

Holding transnational corporations accountable for human rights obligations: the role of civil society

Civil society organizations are employing a variety of methods to hold corporations accountable for meeting their human and labour rights obligations. These initiatives and mechanisms aim to protect and promote fundamental human and labour rights, with varying degrees of effectiveness. Although they represent an initial attempt to address weaknesses inherent in the unilateral, voluntary model of Corporate Social Responsibility, the only truly effective solution would be to change the paradigms of both the human rights framework for corporations and the economic model in general.

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The financial and economic crisis sweeping the globe is not simply another cyclical downturn endemic to the capitalist system. It represents a spectacular collapse of the neo-liberal economic model. Implementation of this model, which prescribed financial-sector deregulation, trade liberalization, and privatization of state functions and enterprises, led not only to destabilization of the world's markets but to the creation of an acute global imbalance of power between workers, private enterprises, and states.

During the heyday of neo-liberalism, many companies took advantage of improved communications and transportation infrastructure, lax national regulations, and the auctioning off of lucrative State assets to transform themselves into gigantic transnational conglomerates with a substantial presence around the world, and achieved record profits in the process. Their economic muscle gave them immense political clout among developing countries eager for foreign direct investment. These countries attempted to make their territories more "attractive" to multinationals by strengthening legislation protecting investments and weakening labour and environmental laws. Thus, in addition to its economic consequences, the proliferation of investments by multinational enterprises in developing countries over the last decades has had profound social and environmental impacts, to the point where some multinationals have been complicit in gross violations of fundamental human, social, labour and environmental rights.

Transnational corporations and human rights obligations

Business enterprises, particularly transnational companies, are typically private, non-governmental entities subject only to national laws in either the country where the company has its headquarters or in the host countries where the company has investments. Even though these companies may have significant presence in multiple countries, they are not technically considered to have international legal status, which is limited to states and certain inter-governmental organizations such as the European

Union and the UN. This means that by and large they have not been subject to the rights and obligations of international law, including international human rights law.

This interpretation is gradually being revised in practice, however. Some contemporary scholars advocate granting transnational business enterprises neo-feudal or corporative rights.¹ Some international treaties – in particular bilateral and multilateral trade and investment agreements – give transnational enterprises specific rights that can be enforced in either the host country's courts or in international arbitration tribunals.² For example, the Chapter 11 provisions under the North American Free Trade Agreement allow investors to bring claims directly against participating States for presumed violations of the investment provisions in the treaty. Similarly, many bilateral investment treaties include mechanisms that allow companies to bring cases against signatory States in arbitration tribunals, such as the International Centre for the Settlement of Investment Disputes, on expropriations, losses incurred due to civil disturbances, and restrictions on the repatriation of capital and other matters.³ The implications of these clauses are profound. Since 1995, more than 370 bilateral and multilateral trade agreements have been signed and more than 1,500 bilateral investment treaties have been concluded, involving virtually all of the world's major economies.⁴ These agreements confer supra-national rights on corporations, without granting corresponding rights to the people who may be adversely affected by their actions.

Today, the obligations of non-state actors such as business enterprises to protect and promote human rights are becoming more explicit in both theory and practice. For instance, the Preamble of the Universal Declaration of Human Rights calls for "every individual and every organ of society" to uphold and promote the principles contained in the Declaration. According to legal scholars, that obligation includes all persons and all legal entities such

as companies.⁵ Other international standards in the realm of "soft law" that directly impose human rights obligations on companies include the International Labour Organization Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy (formulated in 1977) and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (adopted in 1976 and revised in 2000).

In addition, a growing number of corporations are designing and implementing specific human rights policies. More than 240 enterprises have formulated their own guidelines, according to the Business and Human Rights Resource Center,⁶ and more than 5200 companies are listed as active members of the UN Global Compact,⁷ a multi-stakeholder initiative that commits businesses to respect universal principals relating to human rights, labour rights, environmental issues and anti-corruption practices.

Civil society and corporate social responsibility

The changing relationship between businesses and human rights is intimately linked to the rise of corporate social responsibility, defined by the European Commission as a "concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with stakeholders on a voluntary basis".⁸ Although some companies have implemented philanthropic programmes to benefit their employees, local communities and society in general since at least the 1950s, the current notion is different. It promotes the incorporation of human, social and environmental rights as an integral part of corporate strategies, not to comply with any moral or ethical imperative but simply as a good business practice that can minimise risks and enhance company performance.

