"What laws are companies currently bound to? What changes have been proposed and what are the likely developments?"

Paper for Chatham House Conference on Corporate Social Responsibility, 17 March 2005

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To answer the first question: "What laws are companies currently bound by?" could either take several days or just a few minutes. For if the question is about what rules of *international* law directly bind companies, the answer is: "Practically none". If it is about what rules of *national* law bind them, the answer is: "Very many, which it would take a very long time to enumerate or even summarize". The reason for this paradox provides one of the keys to the whole of the present controversy.

But first, what categories of law are we talking about? Companies are of course subjected to all sorts of national laws. They are subject to virtually all of the civil law, and much of the criminal law, of the jurisdictions in which they operate: laws relating to contract and tort, to misrepresentation and vehicle maintenance, health and safety at work, wages, and so on and so forth. For much of the time, they are treated in the same way as individual human beings; they also have certain additional responsibilities, relating to audits, price manipulation and the like. Most of this is not, however, normally regarded as directly pertinent to human rights or even corporate social responsibility, so we have to narrow our focus for the purpose of this conference. But to what extent? What should we include, and what exclude?

One area of interest is environmental protection. Clearly, domestic law already deals with this, sometimes in pursuance of international agreements, sometimes not. Companies are one of the obvious targets here, along with various other bodies, such as State agencies and instrumentalities, which are also capable of causing substantial pollution. But I suggest that environmental protection should be treated as *sui*

generis. There is already extensive legislative activity on the international and national level. Probably there should be more, and probably it should also be enforced more vigorously; but I do not think that lumping it in with human rights as a subject for discussion particularly helps promote either environmental protection or human rights. And in particular, I submit that the reason for environmental protection has less to do with human rights and much more with not fouling our own nest.

But even if we agree to exclude environmental protection, we still have to decide what else properly falls within the category of human rights. (And this afternoon I am going to confine myself to human rights, especially since the UN draft Norms, to which I shall revert shortly, purported to deal with human rights law. Traditionally, human rights were viewed as comprising civil and political rights: the right of individuals or groups not to be subjected to excessive or unreasonable infringements of their freedom. Classic examples are freedom from torture, from arbitrary arrest and detention, and from arbitrary interference with the right of assembly. Some of these rights are unqualified and non-derogable – for instance, freedom from torture. Others *are* qualified and *are* derogable: for example, freedom of speech can be curtailed both in an emergency and, even in normal circumstances, if this is reasonably necessary for the protection of the reputation of others, the maintenance of public order, and so on. Governments have a "margin of discretion" as to what the situation requires, but in many instances this is subject to judicial supervision at the national and/or international level. The sort of activity that we are talking about here is essentially governmental, not corporate: it is governments who are to refrain from torture, from interfering with the right to found a family, and so on.

More recently, classic civil and political rights have been joined by so-called "economic and social rights". These include the right to education, to a living wage, to employment, and so on. They require governments to take positive action to promote these goods, rather than obliging them to *refrain* from action. But it is important to appreciate that this second category of rights is different from the first. Few if any governments are in a position to deliver all of the goods specified in treaties like the 1966 International Covenant for Economic, Social and Cultural Rights. Consequently, most instruments of this sort are essentially *programmatic:* that

is to say, the governments who sign up to them promise to do their best, but little more. For this reason, amongst others, the rights in question are not really justiciable: that is to say, they do not lend themselves to litigation, since it is practically impossible to prove that a government has not done its best. Also, it is rarely feasible to satisfy all of these goals at the same time: the government has a discretion whether it wishes to focus on education, health, or whatever. And because it is for the government to set the priorities, careful thought needs to be given to the question of how far, if at all, companies fit in. Obviously, individual countries can legislate on things like minimum wages, the right of workers to organize, and so on; but it seems much more questionable that companies should be made *directly* liable under *international* law without the interposition of governments. It is legislatures and governments who are best suited to setting the priorities, not companies.

