

1

Introduction

Rory Sullivan

Insight Investment, UK

1.1 Globalisation, business and human rights

The globalisation of the world economy offers both unprecedented opportunities and unprecedented threats for companies. Companies have, increasingly, found themselves, their partners or their contractors mired in countries where human rights violations are occurring. For example, media investigations into the conditions in Nike factories in Vietnam revealed beatings, sexual harassment and workers being forced to kneel for extended periods with their arms held in the air. More generally, millions of child workers are enslaved through forms of debt bondage in countries such as India; forced labour is widely used in countries such as Burma (Myanmar) and China; trade unionists receive death threats in Colombia, are banned outright in Burma and are routinely pressured into resigning in Guatemala. Furthermore, it has often been the case that the presence of multinational enterprises in a country has been interpreted as providing support for government policies and actions. The silence of Shell in Nigeria, when Ken Saro-Wiwa and eight other Ogonis were executed after unfair trials, was interpreted by the Nigerian government as tacit support for the actions taken. Similar criticisms have been made of many other multinational oil/energy companies, such as Total in Burma and BP in Colombia. These concerns have been exacerbated by the absence of effective legal mechanisms to ensure the human rights performance of companies. Privatisation, free trade agreements and economic integration have limited governments' ability to regulate transnational corporations. Furthermore, the demand for foreign direct investment has meant that governments are less willing to contemplate regulating companies.

1.2 So where does this book fit in?

The intersection between human rights and business is chaotic and contested. On the one hand are those who see companies as ‘the source of all evil’. On the other are those who have a touching faith in the ability of companies, economic growth and ‘the market’ to resolve all of these human rights problems. Yet the truth, if there is such a thing, is far more complex and indeterminate than either of these extreme perspectives allows. Despite the increasing use of human rights language in public policy discourses, the expectations of companies remain unclear. That is, what are the ethical imperatives? What are the legal expectations? How far does responsibility extend? What can companies actually do in practice? The debate is further complicated by the range of actors (companies, governments, international institutions, local communities, non-governmental organisations [NGOs], trade unions, consumers) involved; by debates around free trade versus fair trade; by the discussion of the specific role of governments; by broader concerns about globalisation and narrower concerns about community development; and by questions about regulation versus self-regulation.

This book provides an assessment of the relationship between companies and human rights in the context of globalisation. The analysis is in two parts. The first maps the reasons (financial, ethical, regulatory) why human rights have become a business issue. But it is not enough simply to say that companies should protect and promote human rights, and then sit back and wait for it to happen. It is also necessary to understand the manner in which companies can and have responded to these pressures. For example, certain human rights issues may be outside the control of companies, others may be too large for companies to address on their own and, in other situations, the pressures on companies to address specific issues may be outweighed by countervailing pressures. Therefore, the second part of the book considers specific examples and case studies of how companies have behaved in situations where human rights violations have occurred or where companies have a role or influence in protecting or promoting human rights.

The focus of this book is on transnational corporations (TNCs).¹ This focus is not intended to suggest that the legal obligations or moral responsibilities of TNCs differ from those of other companies. Nevertheless, TNCs deserve specific attention because, through foreign direct investment, they can make an important contribution to the promotion of economic and social welfare, the improvement of living standards, the creation of employment opportunities and the realisation and enjoyment of basic human rights. However, it has also been argued that TNCs are the cutting edge of a development strategy that destroys local cultures, exploits workers, bankrupts the local poor and widens the gap between the rich and often politically repressive elite and the rest of society. Furthermore, TNCs are key players in the process of globalisation. They are the primary drivers of cross-border involvement and the conveyor belts of international trade. Increasingly, they

1 Other terms are commonly used in the literature such as ‘multinational corporation’ (MNC), ‘multinational enterprise’ (MNE), ‘global corporation’ and ‘multinational’ (see, generally, Voon 1999: 220).

operate through complex, integrated global production networks, and many SMEs and family businesses are connected to TNCs through extended supply chains.

