

Talk on Corporate Responsibility for Human Rights Abuses at Third IHL Forum  
Human Rights Watch, Lucy Mair

While business and human rights or “corporate responsibility” has become an emerging field over the past 15 years, there are still serious gaps in understanding the responsibilities of business with regard to human rights and there is a lack of demonstrated accountability and enforcement for existing norms.

Quick history of UN initiatives:

1) Global Compact

In 1999 the Secretary General announced the Global Compact which was launched in July 2000. The Global Compact encourages corporations to act responsibly but has three main obstacles to its effectiveness:

- 1) lack of legally enforceable standards
- 2) lack of monitoring and enforcement
- 3) lack of clarity about the meaning of the standards themselves

The Global Compact is a voluntary set of principles which applies only to those corporations that choose to join the Compact, and even then, it does not bind them. The problem with voluntary norms, as seen in the case of corruption, is that there is a competitive dynamic that discourages some corporations from adopting socially responsible standards unless they are convinced that their competitors will do the same. The UN can break through this dynamic by using the multilateral forum provided by the Compact to develop a binding, multilateral legal regime for human rights, labor rights and the environment.

The Global Compact has been charged as a white-washing device – corporations pay lip service to Compact but are nonetheless complicit in violations. In other words, companies will join the Compact just to exploit it for their own PR purposes.

While the Compact guidelines prohibit partnerships with corporations that are complicit in human rights violations they do not define complicity. Does this include the complicity of doing business in a country that does not allow labor unions? Or that legislates discrimination against women, or that uses abusive security forces to defend corporate property? Without defining the meaning of complicity, the guidelines could be applied arbitrarily and subjectively.

2) UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms)

In 2003 the UN Sub Commission for the Promotion and Protection of Human Rights approved the Draft Norms on the responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The document sets out responsibility of companies for human rights and labor rights and provides guidelines for companies operating in conflict zones. The Norms also prohibit bribery and activities that harm consumers, including polluting the environment. The UN Norms are the most comprehensive and authoritative standard on corporate responsibility. However, the Norms are not a law or binding set of standards but rather a set of standards but can be adopted by governments or companies. Their analysis and commentary could provide the conceptual basis of a binding instrument on corporate responsibility since the Norms are an authoritative interpretation of the responsibility of corporations under international human rights law. It is noteworthy that the Norms apply to all forms of business not only to transnational corporations.

### 3) Report of the Office of the High Commissioner for Human Rights

In 2004 during the 60<sup>th</sup> session of the UN Commission on Human Rights, the Commission adopted decision 2004/116 of April 20, 2004 which asked the Office of the High Commissioner for Human Rights to prepare a report on the scope and legal status of existing initiatives relating to the human rights responsibilities of businesses. It also requested that the OHCHR hold broad based consultations which took place in Geneva in October 2004 and included governments, UN agencies, businesses, trade unions, and civil society groups. The resulting report was submitted in February 2005

The report found that there were four existing multilateral initiatives and standards on business and human rights:

- ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (very specific focus on workers rights)
- Global Compact – too general to offer adequate guidance
- OECD Guidelines for Multinational Enterprises which have geographic as well as procedural limitations
- UN Norms – most comprehensive, clear and complete text on business and HR.

OHCHR report identifies areas that need further clarification concerning fundamental concepts of corporate responsibility, including “complicity” “spheres of influence” and the protection of human rights in situations where a “State is unwilling or unable” to do so.

4) Special Representative to the Secretary General on human rights and transnational corporations and other business enterprises.

In 2005 during the 61<sup>st</sup> session of the Commission the OHCHR report was presented and the Commission took the decision to create a mandate for a special representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises with an initial two year mandate. There was strong opposition from the United States and Australia.

Human Rights Watch believes that the special representative should use the Norms as a benchmark for identifying standards on corporate responsibility and accountability. The expert should study outstanding issues identified by the OHCHR report, analyzing standards of corporate responsibility and available implementation mechanisms and proposing additional measures to address accountability for abuses.

-----

In addition to these UN initiatives, voluntary standards and initiatives at company or industry level have been developed (such as the Fair Labor Association for the apparel and footwear industry or the Voluntary Principles on Security and HR in the Extractive Industries).