I will come back to this. But still on the subject of what comprises human rights, some initiatives have sought to widen the concept far beyond its normal confines. An egregious example is a document with the catchy title of Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights of August 2003 - document which, as you may know, provoked a great deal of controversy. Although this draft, produced by a sub-Commission, was repudiated by the competent parent body, the UN Commission on Human Rights, it continues to enjoy a sort of phantom existence (to which I shall return). The Draft Norms, including the accompanying Commentary (which was to have a semi-authoritative status for the purposes of interpreting the Norms), included in the ambit of "human rights" not only civil and political rights and economic and social rights, but also international environmental law, the laws of war, labour law, health law, at least some aspects of consumer protection law, and so on. This is unacceptable. Each of the separate branches of international law that I have mentioned have their own mechanisms for the creation of rules and oversight of implementation, and it is unhelpful to lump them in with human rights in this way.

Indeed, it is more than unhelpful: it is in some respects bogus. By no means all of the "norms" (a posh word for "rules") enumerated in the Sub-Commission's draft and

commentary are binding even on States, let alone corporations. For instance, these texts refer to conventions drawn up under the auspices of the International Labour Organization. Now, whilst *some* International Labour Conventions have been ratified by a relatively high proportion of the world's (almost) 200 States, many others are binding on only a small minority of countries, and some have not even received the minimal number of ratifications required to bring them into force. Since treaties bind only the parties to them, to describe such instruments as "normative" is grossly misleading: for most States, this is simply not the case.

It gets worse. Some of the instruments that the draft refers to are not even treaties, but non-binding recommendations of such bodies as the ILO or World Health Assembly, or even industry "best practice".

Furthermore, even where a State is bound by a human rights obligation, that is an obligation of the State, and not of individuals or juridical persons (corporations) within it. As a general rule, international law does not apply directly to persons (natural or juridical) within a State. There are some exceptions to this in the area of international criminal law – as many of you will know, as a result of recent efforts, individuals can be prosecuted before international tribunals for genocide, crimes against humanity, and war crimes. And in quite a few countries these acts are also criminal under domestic law, as are certain other egregious crimes under international law, such as torture and (pursuant to a very ancient tradition) piracy. But three points must be made about this criminal liability:

- It is very much the exception to the general rule that international law is a law between States;
- It only applies to criminal, not to civil liability;
- It does not apply to corporations.

So if we are asking the question: "What human rights norms are companies bound to under existing international law?", the answer is currently: "None" – subject to some very limited exceptions to which I will return. But of course, if we ask, not what international law currently prescribes, but what it *should* prescribe, it is not a sufficient answer to say that this is the way that international society has

traditionally arranged matters. If there is a good reason for the present arrangements to change, we should certainly discuss that possibility.

But *is* there a good reason? As I have already indicated, the protection and promotion of human rights is essentially a function of the State, not its subjects or inhabitants. Governments, legislatures and judiciaries have to set priorities and balance competing interests. Companies are not suited to perform this function: they have no claim to represent the people; they are not designed to further the public good, but that of their shareholders; they lack sufficient sources of information; and so on. So it is generally better for the State to make the decisions, and require companies operating in their territory to comply. This applies both to home-grown companies, and to the locally incorporated subsidiaries of transnational corporations ("TNCs"), which are of course subject to the laws of the local sovereign as well as those of the "home" State. I am of course talking about *international legal* regulation. A good case for voluntary action can no doubt be made. But some international lawyers, and perhaps especially human rights lawyers, seem to have a compulsion to make more and more treaties and resolutions without working out whether legal regulation is really the right solution and also whether the international level is the right one for the imposition of responsibility.

Of course, this general proposition may need some qualification. Sometimes the local sovereign is unable, or even unwilling, to ensure that TNCs respect human rights. The government may itself be part of the problem. Thus, in the recent *Doe v. Unocal* litigation in the USA (now settled), it was alleged that the defendant had conspired with the armed forces of Myanmar, who were to protect its pipeline, to commit murder, torture, mass rape and to impose forced labour on the local population.