1.3 What are human rights?

Human rights are fundamental principles allowing individuals the freedom to lead a dignified life, free from fear or want, and free to express independent beliefs. Since the end of the Second World War, human rights have been increasingly described in terms of the international human rights legal framework. This framework provides the basis for much of the dialogue around corporate responsibility for the protection and promotion of human rights. While the international human rights architecture, for the purposes of this book, is taken as broadly defining the scope of corporate responsibility for the protection and promotion of human rights, there is one important caveat: namely, that moral rights exist independently of international law. That is, there are moral human rights that may not yet be captured in legislation. Furthermore, the fact that governments legislate against specific human rights (e.g. restrictions on the right to privacy as a consequence of fears of terrorism) does not mean that those rights do not or should not exist.²

The 1948 Universal Declaration of Human Rights (UDHR) is the most widely accepted codification of universal human rights in existence. The UDHR encompasses the right to life, the right to recognition before the law, freedom of thought, conscience and religion, freedom from torture, freedom from slavery and freedom from imprisonment for debt or from retroactive penal legislation. The preamble to the UDHR calls on 'every individual and every organ of society' to respect and promote the rights set out in the UDHR. It is widely argued that these requirements to respect and promote human rights apply to companies as 'an organ of society' (see, for example, Amnesty International 1998; Frankental and House 2000: 22-24; International Council on Human Rights Policy 2002: 58-64; Addo 1999: 27-32). It has been suggested that companies have responsibilities in two main areas. The first is that companies must protect human rights within all of their areas of operation. This includes not only direct employees but also contractors, suppliers, family members, local communities and other parties affected by the company's activities. The second is that companies have a responsibility to support human rights protection more generally through activities such as public statements supporting the protection of human rights, government lobbying, and the integration of human rights considerations into all decision-making processes.

The provisions of the UDHR have inspired or have been cited as the justification for many of the conventions and protocols adopted by the United Nations, defining in greater detail the scope and content of international human rights standards. Because the UDHR is a declaration that has been adopted in the form of a

2 For a more detailed discussion of the nexus between legal and moral conceptions of human rights, see Pogge 2002: 52-70.

resolution of the United Nations (UN) General Assembly, it is, as such, not legally binding. However, the various human rights treaties and conventions that have been produced by the UN are legally binding obligations on the states that are party to them. The two key human rights covenants are the International Covenant on Civil and Political Rights 1966 (which includes the rights to life, freedom from torture or cruel and degrading treatment, freedom from arbitrary arrest and detention, the right of peaceful assembly and freedom of association, and ethnic minority rights) and the International Covenant on Economic, Social and Cultural Rights 1966 (which includes the rights to fair wages, freedom from child labour and forced labour, the right to work, the right to education, the right to join trade unions and bargain collectively, and the right to health and safety in the workplace). These covenants, together with the core conventions of the International Labour Organisation,³ represent the most widely accepted codification of human rights standards in international law.

Companies are not the explicit subjects of international human rights law. That is, international law is addressed to national governments (as the signatories to the various instruments) and nation-states are the primary, if not the exclusive, holders of duties to implement international human rights law. Yet it is also the case that, in many developing countries, governments do not have the capacity or resources to meet these obligations. This raises the question of what companies could or should do, and how far their responsibility extends in such situations. Furthermore, because national governments are the subjects of international law, the specific implications of international human rights law for companies are by no means self-explanatory. The UN Sub-Commission on Human Rights recently issued its Draft Norms on the responsibilities of companies with regard to human rights (UN Sub-Commission on Human Rights 2002b; see Chapter 3 by Peter Muchlinski for a more detailed analysis). The Sub-Commission recognised that, even though states have the primary responsibility to protect and promote human rights, companies, as organs of society, are also responsible for promoting and securing the human rights set forth in the UDHR. A summary of the Sub-Commission's recommendations is presented in Box 1.1.

While there is a growing consensus on what the specific human rights responsibilities of companies should be, it is also necessary to recognise that the degree of responsibility is restricted by the ability to exert influence. A company is, of course, fully responsible for its own actions. It also has a degree of responsibility for situations that it does not control but can influence, although determining that degree will frequently be difficult. In broad terms, there are three levels of influence (Amnesty International [The Netherlands] and Pax Christi 2000: 45-54):

3 The eight core ILO conventions are: Conventions 29 (forced labour), 87 (freedom of association and protection of the right to organise), 98 (right to organise and collective bargaining), 100 (equal remuneration), 105 (abolition of forced labour), 111 (on discrimination), 138 (minimum age of workers) and 156 (equal opportunities and equal treatment for men and women workers; workers with family responsibilities). In addition, ILO Conventions 182, 190 (child labour) and 169 (the rights of indigenous and tribal peoples) are increasingly seen, at least by NGOs, as part of the core set of labour standards.

