

# **Beyond Voluntarism**

**Human rights and the  
developing international  
legal obligations of  
companies**

Summary

## **OVERVIEW**

Do private companies have a responsibility to respect human rights? This question, once marginal, is becoming a matter of concern to companies, as well as governments, intergovernmental and non-governmental organisations, investors and consumers.

Of course, it is not novel to argue that companies should behave ethically. On protection of the environment or workers' rights, companies have long been subject to regulation by government as well as lobbying by advocacy organisations.

It is new, however, to say that companies may have a legal duty to respect human rights. Human rights advocates, who have traditionally focused on government accountability, are beginning to look hard at the conduct of private actors, including businesses.

For the most part, work on corporate accountability has emphasised voluntary approaches – systems of self-regulation based on ethical principles rather than forms of legal accountability supported by mechanisms to enforce them. This is true of company-sponsored codes of conduct, the United Nations Global Compact, and many NGO initiatives. Those involved may refer to the Universal Declaration of Human Rights or international labour standards as a proper basis for company policy, but such standards have generally not been treated as legal commitments.

Can international human rights law be applied not only to states but also to private actors? The issue is complex. This is one reason why debate and campaigning have largely avoided it. As the limitations of voluntary approaches become plain, however, companies, campaigners and legal experts are beginning to accept that international law is relevant and the issue of legal enforcement must eventually be addressed.

A report on this subject by the International Council is summarised here. It discusses the extent to which international human rights law imposes, or is coming to impose, legal obligations on private companies. This Summary is based on arguments that the report develops more fully.

## **RESEARCH PROCESS**

The report is based on work that began in February 2000, when a group of experts and legal advocates met to advise the Council on the content and methodology of its study. Following that meeting, the Council appointed consultants to carry out legal research, interview key actors – including advocacy groups, companies, inter-governmental organisations, academics, and governments – and describe the experience of corporate regulation in a variety of countries.

The research team, and its advisers, met several times to review progress and discuss drafts of the report. Those involved brought international and national expertise, academic and activist perspectives to bear. In addition, experts in environmental and labour issues participated in the project's design and direction.

In January 2001 a draft was circulated for comment to over 400 organisations and individuals. The list included executives and business associations with an interest in human rights and social responsibility issues. The draft was presented and discussed at meetings in India, Switzerland, the United Kingdom and the United States. The many comments received were taken into account in preparing later drafts and the final report.

### **Definitions**

In the report, the term companies refers to private commercial enterprises. Other terms might be used – businesses, corporations: each carries particular legal connotations. Some argue that discussion of the human rights obligations of companies should be limited to multinational corporations, but the report deals more generally with all commercial enterprises.

**International law** includes rules found in agreements between states, usually referred to as treaties or conventions, as well as rules derived from the practice of states, developed over time, that may or may not be found in treaties. The latter are referred to as customary rules of international law. International lawyers often speak of “hard” and “soft” rules of international law. The former are found in treaties, and the latter in resolutions or standards adopted by international organisations, or in joint state declarations. Though in the nature of guidelines, over time “soft” law recommendations often come to be seen as creating legal obligations.

The term **human rights** can mean different things. The report takes international human rights law as its point of reference – that is to say, those standards negotiated and agreed by governments to set out the rights that deserve international recognition and protection. The report devotes one chapter to describing the scope of international human rights guarantees – see the list at the end of this summary.

## ACKNOWLEDGEMENTS

**Nicholas Howen** was the lead researcher on the project and wrote much of the report. The report was edited by **David Petrasek**, Research Director at the Council, who also co-ordinated the project.

Several researchers examined the national experience of different countries. They included **Maria Socorro I. Diokno** (Philippines), **Tamás Gyulávári** (Hungary), **Sarj Nahal** (UK), **Romina Picolotti** (Argentina) and **Usha Ramanathan** (India). A paper looking at trade issues and the WTO was prepared by **Caroline Dommen**.

**Saman Zia-Zarifi** wrote much of the material dealing with enforcement, and **Lene Wendland** made additional written contributions.

The project's Advisers were:

**Christopher Avery**, an international lawyer, who worked with Amnesty International and now runs a resource website on business and human rights,

**Sumitra Dhanarajan**, Business Standards Adviser at Oxfam – UK,

**Virginia Leary**, Professor of international law and Member of the International Council, who has worked with the ILO,

**Deepika Udagama**, Professor of international law at the University of Colombo, Sri Lanka, and alternate member of the UN Sub-Commission on the Promotion and Protection of Human Rights.