How we *do* deal with these egregious cases remains a legitimate question. In most serious cases, such as complicity by companies in crimes against humanity, torture and the like, there is no reason in principle why the individual directors and so on should not be criminally liable. Furthermore, there is perhaps scope for solutions similar to what has been done in relation to corruption, where under both the OECD

and UN conventions both the host State and the headquarters State impose criminal liability on those guilty of corruption.

But conspiracies by companies to violate human rights are exceptional cases, and it does not seem to me that they outweigh the problems of imposing international legal responsibility directly on corporations, rather than States, in the generality of cases. Nor is it self-evident that a huge and elaborate legal structure should be erected because of these exceptional cases.

Returning from policy considerations to existing law, it is the case that corporations are not, as a general rule, liable under international human rights treaties nor capable of being made respondents to claims before international human rights tribunals. And when they are subject to domestic law, it is by virtue of its being *domestic*, not international, law.[1]

For the reasons I have just given, and some others, I wrote an Opinion strongly critical of the draft Norms, and reservations of this type contributed to the rejection

[1] Parenthetically, there is a limited category of exceptions to which I should draw attention. The very first Congress of the United States passed the Alien Tort Claims Statute, which is very brief. It says that "The district [i.e. federal] courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations [otherwise known as customary international law] or a treaty of the United States". The original purpose and meaning of the Statute is rather obscure, and for the first two hundred years of its existence it was used only a couple of times. Then, starting in the 1970s, there was an explosion of such cases. It started with a case in which the father and sister of a young man tortured to death in Paraguay brought proceedings against the chief of police allegedly responsible for his torture when he turned up in the USA, and it rapidly spread to encompass claims against corporations (usually US corporations), not only for clear human rights violations but also for more debateable breaches, such as environmental damage. However, very recently the Supreme Court has considered the Statute, and it has in effect held that the only breaches of international law which are caught by it are those which were contemplated originally or which have become clearly accepted as fundamental breaches of international law, and it has enjoined judicial caution about permitting such actions, especially when they could have an adverse effect on the foreign relations of the US. How exactly this decision will be applied in practice has yet to be worked out, but it seems that, although the door has not been completely closed, it is not open very wide.

Furthermore, the Alien Tort Statute is practically unique in the world. There are some moves afoot to imitate it, or reach similar results by other routes, in some other developed countries; but those are also acutely aware of the harm to their foreign relations that could ensue from this type of litigation. I am doubtful whether, as a matter of practice, the US Statute will be widely imitated. Furthermore, there are objections of policy to this sort of universal jurisdiction, where courts exercise authority over matters with which they have only a scanty connection, even if there are some arguments in favour too.

of the draft in 2004 by the superior body, the UN Commission on Human Rights. If one is familiar with the coded language used in the UN, the terms in which the Commission rejected the draft were of unprecedented severity. It said that the draft had not been requested by the Commission and had no legal standing, and furthermore decided that the Sub-Commission should perform no supervisory functions in relation to it. Nevertheless, the Commission referred the general question of what, if anything, should be the responsibilities of TNCs to the UN High Commissioner for Human Rights. She has consulted interested parties, or "stakeholders" as the jargon now describes them, and is now about to deliver her report.

This leads me into the second question: Where are we now and how are things likely to develop? I have seen an advance copy of her report. The bottom line is that it bats the responsibility for further study back to the Commission for Human Rights. Whether this is because the High Commissioner's own resources are too limited, or because she regards it as a relatively unpromising subject or too hot a potato (or a combination of these factors) I know not.

However, in the course of her brief study (some 21 pages plus annexes) there is some useful analysis of the existing state of affairs as well as some recommendations to the Commission, though one also needs familiarity with UN-speak and an ability to read between the lines to decipher some of it. Some of the highlights are as follows.