Companies must respect and promote the following rights:

- Right to equal opportunity and non-discriminatory treatment
- Right to security of person
- Rights of workers (companies shall not use forced or compulsory labour, shall respect the rights of children, shall provide a safe and healthy workforce, shall provide workers with remuneration that allows for an adequate standard of living for them and their families, shall ensure the freedom of association and the right to collective bargaining)
- Respect for national sovereignty and human rights (including not paying bribes, ensuring that the company's goods and services are not used to abuse human rights, respecting civil, cultural, economic, political and social rights in particular, the rights to development, adequate food and drinking water, highest attainable standard of physical and mental health, adequate housing, education, freedom of thought, conscience and religion, freedom of opinion)
- Consumer protection
- Environmental protection

These obligations apply to the company itself and also to contractors, subcontractors, suppliers and licensees.

Box 1.1 Recommendations of the UN Human Rights Sub-Commission on Companies and Human Rights

1. A company has direct control (i.e. its own operations and activities) and can be held responsible for the realisation of human rights. This responsibility relates to issues such as labour standards, expectations that the company will not use, procure or offer goods that have been produced using forced or bonded labour or the worst forms of child labour, the treatment of indigenous peoples, and security arrangements.
2. A company can exert influence over a situation and thus can contribute to the realisation of human rights by or in conjunction with others. In the context of TNCs, these responsibilities relate particularly to supply chains and relationships between the company and its suppliers, subcontractors and business partners. In these situations, TNCs can usually require these parties to meet certain standards (including human rights standards). Another dimension to these responsibilities is that companies should consider the manner in which their products or services may be used to violate human rights. The obvious example is military equipment but another example could be the provision of aviation fuel to a repressive regime.
3. A TNC can contribute to the creation of an enabling environment for the realisation of human rights. Even in situations where a TNC has no direct control over a situation, it still has a responsibility to contribute to the creation of an enabling environment for the realisation of human rights

by all. While the main contribution of TNCs tends to be through the provision of economic benefits (i.e. overcoming economic barriers to the realisation of human rights), the responsibility does not end there. TNCs can also contribute to the protection and promotion of human rights through their public commitment to the UDHR, by making public statements of support or concern regarding human rights violations, and by contributing to or supporting development activities.

1.4 Structure of the book

The book is divided into two main sections. The first section is a discussion of the reasons why human rights are important to companies. Geoffrey Chandler starts by locating the business and human rights debate in the context of NGO campaigns, of corporate mistakes and misdeeds and of changes in the international geopolitical situation, in particular since the collapse of communism. Peter Muchlinski, David Kinley and Adam McBeth then look at the legal context within which TNCs operate. Muchlinski looks at efforts to directly regulate or otherwise ensure the performance of companies. In contrast, Kinley and McBeth look at the specific issue of trade law ('the rules of the game') and argue that, if the conduct of 'the players' cannot be guaranteed directly, the rules by which they play could instead be amended. Both of the chapters confirm the feasibility of directly regulating TNCs and provide examples of how this has been done. Yet both conclude that there is limited political appetite for directly regulating TNCs.

The weakness of the regulatory threat raises the question of why companies should be concerned about human rights. Denis Arnold considers the ethical (or moral) reasons why companies must protect and promote human rights, and highlights the benefits that can accrue from such an approach. Companies often argue that, despite the ethical reasons, they do not have a mandate to engage with governments on human rights. Frans-Paul van der Putten, Gemma Crijns and Harry Hummels challenge these arguments, proposing that it is in companies' interest to protect and promote human rights. Furthermore, they argue that shareholders (as the owners of companies) must accept their moral responsibility for the protection and promotion of human rights. This theme is developed by David Coles, who examines the role and responsibility of shareholders in some detail. Finally, Rory Sullivan and Nina Seppala look at the business costs and benefits of protecting and promoting human rights. Taken together, the chapters in the first section provide a model of 'regulation', where the pressures that are brought to bear on companies are not just traditional legal approaches but include reputational, financial and ethical pressures. While each of the pressures on its own is relatively weak, the combined effect is synergistic and reinforcing. It is increasingly clear that not only do companies have a responsibility for the protection and promotion of human rights but there are also ever-stronger pressures on companies to discharge these responsibilities.

The chapter by Sullivan and Seppala, which considers how companies organise themselves (through management systems and processes) to respond to these pressures, provides a bridge between the first section of the book and the second, which looks at the experiences of companies in responding to human rights pressures. The section is divided into three parts: operations, supply chains, and community and government. While this division is somewhat arbitrary (and, indeed, many of the case studies could belong to more than one of these categories), it reflects the manner in which many TNCs organise themselves (i.e. supply chain management tends to be a separate function from operations and from community and government issues, which are frequently covered under 'external relations').