1 See Teitelbaum, Alejandro. *Al margen de la ley: Sociedades transnacionales y derechos humanos*, Bogota: ILSA, 2007. p. 31.

2 *Ibid.*

3 Damrosch, Lori ed. *International Law*, St. Paul, USA: West Publishing, 2001. pp. 809-12.

4 Adlung, Rudolph and Molinuevo, Martín. *Bilateralism in Services Trade: Is There Fire Behind the (BIT) Smoke?* Geneva: World Trade Organization, 2008. pp. 1-2.

5 Avery, Christopher, Short, Annabel, & Tzeuschler Regaignon, Gregory "Why all companies should address human rights", 2006. Available from: <www.cca-institute.org/pdf/averybusiness%26humanrights.pdf>.

6 See: <www.business-humanrights.org/Documents/Policies/>.

7 See: <www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html>.

8 European Commission. "What is CSR ?", 2009. Available from: <ec.europa.eu/enterprise/csr/index_en.htm>.

“ The impacts of the crisis are evident in the massive lay-offs taking place in foreign banks such as the BBVA, Santander, and HSBC. Our rights as workers have been taken away. Debtors are also feeling the impacts, it's already happening. They are being evicted because for different reasons they cannot pay anymore. What is worse, especial military forces of the state are being used to carry out the evictions; those forces are there for the security of all, not to throw poor people in the streets because they cannot pay.”

Janio Romero (*union leader of the Unión Nacional de Empleados Bancarios, Colombia*)

This shift in the concept and practice of corporate social responsibility did not arise out of a spontaneous change of heart in the business community. It resulted from the work of journalists and civil society organizations that have exposed gross rights violations committed directly or indirectly by corporate actors, leading to public outcry and a push for stronger social controls on companies. Early initiatives led by civil society to hold companies accountable for rights abuses included the groundbreaking campaigns in the early 1990s related to labour malpractices committed by Nike in Indonesia and other Southeast Asian countries and the complicity of Royal Dutch Shell in the execution of Ken Saro Wiwa and other human rights activists in Nigeria. More recent campaigns have included targeting Coca-Cola for alleged involvement of its bottlers in Colombia in the assassination of trade union leaders.

The typical reaction of companies under scrutiny in such cases has been to try to mitigate damage to their operations and image by establishing principles and practices such as “codes of conduct” and “sustainability reporting” to prevent similar occurrences in the future. Many other companies that have remained relatively unscathed by these types of campaigns have adopted similar measures. For example, more than 1000 companies issued in-depth reports on their social and environmental performance in 2008, applying the “Global Reporting Initiative” guidelines.⁹

Despite the diversity of initiatives that have sprung up in recent years, nearly all have been unilateral and voluntary, lacking binding mechanisms that can be used to invoke real and not just moral sanctions in cases of corporate complicity in rights abuses. For this reason, a wide segment of civil society, including unions, human rights organizations and environmental groups, has tended to regard corporate responsibility initiatives with scepticism,

seeing them as mechanisms to improve the public image of companies that do not address the substantive issues that the social and environmental practices of businesses generate. That said, many civil society groups have been using the social responsibility concept to develop more transparent, effective mechanisms to hold companies accountable for human, labour and environmental rights obligations, as spelled out in international norms and national laws.

Some of the fundamental challenges that civil society organizations face when trying to seek remedies for human rights violations aided or abetted by multinational corporations are a lack of legal remedies in host country jurisdictions with lax national laws, inefficient justice systems, lack of political will to prosecute investors, or a combination of these obstacles. However, since 1992 a number of civil lawsuits have been filed against transnational corporations under a little-used provision in US law called the Alien Tort Claims Act (ATCA), which was invoked and reaffirmed in the 1980s in a case involving individuals,¹⁰ and the subsequent passage of the Torture Victim Protection Act.¹¹ Based on the precept of universal jurisdiction for crimes involving the “law of nations”, this legislation entitles US courts to rule on cases involving gross violations of human rights regardless of the location and nationality of the perpetrators and their victims. Between 1993 and 2006, NGOs such as the International Labor Rights Fund, Earthrights International, and the Center for Constitutional Rights filed 36 lawsuits against multinational companies in US District Courts under ATCA, bringing to light alleged corporate complicity in human rights abuses.