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## Main arguments

### **Voluntary initiatives alone are insufficient**

It is welcome that interest is growing in the duty of companies to respect human rights. Nevertheless, more attention should be given to the role international law can play in anchoring these responsibilities in a legal framework that crosses national boundaries. In the absence of a framework of legal accountability, voluntary approaches will often be ineffective and will remain contested.

### **International human rights law – indirect and direct obligations**

In the last 50 years, UN and regional organisations have developed many international rules to protect human rights. Though primarily concerned with the obligations of states, these rules provide a clear basis for extending international legal obligations to companies. Such obligations can arise in two ways:

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

Indirect obligations are firmly established. Though less strong, there is some basis for extending direct legal obligations to companies and, significantly, a trend towards doing so is emerging.

### **Importance of state action**

States must take reasonable steps to prevent or sanction abuses by private actors. They have a duty to provide victims with effective legal remedies through courts and other bodies. Primary responsibility for protecting human rights must remain with states. A problem with codes of conduct and other voluntary approaches is that they tend to overlook state responsibility.

### **International law is developing**

International law is not static. Its rules regarding human rights are evolving as international bodies, governments and national courts interpret them and set new standards.

## Beyond voluntarism

Not everyone believes that law, and international human rights law in particular, is the appropriate instrument for ensuring that companies respect human rights. Some argue that voluntary approaches and self-regulation have produced results and that appeals to self-interest ultimately change company behaviour more effectively. The point is made that international legal rules are abstract and difficult to enforce, and that companies are already subject to national law and regulation in many relevant areas (including health and safety, labour rights, and environmental protection). While these arguments have some basis, they are ultimately not persuasive.

### **Constraint on power**

One function of law is to limit power by establishing enforceable rights and corresponding duties. The economic and political resources of many states are dwarfed by those of the largest multinational companies. Many states are unwilling or unable to influence the behaviour of companies effectively, or to protect their citizens from abuses that may occur. Even small companies exercise considerable power over their employees and the communities in which they operate. Legal redress can provide effective protection of the weak.

### **Redress**

Voluntary codes rely entirely on business expediency or a company's sense of charity for their effectiveness. By contrast, legal regimes emphasise principles of accountability and redress, through compensation, restitution and rehabilitation for damage caused. They provide a better basis for consistent and fair judgements (for all parties, including companies).

### **Deterrence**

Even if enforcement through courts is slow, and by no means assured, a legal framework encourages a culture of compliance. Where behaviour is judged to be illegal and to violate human rights, a deterrence is created, particularly where the judgement has international weight and authority. Law can assist advocacy efforts and give legitimacy to claims. For these reasons, companies will take more seriously claims that are grounded in law.

The unrestricted public sovereignty of states – restrained by the emergence of human rights law – should not be replaced by a new, unrestricted private sovereignty of commerce.

## Strengths of international human rights law

### **A benchmark for national efforts**

International law does not diminish the importance of national regulation. On the contrary, only states can enforce most of its rules. International enforcement mechanisms usually do not kick in until national efforts fail.

International law can harmonise rules at a time of weak national regulation. It can provide reference points for national law; benchmarks, core minimum requirements, and definitions of what is impermissible.

New international free trade rules, the multinational nature of modern business, and competition for investment have all weakened corporate regulation at national level. Large multinationals are beyond the reach of many states to regulate them effectively. When international law is well developed it can strengthen enforcement at national level and create coherent standards that can be applied in different countries and across national boundaries.

### **A common and universal standard**

International human rights law provides such a standard and can therefore assist all parties to judge company practices objectively. Human rights agreements have been formally approved by an overwhelming majority of states. By contrast, codes of conduct cannot provide such a yardstick and will always be open to charges of selectivity.

### **Law complements voluntary approaches**

Law, of course, can never provide a complete solution. International legal rules are difficult to apply in practice and will not change company behaviour overnight – as they have not immediately transformed the behaviour of governments. Voluntary codes can be easier to apply, because they are adapted to the circumstances of particular industries or firms. Some go beyond minimum human rights standards.