#### HRW work on business and human rights:

HRW has found that monitoring the use of equipment and prohibiting their use for violations is something that is gaining acceptance in general and is being taken seriously by companies

HRW has worked both on trying to set standards and legally binding instruments as well as reporting on corporate abuses of human rights especially in extractive industries (such as mining, oil exploitation, etc.). HRW also called for limiting sales of landmine components and military dual use equipment and we regularly engage with companies about the possible misuse of equipment.

- On landmines, HRW had a campaign to get US companies producing components to formally commit to no future production. HRW identified thirty some companies and the majority committed in writing, including Motorola.
- Over a year ago, HRW had discussions over the potential misuse of a helicopter in Colombia that culminated when our director raised the issue with John Browne, CEO of British Petroleum. It led to an internal audit and changes within the company on the use of such equipment in Colombia. Similarly, we've recently had discussions over the possible misuse of vehicles in the Caucasus and procedures (auditing and monitoring to prevent them).
- HRW helped draft a set of principles on security and human rights for the extractive industry that has been endorsed by every major transnational oil company (except Total) and the governments of the U.S., U.K., Norway, and the Netherlands and includes a provision that states: "Equipment imports and exports should comply with all applicable law and regulations. Companies that provide equipment to public security should take all appropriate and lawful measures to mitigate any foreseeable negative consequences, including human rights abuses and violations of international humanitarian law." These guidelines have been out since December 2000 and largely guide the industry's approach to human rights and security issues. They also have broader acceptance. For example, a few months ago, the International Finance Corporation (IFC, the private sector lending arm of the World Bank) announced that it would require oil, gas, and mining companies to abide by these principles if they wanted IFC financing.

### Domestic Legislation

In the US there are two federal statutes which provide civil (as opposed to criminal) remedies against rights abusers:

- 1) Alien Tort Claims Act (ACTA)
- 2) Torture Victims Protection Act (TVPA)

The main difference between the two is what crimes are covered and who can file.

- ACTA permits foreign nationals to seek relief in Federal US court for actions that violate the "law of nations" or a US treaty. US courts have interpreted violations of the law of nations under the ACTA to include crimes against humanity, war crimes, genocide, torture, rape and summary execution.
- TVPA allows US or foreign nationals to bring an action against a person who, acting under "actual or apparent authority or color of law, of any foreign nation," subjects an individual to torture or extrajudicial killing. [intent is to permit actions in US courts against those responsible for acts of torture or extrajudicial killing committed outside the US]
- ACTA has been used effectively on behalf of victims of gross human rights abuses perpetrated by well-known political and military figures (Marcos, Karadzic, etc.– as well as lesser-known govt officials in different parts of world.
- ATCA has provided means of holding officials accountable for gross violations of human rights, offering potential to deter future abuses, keep US from becoming a safe haven for perpetrators
- While no case brought in Federal court under the ATCA against a corporation has even reached a trial on the merits, let alone a finding of liability, it is clear that such a case will require an especially high threshold of proof – showing that a company was acting in concert with government officials who engaged in killings, torture, or other gross human rights violations. Those seeking relief must show that the company knew of the human rights violations and aided them in some way. Being present in a zone of human rights abuses is simply not sufficient to meet the high threshold. Nor is this about "guilt by association" – as some have claimed. Merely doing business with a repressive government will not subject a company to liability for human rights abuses under these statutes.

- Cases against corporations should be considered by the courts according to the same ground rules and same legal criteria as those against government officials – though it is likely to be even harder to find corps liable under the statute.

An Alien Tort Claims Act case was filed against ExxonMobil for alleged complicity in violations in Indonesia in part because the company provided bulldozers to the military in order to dig mass graves. It is conceivable that a U.S. court could determine that companies face liability if they provide such equipment in cases where abuses occur. Although it may not happen or happen soon, it is certainly a possibility.