To date, however, no companies have been found guilty under ACTA. Of the 36 cases presented, 20 were dismissed,¹² some on the grounds that the

crimes committed did not fall within the scope of the law (which only applies to violations of “specific, universal and obligatory” norms such as those against torture, genocide, crimes against humanity, and summary executions), others for reasons related to an applicable statute of limitations or a failure to provide sufficient evidence linking the company to the crime committed. Several companies that were brought to trial under ATCA, such as Drummond Mining and Chevron, were found not guilty by juries. The remaining cases were either settled out of court by the companies or are still pending.

On the positive side, the out-of-court settlements in cases such as the lawsuit against Shell for the murder of Nigerian activists mentioned above have been exemplary, with the company agreeing to a USD 15.5 million payment to the victims.¹³ Overall, although ATCA has not yet created a strong deterrent effect among corporations potentially implicated in human rights abuses, the important precedents it has set for the use of innovative legal mechanisms based on extraterritorial jurisdiction could pave the way for the creation of new forums such as an “International Criminal Court” that would provide legally binding remedies for victims of grave human rights violations committed by business enterprises.

Trade unions and corporate social responsibility instruments

The experience of trade unions in the use of corporate social responsibility instruments is based on a strategy that was previously defined in the international arena by the International Trade Union Confederation (ITUC). This strategy asserts that companies have an “internal responsibility” for their workers that should be regulated and enforceable. Mechanisms for accomplishing this include the Tripartite Declaration of the ILO and the OECD Guidelines for Multinational Enterprises and bilateral global framework agreements (GFAs) negotiated between Global Unions and multinational corporations.

It is estimated that the Global Unions have signed close to 70 general framework agreements; although no centralized, up-to-date register exists.¹⁴ These agreements are based on the companies’ “internal social responsibility”, and clearly linked to ILO norms. The metalworkers federation (IMF), service-sector workers federation (UNI), chemical and oil workers federation (ICEM) and construction workers federation (BWI) are especially active in

9 Available from: <www.globalreporting.org/NewsEventsPress/PressResources/PressRelease_14_July_2006_1000GRIReports.htm>.

10 *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd cir. 1980)

11 See: <www.derechos.org/nizkor/econ/TVPA.html> and <www.derechos.org/nizkor/econ/ACTA.html>.

12 Baue, Bill. “Win or Lose in Court” in *Business Ethics*, Summer 2006, p. 12.

13 Kahn, Chris. “Settlement Reached in Human Rights Cases against Royal Dutch Shell”, 2009. Available from : <www.globalpolicy.org/international-justice/alien-tort-claims-act-6-30/47879.html>.

See: <www.global-unions.org/spip.php?rubrique70>.

14 See: <www.global-unions.org/spip.php?rubrique70>.

negotiating these agreements, accounting for 80 per cent of the total. The Global Unions participate in other kinds of work with businesses and institutes co-sponsored with business organizations, such as the one involving the International Federation of Journalists, and multi-stakeholder forums, such as one related to coffee production in which the International Union of Farmworkers participates. Other framework agreements have been organized on a sub-regional basis.

Once GFAs are signed, they can be used in various ways. Companies tend to use them as evidence of their commitment to corporate responsibility, as their signing and implementation are voluntary. This perspective is being challenged by the union movement and by European academics, with the goal of constructing a strategy to make the contents of framework agreements legally binding. In the meantime, union denunciations of corporate practices violating clauses of a framework agreement have sometimes compelled multinational companies to change their policies; for example, by agreeing that unions can be established in their foreign subsidiaries.

The OECD Guidelines have been adopted by its 30 member countries as well as nine observer countries, including Argentina, Brazil, Chile and Peru in Latin America. This instrument includes an explicit complaints mechanism that can be activated when a violation of the spirit and letter of a Guideline clause is identified. The thematic scope of the Guidelines is quite broad. In addition to labour rights, clauses cover the environment, consumer rights, science and technology, and competition. Complaints are directed to “national contact points” that governments are obligated to create. The Guidelines call for voluntary compliance by companies, which means that they can ignore the mediation efforts of governments with respect to the complaints presented by an interested party. However, once the process is completed, the national contact point can publicly reveal the negative actions of the company and publicize critical opinions. As a result, resort to the Guidelines complaints mechanism tends to have consequences similar to the rulings of the Commission of Experts on the Application of Conventions and Recommendations of the ILO. Although employers frequently assert that this mechanism goes beyond their concept of CSR, it has been widely acknowledged not just by civil society organizations but also by governments of countries that belong to the OECD.