Even where voluntary approaches are working, however, anchoring these in a legal framework is likely to enhance their effectiveness. And where voluntary approaches are not effective, a legal framework provides powerful tools and incentives for improvement.

Legal and voluntary approaches should complement one another.

## Indirect legal obligations on companies – the duty of states to protect rights

International human rights law does not confine itself to abuses committed by states and those acting on its behalf. States are also responsible for preventing abuses by private actors, including companies. This is affirmed in

- human rights treaties
- comments by UN expert bodies which interpret these treaties, and
- decisions of regional human rights courts in Europe and the Americas.

The duty on states to ensure private actors respect human rights has been recognised by an overwhelming majority of governments – notably in declarations adopted by the UN General Assembly and at the 1995 Beijing World Conference on Women.

It is also recognised in relation to a wide range of rights - including the right to life, freedom from torture, freedom from discrimination (in relation to women and race), prohibition on violence against women, right to privacy, freedom of expression, right to adequate food, as well as many workers' and children's rights.

Of course, states cannot be held responsible for every crime or harm inflicted by private parties. They incur responsibility when they fail to exercise due diligence in protecting the rights of people within their jurisdiction. States are required to take reasonable or serious steps to prevent or respond to an abuse.

“Under general international law and specific human rights covenants, states may also be responsible for private acts...”

UN Committee on the Elimination of Discrimination against Women 1992



## Direct legal obligations on companies

International law can impose obligations directly on companies. The international legal system is made *by* states but is no longer exclusively *for* states. It is evolving to regulate companies directly, as well as indirectly through states.

Many inter-governmental organisations have concluded that companies should respect human rights and some international standards already refer explicitly or by interpretation to companies. They include:

- the Preamble to the Universal Declaration on Human Rights,
- the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the International Labour Organisation (ILO),
- the Guidelines for Multinational Enterprises, adopted by the Organisation for Economic Co-operation and Development (OECD).

Many legal experts continue to say that existing declarations referring to corporations are voluntary in character, or are “soft law” standards that do not impose a legal duty on companies to abide by human rights norms. The reality is more complex. Both the OECD and ILO documents have the status of authoritative and high-level declarations of states. The Universal Declaration remains one of the most respected and authoritative human rights documents.

Binding international legal norms also impact on companies. The most serious human rights violations are outlawed by international criminal law. Managers or employees may be prosecuted if they are implicated in crimes against humanity or war crimes.

“... transnational corporations and other business enterprises, their officers, and their workers are further obligated directly or indirectly to respect international human rights and other international legal standards”

Preamble, Draft UN Fundamental Human Rights Principles for Business Enterprises

## The trend towards legal accountability

The development of international law and the emergence of binding norms is a complex and living process. It is propelled forward by the actions and statements of states as well as international and domestic court decisions, the writings of commentators and the statements and behaviour of companies themselves. More and more states – both individually and through inter-governmental bodies – as well as legal experts are coming to the view that companies should respect human rights law.

Several standard-setting initiatives, recently concluded or underway, will reinforce this trend. Indirect obligations will be strengthened through new or proposed treaties that deal with anti-corruption and tobacco control, both of which touch on human rights issues. Governments are negotiating and endorsing other standards that place indirect obligations on companies, for example with respect to the sale of diamonds from areas of armed conflict and the illicit trade in small arms.

A UN expert body, the Sub-Commission on the Promotion and Protection of Human Rights, has prepared draft Fundamental Human Rights Principles for Business Enterprises, which foresee placing direct obligations on companies. The European Parliament has called on the European Union to adopt binding regulations, covering human rights, to govern the conduct of multinationals based in Europe.

### **Global Compact**

The UN's Global Compact initiative requires companies to commit themselves to nine principles relating to human rights, protection of the environment and labour rights. After doing so, their only obligation is to share regular information with the UN on measures they have taken to respect the principles. The Compact is not an enforcement mechanism. It is intended as a forum for learning and best practices. Whatever merits may lie in this approach, the UN should also support efforts to strengthen legal accountability.

## International enforcement possibilities

Clear international legal rules requiring companies to respect human rights will be of little value in the absence of effective means to enforce them. National procedures should provide the primary means of enforcement. However, victims face numerous obstacles when they use national courts to complain of company abuse. National law may be weak or out-dated. Even when this is not so, procedural rules, the costs and delays involved, and the relative weakness of victims, compared to companies, make effective enforcement difficult.