### Rachel Corrie Lawsuit

The family of Rachel Corrie has filed a case against Caterpillar under TVPA since the Corries are US citizens. However, the petition has now been amended to include allegations under ATCA on behalf of Palestinian victims. The suit, filed in US District Court for the Western Federal District of Washington alleges that Caterpillar violated international and state law by providing bulldozers to the Israeli military that it knew would be used to demolish homes and endanger civilians. The amended complaint details the stories of ten Palestinians who were killed and another six who were physically injured when CAT bulldozers were used to demolish their homes without warning.

This case is significant because it is the first time where charges of aiding and abetting crimes against humanity under ATCA are being attributed to a corporation for the use of their product, because they “should have known” what use there product would be put to. An ATCA case brought against UNOCAL in US courts established “knew or should have known” as the standard of aiding and abetting/ complicity in human rights abuses. Observers believe that the Corrie case is a long shot because there are really no legal precedents and no other common standards but it could serve as a first step in forming them.

### Sample of initiatives taken against Caterpillar:

- 1) City divestment campaigns (general – not just focusing on CAT) – ex. Somerville (we sent our materials – we didn’t endorse the divestment initiative but since CAT was one target we wanted to provide our documentation). While initially 8 of the 11 co-sponsored the resolution, after public debate and a lot of public pressure only the head alderwoman ended up supporting it.
- 2) Proposal to city councilors by solidarity group to get Limerick city councilors to declare Limerick a Caterpillar Free Zone. However, the councilors were advised by the city manager that such a move could have serious legal implications for the Council since it would impact upon contracts already signed with construction companies and would also have to be included in all new tender and contract documents so it seems unlikely the council will adopt.
- 3) Shareholder resolution – introduced in both 2004 and 2005 and requesting the CAT Board of Directors to appoint a committee of outside directors to issue a report, addressing the following: “The process for review and evaluation used to determine whether the sale (either directly or through intermediaries, including agencies of the United States government) of Caterpillar equipment to the IDF comports with Caterpillar's Code of Worldwide Business Conduct.” Very modest proposal – although implied, the resolution does not specifically ask the company to stop selling bulldozers to the IDF. The cost of complying with this resolution by issuing a report outlining the review process used to determine whether the sale of Caterpillar equipment to the IDF comports with the company’s worldwide code of conduct would be negligible.

### Outcome of Shareholder Resolution:

While it received only 4% of the vote first year and 3% second year it is seen by a success by its sponsors for several reasons: Shareholder resolutions are non-binding and one of their main purposes is to shine light on a particular issue or problem which it successfully did. The CAT resolution was basically the only item being discussed at the annual shareholder meeting and many shareholders expressed their sincere interest in learning more (our rep was at the meeting)

HRW presented our position that because Caterpillar knows that the IDF is involved in serious violations of human rights and international humanitarian law it is complicit with these violations as long as it continues to sell its equipment to the IDF.

### Obfuscation under FMS

Caterpillar claims that its bulldozers are purchased by the U.S. government and given to Israel through the U.S. Foreign Military Sales Program created under the Camp David Accord. These military exports are part of the U.S. government's foreign aid package to Israel. The company has not disclosed how much it makes through its participation in this program. All sales under the FMS are subjected to the US Arms Export Control Act which prohibits the use of military aid against civilians. However, Pentagon officials (at the Defense Security Cooperation Agency which deals with FMS) said that Caterpillar bulldozers are not sold under FMS and that Caterpillar has no license with the Department of State which is required for any munitions sale. This obfuscation is perhaps an attempt by CAT to absolve itself of responsibility and place the blame on the US government.

### Conclusion

There are many ways in which to hold corporations responsibility for human rights abuses:

- 1) don't invest in them, don't buy from them
- 2) expose their complicity
- 3) pressure home governments to hold their own companies responsible for violations of IHL/HR committed abroad
- 4) work to create an international standard

In order to use corporate responsibility as a tactic in fighting against the Wall, settlements, etc. much work is needed in terms of research, documentation and advocacy. It is important to figure out what tactics will work with specific companies or foreign governments: For example, do foreign companies have major holdings in Israeli companies who are involved in building the wall. If so, what tactics are likely to success in those companies/ countries – pushing the companies' own internal code of conduct, bringing consumer pressure to bear, publicizing the abuses occurring and naming involved companies to uncover their complicity, bringing legal action against corporate complicity through domestic courts, invoking the UN Norms, etc.?