To date, approximately 200 complaints have been brought to national contact points, of which 80 per cent were lodged by trade unions. According to the Trade Union Advisory Committee (TUAC), complainants achieved satisfactory results around half the time. At the end of 2008, 24 union-based complaints were presented in Latin America, and 10 others were brought by NGOs. The proportion of

“ I began working with a major Spanish advertising and film producing company, which opened a division here in Argentina in 2007. When the crisis broke in earnest, everything started to get complicated. Work decreased a lot, and we spent up to a month without filming. In January they told me that they had to fire me. I received the severance pay and started looking for work. Since then up until today, I haven't been able to find any decent job. What little work exists is practically slave labour: 8 or 9 hours, with very poor salaries. I have almost spent all my savings and I live alone in a rented flat, so I need to get something urgently. What else am I going to do? ”

Young woman from Buenos Aires

complainants that had a positive result was similar to those at the global level.

The Trade Union Confederation of the Americas (TUCA), created in March 2008 and headquartered in Sao Paulo, has developed an explicit strategy regarding corporate social responsibility, based on that of the ITUC. It is working with the Global Union federations and the TUAC on issues related to global framework agreements and the OECD Guidelines, particularly to assist union organizations in testing the complaints mechanisms of these instruments. It has also extended an invitation to OECD Watch to coordinate work related to the Guidelines. Additionally, it has organized campaigns to counter the concept of social responsibility promoted by the Inter-American Development Bank. TUCA, in collaboration with the Global Union federations and the Friedrich Ebert Foundation in Latin America as well as with like-minded NGOs, has created a Working Group on Transnational Companies to further develop concepts and strategies relating to trade union perspectives.

The need for a paradigm shift

Although not all of the mechanisms profiled above have been equally effective in protecting and promoting the fundamental human and labor rights that companies are obligated to uphold, they at least begin to address the weaknesses inherent in the unilateral, voluntary model of corporate social responsibility. Although it can be argued that the generation of business initiatives linked to this model has helped to introduce human rights issues into corporate culture, from the point of view of civil society, these measures are no substitute for enforceable human rights laws on the national level that are consistent with international norms and accompanied by strong, independent judiciary systems that provide concrete remedies for victims. Unfortunately, many governments choose not to take forceful action to hold companies accountable for violations of their human rights obligations, as they are fearful of losing foreign investment to countries that enforce rights less stringently. This creates a deplorable “race to the

bottom” regarding the promotion and protection of human rights and labor standards, among countries as well as companies.

This tendency notwithstanding, human rights protection need not be a zero-sum game. The solution is to change the paradigms of both the human rights framework for corporations and of the economic model in general. A comprehensive international treaty formulated within the UN human rights system could clarify the human rights obligations of businesses, which have been obscured by the literally hundreds of CSR initiatives that have sprung up over the last two decades, and establish binding mechanisms that can provide remedies for victims in cases where it is impossible to prosecute victimizing companies in domestic jurisdictions. A conceptual framework proposed in 2008 by John Ruggie, Special Representative to the UN Secretary on Business and Human Rights, based on the governmental obligation to protect rights, business responsibility to respect rights, and the need for victim access to effective remedies in cases where abuses have occurred, is a step forward. However, this framework needs effective mechanisms to instrumentalize it.

In addition, a wider transformation is necessary to reverse the negative impact of the neo-liberal economic model that has been imposed upon developing countries in recent years. The role of the state as an active shaper and regulator of economic and social policy must be revived, along with endogenous paths to development based on strengthening internal markets and national productive capacity. This would break the cycle of dependence on investments by unscrupulous multinationals. The current economic and financial crisis has raised real questions about the “benevolence” of the private sector and highlighted the flaws inherent in the neo-liberal model. This provides a historic opportunity to establish a social compact between businesses, workers, consumers and the state that can generate a new economic model based on human rights and sustainable development. We should not squander this opportunity. ■