Four case studies are presented that relate to companies' direct area of operations. Charles Woolfson and Matthias Beck look at the question of 'corporate killing' and the responsibility of companies to protect the well-being of their employees, using the example of the offshore oil industry and the tragedy of Piper Alpha. They use this example to raise broader questions about the manner in which public policy can be captured or influenced by business interests. Simon Handelsman covers a similar theme in his chapter, looking at case studies from mining operations in Indonesia and Bolivia. In both countries, the companies inadvertently caused, or contributed to, situations where people were killed. Handelsman compares the corporate responses—one company learned from its experience and has subsequently implemented a range of development, capacity-building and conflict-reduction measures, whereas the other appears to continue in a 'state of denial'—and draws important conclusions about the manner in which companies can prevent conflict.

Norbert Goldfield looks at the potential for a company's products to contribute to human rights violations (in this case, the manner in which transplant rejection medicine has contributed to the problem of the harvesting of body organs from executed prisoners in China). Goldfield uses this example to discuss the role of professionals (in this case, medical specialists) within the corporation and examines what these individuals should do in situations where professional and personal ethics conflict with corporate norms. Finally, Christopher McDowell deals with an emerging issue that, in many ways, is typical of the debates around globalisation. The displacement of indigenous populations (with associated problems such as lack of prior informed consent, forced or violent displacement, inadequate consideration of indigenous peoples' rights, inadequate compensation) has been a consequence of many large-scale infrastructure projects such as dams. Historically, governments have managed the displacement process (albeit extremely badly in many cases). There is a growing trend for the private companies building or managing large projects (not just traditional infrastructure such as roads and dams but also large industrial developments) to have the primary responsibility for managing the relocation of local populations. McDowell describes the issues that are likely to be faced by companies and analyses more generally the implications of the private sector supplanting government in these situations.

The discussion of supply chains comprises four distinct case studies: Steven Lim and Michael Cameron's chapter on the potential for rural development (in particular, the location of TNCs' manufacturing facilities in rural areas) to contribute to

reducing the incidence of HIV/AIDS; Bahar Ali Kazmi and Magnus Macfarlane's chapter on the efforts to eliminate child labour in the football stitching industry in Pakistan; Deborah Leipziger and Eileen Kaufman's chapter on the potential for standards and certification processes to contribute to improved labour conditions in supply chain factories; and Luis Reygadas's chapter on the maquiladoras in Mexico. The chapters all identify the potential for TNCs, through their supply chains, to contribute positively to the protection and promotion of human rights, through the provision of economic benefits such as wages and salaries to employees, the provision of safe workplaces, and other initiatives such as employee training and community development or philanthropy. However, the case studies also emphasise the importance of a socially and culturally sensitive approach to supply chain management. While the motivations of companies may be positive (e.g. to eliminate child labour), the consequences of inappropriate approaches can be to transfer problems elsewhere, to exacerbate the problem that it was originally intended to address or even to have no impact at all on the issue in question.

Finally, the discussion of community and government (e.g. business–government relationships, business–NGO relationships, business and community development) comprises five case studies, looking at different aspects of this question. Jessica Banfield, Gary MacDonald and Timothy McLaughlin, and Bennett Freeman and Genoveva Hernández Uriz provide different perspectives on the role of companies in conflict situations and the potential for companies to contribute to peace-building and/or to exacerbate conflict. Banfield's chapter provides the overall framework for understanding the contribution of companies to conflict or, more positively, to peace-building. MacDonald and McLaughlin discuss the reasons why mining companies so often find themselves in conflict situations. They argue that it is not simply 'because of the nature of their activity' but it is more to do with the way companies see the world as a mechanical system where problems can be 'fixed' (e.g. through the provision of more money for community development). The consequence is that companies tend to reward the wrong behaviours (e.g. communities protest and get 'rewarded' with community development benefits). Freeman and Hernández Uriz then look at the contribution that TNCs can make to conflict prevention at the global level, using the example of the Voluntary Principles on Security and Human Rights. While their chapter also shows how governments can use their influence to encourage responsible corporate behaviour, the question of whether this form of global self-regulation will prove effective remains unanswered.

Corruption remains one of the critical barriers to the realisation of human rights. David Hess and Thomas Dunfee look at the measures that can be adopted by companies to combat bribery and the business arguments for companies to take a strong position on this issue. Finally, Heike Fabig and Richard Boele look at the potential for companies and NGOs to work together to promote human rights and the potential challenges faced by companies and NGOs seeking to 'sleep with the enemy'.