents clear commitments that their policies are going to be implemented under the aegis of a list of international human rights instruments. This would be a requirement that directors be answerable to their own company and the possibility of actions against them by shareholders or other directors.

(iii) A **voluntary approach** which may be useful and perhaps more realistic could be for a leading group of companies to incorporate voluntarily into their articles such human rights undertakings. Interested parties with standing would be able to bring actions against the company for breach by the directors and other relevant individuals of their obligations to the company.

(iv) The **contractual approach**. This can take two forms:

(a) Contractual obligations down the supply chain. Legally enforceable human rights guarantees could be voluntarily brought to the table by the purchasing company, and demanded as a condition for business. The supplier would in turn require the same condition further down the supply chain. This would be a legal obligation incorporating human rights demands via the device of contract;

(b) Change to the way in which state contracts / investment agreements are negotiated. It is crucial that human rights be brought into investment agreements as a barrier to prevent the freezing effect on human rights and sustainable development that has been discussed. The elements that are debilitating to proper action by host governments must be removed.

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The discussion then moved to a more traditional perspective of business. It was noted that businesses had welcomed the decisions of the Human Rights Commission and wanted to be involved in a dialogue that is balanced and representative. In this regard it was noted that while much was heard about the accountability of governments and business, not much was heard about the accountability of NGOs. NGOs need to be more transparent about their agenda, how they get their positions together and whom they represent. Other points of departure included the desire to re-emphasise the role of national governments in the protection of human rights norms. This, it was contended, was the key building bloc. More effective enforcement by national governments of existing human rights obligations via domestic legislation should be further explored. Compliance with the law is a touchstone for business. The Geneva process should try to find common terminology. What are the categories of applicable human rights? What is the normative status of the rules under consideration? States have the primary responsibility.

Furthermore, even if it was possible to enact the Norms, would it help promote human rights? It was submitted that there is a strong argument to say that companies as wealth creators and generators of employment and economic growth will look closely at where they put their investments, and it is important not to choke investments for countries or regions that need it most. There is a danger of distracting attention from the key point that human rights is the job of governments. It was argued that we must all be on guard not to create a default position that if governments are not doing their job, business will do it.

In discussion it was noted that companies did not have the necessary overview to make human rights decisions, especially given that there was a lack of clarity over what the human rights meant. Indeed, some human rights instruments were not binding at all, others only some governments accept, and still others vary in terms of clarity. In the less clear instruments, it is debatable what will in fact promote or detract from human rights. Simply because a minority of states failed in their duties to protect human rights, the legal framework
did not need to change to address companies. Those wishing to extend the traditional inter-
State framework needed to prove that there was a need for such extensions, and that it would
not be counter-productive.

In response it was noted that companies can sometimes be one of the greatest obstacles to
States in the exercise of their primary responsibility, as in the case of investment agreements
that freeze a state’s ability to make fresh regulations in respect of particular projects.

A different comment was made that large multinationals, in fact, are often pushing states
failing in their protection of human rights to allow companies to raise standards; those
companies often have a reputation to uphold within the marketplace. Keeping factories open
for humanitarian reasons, it was argued, however, would not work in the real business world.
The standards were useful as such, and should not be made binding in such a way that would
have a reverse effect or bind companies to impossible obligations.

It was countered that while in many cases companies may indeed have excellent policies in
place for improving local standards, the apparatus of the law existed for those situations when
things went wrong.

One view was expressed that it was important not to ignore what the best companies are
doing in the world today in the context of human rights. Companies do have responsibilities
and a minority are leading the way. To do nothing is simply not an option for business. The
Norms are particularly helpful in making a complex set of human rights principles
comprehensible. The suggestion in favour of a voluntary approach ignores the historical fact
that such an approach has never worked with companies. Another speaker argued that there
was often a dichotomy between what corporations say and what they do. Publicity material
sometimes presented a more glowing picture than was warranted in fact.

The point was made that regardless of whether regulatory or voluntary approaches are taken,
companies must have specific incentives in order to meet human rights standards, and that
‘image’ is possibly the best way of providing such incentive.

Another view suggested that it was important to focus on the question of ‘what we are trying
to achieve?’ Pragmatic solutions may be better than getting deflected by protracted and
heavy UN negotiating processes.

In conclusion, it was noted that there was a constant search for effective models such as the
Ethical Trading Initiative. In relation to the Norms, the process involved companies, trade
unions, and NGOs around the same table, and was therefore complex.

(Note prepared by Daniel Geron, International Law Programme, Chatham
House).