These obstacles can be addressed, at least partially, by recourse to international procedures. The report surveys several international enforcement procedures that might be used to ensure companies respect human rights.

### **Enforcing the state's duty to protect human rights**

Several international procedures scrutinise the degree to which states are fulfilling their international human rights obligations. The UN and regional mechanisms allow expert committees to review measures states have taken and, in some cases, to receive complaints submitted by individuals. Intergovernmental bodies, such as the UN Commission on Human Rights, can and do monitor the practice of states. In addition, special international procedures have been established, for example under the North American Free Trade Agreement (NAFTA) and by specialised bodies such as the International Labour Organisation (ILO).

Some of these international procedures are well placed to examine whether states are protecting citizens from abuses committed by private actors such as companies. Some have already begun doing so.

### **Enforcing direct obligations**

Only two international procedures exist that can directly scrutinise the degree to which companies are respecting human rights. These are the implementation provisions of the ILO **Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy** and the OECD **Guidelines for Multinational Enterprises**. Though officially endorsed by governments, they rely on the voluntary co-operation of multinationals and remain rather weak.

National courts are also beginning to scrutinise whether companies – at home or abroad – are respecting human rights, or are complicit in violations of those rights.

## Complicity

Companies may be liable if they are complicit in human rights violations committed by others – especially agents of the state. Though clear international legal rules do not yet exist for judging such cases, principles of tort and national and international criminal law are relevant. These principles are likely to shape the development of international legal rules to determine when companies are complicit in human rights abuses.

A company might be accused of complicity in human rights abuses committed by political authorities in four situations:

- When it actively assists, directly or indirectly, in human rights violations committed by others;
- When it is in a joint venture (or similar formal partnership) with a government, and could reasonably foresee (or subsequently obtains knowledge) that the government is likely to commit abuses in carrying out its part of the agreement;
- When it benefits from human rights violations, even if it does not positively assist or cause the perpetrator to commit the violations;
- When it is silent or inactive in the face of human rights violations.

Legal complicity is clear in the first situation, and possible – depending on the facts and the law applied – in the second and third situations. It is unlikely that companies could be held legally accountable in the fourth situation; though they are likely to be considered morally complicit if they remain silent in the face of grave abuses and to suffer condemnation as a result.

A company's "sphere of influence" is determined by its proximity to both victims and perpetrators, and is a crucial factor in determining both legal and moral complicity.

## **HUMAN RIGHTS AND FREEDOMS – A SELECTED LIST**

### **International law protects:**

**Women's rights** – to equality, non-discrimination in the enjoyment of human rights, and freedom from harassment, violence and exploitation.

**Life, liberty and physical integrity of the person** – the right to be treated with humanity and dignity and with due process of law; prohibits arbitrary killing and detention, torture and other cruel treatment.

**Civic freedoms** – thought, opinion and expression, religious belief and practice, movement, peaceful assembly and association, privacy and family life.

**Employee's rights** – to association, to organise and bargain collectively, to a safe and healthy work environment, a living wage and reasonable working hours; prohibits discrimination in employment and in the workplace.

**Economic and social rights** – to education, work, physical and mental health, and an adequate standard of living including food and housing.

**Right to a clean and healthy environment** – in particular where environmental hazards harm other rights, including to life, health or privacy.

**Children's rights** – to have decisions made in their best interests; prohibits child labour, economic exploitation, and employment that might endanger their health or safety.

**Access to information** – to receive information held by public or private bodies where key public interests are at stake or it is essential to protect other human rights.

**Rights of special groups** – including indigenous peoples, linguistic, religious or racial minorities, the disabled and the elderly; prohibits discrimination and exploitation of such groups.

**Right to justice** – redress for victims, punishment for perpetrators, access to courts and other procedures, measures to prevent further abuse.

**Civilians and victims in war** – from attack, and right to humane treatment; prohibits forcible relocation and expulsion, certain weapons and trade in such weapons.

International law **prohibits discrimination**, on grounds including race, colour, sex, language, religion, political opinion, national or social origin, birth or other status. It also **prohibits forced or bonded labour**, and **slavery**.



## HOW TO ORDER

### Main Report

***Beyond voluntarism: human rights and the developing international legal obligations of companies***, ISBN 2-940259-19-4, 174pp., 165mm x 220mm,

Price: CHF: 36.– +p.&p. Available in English.

