

International Federation for Human Rights (FIDH)
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Meeting on the OECD Guidelines for Multinational Enterprises and Other Global Instruments for Corporate Responsibility
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STATEMENT ON THE INTEGRATION OF HUMAN RIGHTS
IN CORPORATE PRINCIPLES

First of all, may I thank the conveners of this meeting for inviting the FIDH; we welcome the opportunity to submit this paper on corporate responsibility.

It has been argued that human rights organisations have no business dealing with multinational companies: indeed, under international human rights law, states are the primary duty-bearers: they have primary responsibility for upholding these rights and freedoms; they are the ones who are ultimately responsible for protecting and implementing rights. This means that governments are our natural “targets”, since our aim is to make them comply with their obligations.

But the international scene is no longer just about formal, diplomatic relations between states – it has witnessed the emergence of increasingly powerful non-state actors; powerful in the sense that their activities have a major and direct impact on the lives of millions of people, on international relations, on conflicts... These non-states actors operate in the financial and economic fields, and they are essentially of three types: international institutions such as the IMF, the WB, the WTO; public or semi-public national bodies such as export credit agencies; and private entities such as MNEs. The problem is that their power is not matched by a corresponding degree of responsibility and accountability. Some MNEs have a budget that far exceeds that of many developing countries – and still, there is no mechanism to hold them accountable for the violations of human rights that their activities generate. In many developing countries where these MNEs operate, the rule of law is ineffective; there are no legal remedies, and no possibilities of redress – which goes to say that the MNEs can act in near-total impunity.

Basically, this means that international law has to evolve so as to become a global instrument that limits the power and rights of organised institutions, obliging them to abide by universally accepted norms and values; in turn, this comes down to recognizing the superior standing of the UDHR in the international legal framework, *i.e.* recognizing that it prevails over any other international treaties. The issue here is that of the supremacy of international human rights law – a supremacy now widely acknowledged, and backed by powerful legal arguments.

In other terms, one should try to prevent the insulation of trade and investment practices from other aspects of international relations and international law. Economic, trade, or financial policies and practices should be subordinated to what is universally acknowledged as the supreme principles in international law: respect for human rights.

This focus on law is not intended to privilege legal enforcement as opposed to voluntary initiatives, which have a value as a first step towards ensuring universal compliance for human rights. But the emphasis here is three-fold:

1. First, that the question of legal accountability of multinational enterprises is important and that international law should play an important role in reinforcing such accountability.
2. Second, that international human rights law offers a comprehensive framework for the companies' commitments in the field of corporate responsibility, as it consists in a holistic approach, which encompasses the full spectrum of civil and political rights as well as economic, social and cultural rights. This is why the FIDH promotes a rights-based approach.
3. Third, that any functioning guidelines will have to be both *retrospective* and *prospective*: *i.e.* both open the possibility to seek redress for harm done, and prevent future harm.

Now, this has several consequences, among which three are singularly important in the context of our discussion:

1. Public authorities can do a lot to force companies to abide by human rights standards. For example, the Security and Exchange Commission in the US recently ruled that information dealing with human rights (based on the State Department Report) is "material information" and must be reported by the firm; in the UK, the government ruled that pension funds must declare whether they incorporate ethical criteria when investing, etc... There is a whole array of actions that a government can take to incite its corporations to comply with human rights, such as, for instance, imposing strong guidelines for its credit export agency. One could add here that actually States have a *legal* obligation to regulate the behaviour of non-state actors and to ensure that these agents do not violate human rights.
2. The second point is that the key to a satisfactory implementation of any guideline or of any code of conduct is the *control mechanism*. In a recent OECD publication *Corporate responsibility, private initiatives and public goals*, the authors noted the ambiguity of the term "voluntary" when it comes to voluntary codes of conduct: such initiatives are often the result of a very strong pressure (by public opinion, by public authorities, possibly by shareholders...) put on the company. In other terms, companies *do not spontaneously* want to be regulated in these non-trade aspects; this means that, unfortunately, one cannot grant them the benefit of the doubt when it comes to the implementation of such charters, as the examples of Total in Burma, of pharmaceutical companies in developing countries, of diamond companies in Africa, amply demonstrate. One should acknowledge the virtues of dialogue with multinational companies – but unfortunately also the limits of such a dialogue. For companies to satisfactorily implement their charter, the same type of pressure as that which led to its adoption has to be applied, which means that *an independent and credible enforcement procedure* has to be put in place. This is indeed the big stumbling block of many of these guidelines, including the OECD Guidelines. It is obviously notoriously difficult to check the correct implementation of a code within an MNE, if only because of its often sprawling companies, its multiple and often hidden sub-contractors, etc... But a good hint is always: what control mechanisms has the company provided for in its charter? Is the firm open to public scrutiny? This is obviously linked to the issue of transparency.
3. Due to the intrinsic limitations of voluntary charters, intergovernmental institutions should envisage setting up *binding* guidelines for MNEs. Respect for

human rights, and particularly of labour rights, cannot be left to the mere good will of the company.

Now, if I turn to the OECD guidelines, what would the flaws be in this respect? The 2000 review of the guidelines indeed marked a progress, insofar as it makes reference to human rights (§ II, 2). The FIDH considers that this is a welcome step, though yet not enough.

I will limit myself here with more general remarks on the OECD guidelines.

1. The first problem is that the Guidelines are non-binding in character, though their implementation procedure is binding on member-states.
2. The second problem is the disappointing record of National Contact Points in promoting and enforcing the Guidelines.
3. The Contact Points can refer issues to the OECD's Committee on International Investment and Multinational Enterprises (CIIME); but neither the Contact Points nor the CIIME can judge the behaviour of individual companies; they can merely clarify the meaning of the guidelines for the future.
4. Nor are their decisions technically binding on the parties. This amounts to saying that there is no enforcement; this is made worse by the fact that there is no possibility of public pressure: the practice is that the identity of companies is never revealed.

The point here is to underscore the necessity for strong enforcement mechanisms. Precisely because the mechanisms that enforce human rights standards at the international level are weak, based essentially on diplomatic and public pressure, one should not underestimate the power of public exposure – which could actually be possible under the OECD Guidelines, as the Contact Points are allowed to release the results of their investigation. The presumption should be in favour of disclosure instead of the other way around.

Transparency is thus essential both for the enterprises in order to ensure their bona fide commitments, and for the issuing body – in our case, the OECD – in order to maintain its legitimacy and not undermine public confidence in its procedures.

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