Time to Act : Holding Business Accountable to Human Rights

A Contribution of the International Federation for Human Rights (FIDH) to the European Multi-Stakeholder Forum on Corporate Social Responsibility

– 29 June 2004 –

I - Introduction
II - Developing European Public Procurement law in accordance with the requirements of human rights
III - Contributing to the promotion of the OECD Guidelines for Multinational Enterprises
IV - Securing the credibility of codes of conduct
V - Combating impunity for human rights violations committed in third countries by EU-based multinational enterprises, or with their complicity
VI - Imposing a ban on investments in States committing gross and systematic human rights violations
VII - Conclusion
Time to Act : Holding Business Accountable to Human Rights

A Contribution of the International Federation for Human Rights (FIDH)
to the European Multi-Stakeholder Forum on Corporate Social Responsibility

1. Introduction

The International Federation for Human Rights (Fédération internationale des Ligues des Droits de l’Homme – FIDH) has 142 member organisations, all dedicated to promoting and protecting the rights enshrined in the Universal Declaration of Human Rights, and covering all the continents. As it receives regular information from its members concerning this question, the FIDH has been particularly attentive to the risks associated with globalization for developing countries. The internationalisation of economic relationships has been encouraged by the progressive elimination of barriers to foreign direct investments and by the strengthening of the protection of these investments, results which have been achieved through the conclusion of a large number of bilateral investment treaties. Many of these bilateral investment treaties impose obstacles to the regulation by the host States, mostly developing countries, of the activities of multinational enterprises operating on their territory either directly or through the setting up of subsidiaries. Even where the developing countries receiving foreign direct investments are not prohibited from acting to better regulate the activities of multinational enterprises operating under their jurisdiction, they may be reluctant to do so, because of the risk that investors will move to other jurisdictions, competing for investments which may be a source of economic growth, may contribute to creating employment, and may encourage the transfer of technologies.

In the view of the FIDH, therefore, the industrialized countries, including the member States of the European Union, have a duty to act to better control the corporate actors which are domiciled in their jurisdiction. They must ensure this control, which developing States hosting the investments from multinational enterprises are prohibited from exercising, or may be unable or unwilling to exercise.

It is against this requirement that the results of the European Multi Stakeholder Forum on Corporate Social Responsibility are to be assessed. The FIDH, like a number of other non-governmental organisations and a panoply of research centres in universities or foundations, has been following the emergence of CSR practices since many years. It has identified certain good practices in the field. It has also denounced situations where the ways of acting of corporations do not meet up to the expectations raised by their discourse, for instance by the adoption of codes of conduct. But in the view of the FIDH, the European Union and its member States are more than observatories. They are not simply there to organize roundtables, to identify positive developments and express regrets about less encouraging evolutions. They have a power to regulate non-State actors, especially to ensure that international human rights are not violated by these actors. Under the relevant international instruments, in fact, they are under an obligation to adopt measures to ensure that private actors do not violate the fundamental rights of others: what they are prohibited from doing directly, they should not tolerate indirectly where the violations have their source in the acts of non-State actors.

The FIDH is grateful to the European Commission for having set up the European Multi Stakeholder Forum on Corporate Social Responsibility, indeed a much needed exercise in sharing knowledge, and for having being so active in encouraging all the interested parties to invest in the process. However, what the European Commission has done, any organisation, whether public or private, could have done as well, provided with the necessary means. It is time, now, that the Commission takes responsibility for translating the discourse on CSR into effective regulation. Every day, human rights are violated with the complicity or the active participation of corporate actors which are insufficiently regulated by their home State, because the States where they operate cannot impose on them effective regulations in the social, environmental or human rights fields, or because – more frequently – the local governments themselves are the prime violators of the human rights of their own populations.
In the view of the FIDH, now is the time to act. The European Commission should make concrete proposals, of a regulatory nature, to put an end to the existing situation of impunity. The European Multi Stakeholder Forum on Corporate Social Responsibility was launched based on the premise, which all participants agreed to, that CSR is about “the voluntary integration of environmental and social considerations into business operations, over and above legal requirements and contractual obligations. CSR is about going beyond these, not replacing or avoiding them”. In fact, while dialogue within the Forum has been developing, almost nothing has been done to develop these legal requirements and contractual obligations, which that dialogue should not have replaced. In the impression of many, the Commission has been invoking the dialogue which is now coming to a close to refuse to take responsibility where it could have acted better and more efficiently. This impression must be dispelled. The FIDH calls upon the Commission to take initiatives in the five following areas:

2. Developing European Public Procurement law in accordance with the requirements of human rights

The Member States should be encouraged to include a concern for human rights in their public procurement policies. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134 , 30.4.2004, p. 114) does not go far enough in that direction. In accordance in that respect with the case-law of the European Court of Justice, that Directive does provide that contract performance conditions may seek to favor the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment, or that they may include a requirement, for instance, that the contractors comply with the basic conventions concluded within the International Labour Organisation (ILO), to the extent that these conventions are implemented in national legislation (Article 26).

This however is insufficient. What is needed is that the Member States may decide to award their public contracts only to economic operators which undertake to respect, ensure the respect of, and protect human rights in their spheres of activity and influence, and who effectively agree to submit to monitoring procedures which ensure that this undertaking is complied with. There are no insuperable technical obstacles to providing for this possibility. In particular, the authorization of States to rely on such an “ethical clause” to select their contractors will not necessarily lack the required objectivity, and create the risk of discrimination or non-transparent practices. For instance, the Member States could be authorized to require that economic operators wishing to compete for the awardance of public contracts agree to abide by the Guidelines for Multinational Enterprises set up by the Organisation for Economic Co-operation and Development, and to comply with any procedure initiated within those Guidelines.

Directive 2004/18/EC already provides that economic operators who have participated in a criminal organisation or who have been found guilty of corruption or of fraud to the detriment of the financial interests of the European Communities or of money laundering may be excluded from public contracts (Article 45). It would have been desirable, and it would have been an important contribution to enhancing the credibility of the discourse of the European Union institutions on corporate social responsibility, to go further. For instance, economic operators who have been found by a judgment having the force of res judicata to have committed, or to have aided and abetted to commit, or to have been complicit in, violations of the fundamental rights of workers as enumerated in the 1998 Declaration of the International Labor Conference on Fundamental Rights and Principles at Work, should be excluded from public contracts, just like under the current Directive they should be excluded if they have been found in violation of national legislation implementing Directives 2000/78/EC or 76/207/EEC. A similar exclusion should be imposed on those undertakings which have been found liable on the basis of the United States Alien Tort Claims Act 1789 (U.S.C. § 1350 (1994)), as the finding of such a liability would mean that the concerned undertaking has violated specific norms universally recognized as part of the “law of nations”.

---

3. Contributing to the promotion of the OECD Guidelines for Multinational Enterprises

The FIDH also believes the European Commission could do more to contribute to the multinational enterprises domiciled in the European Union complying with the OECD Guidelines for Multinational Enterprises and submitting to the control mechanisms of the revised Guidelines (2000). It could, for instance, create contact points in the EU Delegations in third countries, thus facilitating the lodging of complaints against EU-based multinationals for their activities abroad. The “EU contact points” should be recognized the same role as the national contact points instituted in each country of the OECD: they should promote the OECD Guidelines by reaching out to those affected by the activities of EU-based multinationals operating in third countries, especially the representatives of local communities, trade unions and non-governmental organisations; they should handle enquiries about the Guidelines; they should aid in the interpretation of the Guidelines; and they should receive complaints, whenever Member States, enterprises or trade unions, but also “other parties concerned”, allege that a particular enterprise has violated the Guidelines.

4. Securing the credibility of codes of conduct

The FIDH also believes that the current proliferation of codes of conduct, while encouraging in principle as it demonstrates a willingness by business actors to accept that they have a responsibility which goes beyond making profit for their shareholders, also may constitute a problem. The codes of conduct are of very variable quality. They may or may not include a reference to certain fundamental standards, such as the 1998 ILO Declaration on Fundamental Rights and Principles at Work and the Universal Declaration on Human Rights. They may or may not be combined with credible, external monitoring of the activities of the enterprise which adopted the code of conduct, and its sub-contractors on whom it may impose that they comply with the same norms. They may or may not be interpreted as prohibiting the enterprise to work in certain countries, where any investment per necessity would contribute to repressive governmental activities, as they may contain varying understandings of the conditions under which an investor should be seen as sharing complicity with the local government, for human rights violations committed by the regime of the host State.