**Summary** – Available in English, French and Spanish.

***Beyond voluntarism: human rights and the developing international legal obligations of companies – Summary***. Price: CHF: 10.– +p.&p.

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### Other publications

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***The persistence & mutation of racism***, 2000, ISBN 2-940259-09-7. (Available also in Arabic, French & Spanish.)

***Ends & means: human rights approaches to armed groups***, 2000, ISBN 2-940259-02-X.

***Local perspectives: foreign aid to the justice sector***, 2000, ISBN 2-940259-04-6.

***Performance & legitimacy: national human rights institutions***, 2000, ISBN 2-940259-03-8.

***Hard cases: bringing human rights violators to justice abroad – A guide to universal jurisdiction***, 1999, ISBN 2-940259-01-1. (Available also in Spanish.)

***Taking Duties Seriously: Individual Duties in International Human Rights Law – A Commentary***, 1999, ISBN 2-940259-00-3.

### USEFUL WEBSITES

All United Nations human rights standards can be found at:

[www.unhchr.ch](http://www.unhchr.ch) (Click on “treaties”.)

All ILO standards can be found at:

<http://ilolex.ilo.ch:1567/english/index.htm>

A useful collection of international standards can be found at:

[www1.umn.edu/humanrts/links/omig.html](http://www1.umn.edu/humanrts/links/omig.html)

A resource website with links to information from governments, companies, intergovernmental organisations and NGOs can be found at:

[www.business-humanrights.org](http://www.business-humanrights.org)

## **Advantages of a legal framework**

It is often assumed that companies (and many governments) would oppose the development of binding legal obligations on businesses to respect human rights. Recourse to law suggests (expensive) compliance procedures and possible litigation.

The position, however, is not so clear cut. Companies that are genuinely committed to respecting rights should have nothing to fear from such a development. In fact, clear law might provide significant advantages:

- Where commitments are voluntary, more enlightened companies can lose out to competitors who do not make similar commitments or are not serious about compliance (the so-called “free rider” phenomenon). International standards provide a level playing field.
- Some business leaders acknowledge that they would prefer obligation and clarity to voluntarism and confusion. When the scope of duties is doubtful, companies cannot easily defend themselves or prevent criticism.
- Where clear minimum standards exist, companies that do more can rightly claim to be more socially responsible. As things stand, however, the most inadequate voluntary code can be hyped by the company concerned – while even excellent ones are difficult to defend against critics.

The debate on human rights and business has moved rapidly in recent years. Though discussion still centres on voluntary approaches, increasing attention is being given to the potential role of national and international regulation. International standard-setting initiatives are underway in numerous places, and a number of such initiatives have official government endorsement. Companies would be short sighted, and governments negligent, to ignore this trend.



Do private companies have a legal responsibility to respect human rights?

The debate on business and human rights is well underway. The “spotlight” of human rights concern, traditionally focused on governments, is now turned on the conduct of companies. Most discussion and campaigning, however, centres around voluntary initiatives, such as codes of conduct promoted by companies or NGOs. As the limitations of voluntarism have emerged, however, companies, campaigners and legal experts have started to look harder at international human rights law.

The private sector increasingly accepts that it has social and moral responsibilities. Can such commitments be anchored in international law? In the last 50 years the world’s governments, particularly through the United Nations, have agreed dozens of standards that define and guarantee basic human rights and freedoms. To what extent do these standards – originally aimed at states – create binding legal obligations on companies?

A new report released by the International Council, summarised here, addresses these questions. **Beyond Voluntarism: Human rights and the developing international legal obligations of companies** – information on ordering inside this flap.

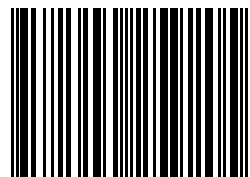
“It will constitute a significant contribution to the debate and will become a standard reference source.” Peter Muchlinski, Professor of Law and International Business, University of Kent, and author *Multinational Enterprises and the Law*

“This a valuable and challenging report, central to the current debate on the future role and responsibilities of companies in a more critical world. The arguments are set out with admirable clarity.” Sir Geoffrey Chandler, Founder-Chair, Amnesty International UK Business Group 1991-2001; former senior executive Royal Dutch/Shell Group.

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