1. The draft Report confirms that most of the existing international initiatives are not legally binding on companies: they are voluntary. This applies e.g. to the OECD Guidelines for Multinational Enterprises; the UN Global Compact, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

2. The High Commissioner notes that there was a division of opinion about the draft Norms. She observes that many non-governmental organizations and some businesses, academics, lawyers and consultants were – predictably, I might say – in favour, but that - equally predictably - most employers' groups and some businesses were opposed. However, it is interesting how

she reports the balance of opinion amongst governments, who are of course the key players. She says that "many governments" were opposed to the draft Norms and [only] "some" supported them. This seems to me to be highly significant for the future, though she does add that there is a need for developing States to involve themselves in the process rather more than they have done hitherto.

3. Again predictably, she does not dismiss the draft Norms "lock, stock and barrel" (too many "stakeholders" have put a lot of effort into developing and supporting them). After summarizing the arguments which had been put forward pro and con, she notes that the Business Leaders' Initiative on Human Rights is currently "road-testing" the draft Norms with companies from various sectors in order to discover ways to implement human rights. She thinks that it could be worthwhile for the Commission on Human Rights to consider what elements of the draft Norms could be useful. But I think that there is a clear recognition here that by no means all of it is useful.

4. For one thing, she seems to recognize that it is not appropriate to include all of the huge catalogue of subject areas enumerated in the draft Norms. She essentially confines herself to civil and political, and economic, social and cultural rights.

5. So far as concerns the nature of the responsibility of businesses, she thinks that essentially this should be to avoid complicity in human rights violations, and to support human rights. The former – avoidance of complicity – is perhaps relatively straightforward, and I think, as I have already said, that there could be some scope for regulation here. She highlights the possibility of home State (and not just host State) regulation, but she also rightly underlines the need to respect the sovereignty of the host country. (For instance, in one US case in which I gave expert evidence, a US oil company was sued under the Alien Tort Statute for what was alleged to be serious pollution of a part of Ecuador, even though the government of that country had granted a concession in the exercise of its sovereign authority.) So far as concerns the obligation to *support* human rights, on the other hand, she

recognizes that this raises very complex issues; that there are certainly some matters that should be left for government regulation; and that the rules in question will not always necessarily be legally binding.

6. She recognizes that there is a serious question to be addressed about how far the responsibilities of businesses should be the subject of international, as opposed to national, regulation. Likewise, though she thinks that it is worth studying whether new UN instruments could further clarify these responsibilities, she is not necessarily thinking of binding instruments, as opposed to guidelines for States and businesses.

7. One final point from this report that I would like to highlight is the question of the *personal scope* of the responsibilities of business. *Towards whom* would they have these responsibilities – only their employees, or others, such as the families of these employees, people in the neighbourhood, and consumers of their products? And *for whose acts* should they be responsible (in addition, of course, to their employees): for example, what about businesses higher up or lower down in the supply chain?

Of course, the recommendations of the High Commissioner are not binding on the Governments who make up the Human Rights Commission, and it remains to be seen what they will do. I suspect that the subject will not simply be kicked into touch. Rather, it will run and run. It is clear that some leading NGOs are very committed to the draft Norms, despite its imperfection. To some extent, this seems to me to be due to a faulty approach to sunk costs; just because they have expended a great deal of effort on them in the past is not a sufficient reason for doing so now that the draft's weaknesses have been exposed. They may also hope for a rather crude type of bazaar bargaining: ask for far more than you reasonably expect to get, in the hope that you end up with a compromise that you will be happy with. I have to say that, were I advising such an NGO, I think it would be more productive to focus on what most badly needs remedying and what is feasible, rather than continue to press for the kind of normative mess which the sub-Commission produced: but that is a matter for them. I do think that Governments will quite possibly prove rather hard-

nosed about this. They may not want to give up their own prerogatives of regulation; and to the extent that they are prepared to contemplate something more, if it involves international legal compulsion and not simply voluntary guidelines, they will want to ensure that the rules concerned are reasonably precise and workable, and probably therefore confined to a relatively narrow focus. They may not be prepared simply to put up with a mass of feel-good verbiage. Nor, in my view, should they.

It may be that something worthwhile will emerge from the process at the end of the day; but it is too early to say, and I suspect that the end of the day is a good way off yet.

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