The difficulty with these strong variations in the quality of codes of conduct is that such codes are now quickly losing their credibility. The consumer is uncertain about how to interpret them. In turn, even some enterprises most committed to assuming their environmental, social and ethical responsibilities may feel that it is in their interest to adopt the least constraining code of conduct possible: if consumers do not see any difference between the multiples codes which exist, why would an economic actor choose to impose on itself more constraints rather than less? The current situation is one in which, because of the proliferation of codes, the worst codes have the capacity to crowd out the better ones. It is a situation in which the enterprises most committed to assuming their social responsibilities are being penalized for making this choice, as less scrupulous competitors dress up codes of conduct which are lacking both in terms of content and in terms of control mechanisms but which, in the eyes of the consumer, are hardly distinguishable from the better codes of conduct.

The FIDH believes the European Commission has a crucial role to play in response to this situation. The Commission noted in its July 2001 Green Paper on corporate social responsibility that monitoring is important to “secure the credibility of codes of conduct”. It should immediately set up the European Monitoring Platform called for by the Resolution adopted on 15 January 1999 by the European Parliament, or transform the Multi-Stakeholder Forum on CSR into such an Observatory, and entrust it with the following tasks:

- as proposed by the European Parliament in its Resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility (C5-0161/2002 – 2002/2069(COS), para. 13-14), this Observatory should register the codes of conduct adopted by enterprises domiciled in the EU, and verify these codes against minimum internationally applicable international standards such as the OECD Guidelines for

– the Observatory should receive complaints about non-compliance by an undertaking with its own, self-chosen, code of conduct, and publicize the results of its findings as to whether the complaint has prima facie sufficient grounds or not.

In the view of the FIDH, this should not be seen as imposing new burdens on enterprises, but rather as clarifying the existing situation. A code of conduct advertising the practices of an enterprise to its consumers, whose choices may be influenced by this presentation, is already binding on the enterprise to the extent that it publicizes this code. Such a code, if not complied with by the enterprise, already may be seen as constituting misleading advertising in the meaning of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and the Council of 6 October 1997 (OJ L 290, 23.10.1997, p. 18, corrigendum OJ L 194, 10.7.1998, p. 54).

5. Combating impunity for human rights violations committed in third countries by EU-based multinational enterprises, or with their complicity

Multinational enterprises based in the EU which commit, or are complicit in, human rights violations abroad, especially in developing countries whose governments may lack the incentives, the power, or even the will to sanction such violations, should not enjoy impunity within the European Union. They are civilly liable to the victims of such violations: this is already a possibility under Council Regulation n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1), Article 2(1) of which states that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”. However, the FIDH is aware that victims of human rights violations in which corporations domiciled in the EU have a responsibility do not in fact rely on this possibility. This may be due to obstacles such as the geographical distance from the place where such violations occur to the jurisdictions of EU Member States, or the absence the class action mechanism which has been so useful in the context of the Alien Tort Claims Act creating a comparable basis for jurisdiction for the United States federal courts. However one obstacle could be that victims are simply unaware that this possibility exists, or that the Member States, despite the clear terms of Regulation n° 44/2001 – previously the 27 September 1968 Brussels Convention – have not clearly attributed to their national jurisdictions a competence to receive civil suits from victims having suffered violations abroad, in circumstances which could trigger the civil liability of a corporation domiciled on the territory of an EU Member State. The FIDH would welcome a study by the European Commission on the approach adopted by the Member States on this matter. Such a study, insofar as it could lead to improving the uniform implementation of Regulation n° 44/2001 with regard to extra-territorial jurisdiction, could contribute to the elimination of remaining distortions of competition within the EU, where the Member States adopt diverging approaches on this issue.

More importantly, the FIDH believes that, in certain circumstances where serious human rights violations have occurred in which a corporation based in the European Union shares a responsibility, the possibility must exist to engage the criminal liability of that corporation. Recalling the position adopted on this issue in the report presented within the EU Network of Independent Experts on Fundamental Rights on the activities on the European Union in 20032, the FIDH notes that Articles 31, e), and 34 EU could provide the legal basis for the adoption of a Framework Decision providing that Member States criminalize serious infringements of human rights committed by corporations having their registered office, principal place of business or centre of operations in a Member State of the European Union, irrespective of where these infringements have been committed, without prejudice to the possibility of involving the civil or criminal liability of the natural persons who are directly responsible for the violations. Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment

through criminal law (OJ L 029 of 5.2.2003 p. 55) is based on such broad interpretation of Article 31, e) TEU, and it also combines the liability of natural persons with that of legal persons. Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ L 192 of 31.07.2003, p. 54) also was adopted on the basis of Articles 29 and 31, e), EU, and encourages the Member States to take the necessary measures to establish their jurisdiction where the offence has been committed by one of their nationals or for the benefit of a legal person that has its head office in their national territory (Article 7 § 1, b) and c)). These examples show that, if the political will is there, the tools are available to be used.

6. Imposing a ban on investments in States committing gross and systematic human rights violations

Finally, the FIDH considers that in certain cases, the EU should impose economic sanctions, in the form of investment pullout and the imposition of a ban on the export of financial services, on certain States, and should consequently impose on EU-based corporations to leave those countries and to renounce any further investment in those countries in the future. Such a decision would be justified in the face of gross and systematic human rights violations in a country, when these are such that no foreign investor can claim to be able to remain in that country without his presence being supportive of the repressive policies of the government of the host State, and provided that direct aid to civilian populations is not interrupted and the sanctions therefore do not lead to a deterioration of the condition of the local communities.

Burma (Myanmar) presents us with a such a case since many years, as recognized in particular by the International Labour Organisation and the United Nations. In fact, Burma is the only country where any investment immediately disqualifies the investor in the ethical fund ‘Freedom and Solidarity’ set up by the FIDH, and which rates enterprises according to their performance in the field of human rights. Drawing its conclusions from the many reports documenting gross human rights violations in Burma and the continued imposition of forced labour by the military junta in power, the United States Congress has adopted P.L. 108-61 (the Burmese Freedom and Democracy Act of 2003), which includes a ban on all imports from Burma, a ban on the export of financial services by U.S. persons to Burma, and an asset freeze on certain named Burmese institutions. In the report submitted to the Congress on 28 April 2004 pursuant to section 8(b)(3) of the Burmese Freedom and Democracy Act, the U.S. Department of State notes that “the import ban implemented in 2003 would be far more effective if countries importing Burma's high-value exports (such as natural gas and timber), (...) would join us in our actions. Other U.S. measures, such as the ban on new investment in Burma and the ban on the export of financial services to Burma would also be more effective were the EU and others to take similar steps” (our emphasis).

Indeed, it is a matter of serious concern to the FIDH that despite all its insistence on the need for corporations to act responsibly, the European Union has still not imposed a ban on European investments in Burma. European companies still are present there, thus creating the impression by their presence that the military junta can go about its business as usual, and objectively encouraging the regime to persist in its repressive policies. Of course, the European Community has prohibited to grant, sell, supply or transfer technical assistance related to military activities in Burma and to provide arms and related material to any person, entity or body in, or for use in Burma/Myanmar; and it has prohibited to provide financing or financial assistance related to military activities for use in Burma/Myanmar (see most recently Council Regulation (EC) No 798/2004 of 26 April 2004 renewing the restrictive measures in respect of Burma/Myanmar and repealing Regulation (EC) No 1081/2000, OJ L 125 of 28.4.2004, p. 4). However, this remains short from imposing the kinds of sanctions the United States has chosen to impose, and which the opposition to the military junta and the International Labor Organisation have called for. It is also notable in the view of the FIDH that, although the Council has imposed certain sanctions on members of the military junta and persons who are cooperating with the Burmese regime and support their repressive policies (Council Decision 2003/907/CFSP of 22 December 2003 implementing Common Position 2003/297/CFSP on Burma/Myanmar, OJ L 340, 24.12.2003, p. 81), there is no mention of directors of European enterprises which have invested in Burma, and remain there in the face of unanimous criticism by NGOs and calls from the ILO to withdraw, although persons heading State Economic Enterprises in Burma are mentioned.

p. 6
The FIDH has been one of the most active non-governmental organisations in denouncing the conditions in which the French multinational Total (now TotalFinaElf) has been present in Burma since 1995, in a joint venture with the California-based Unocal and the MOGE gas company owned by the military junta (State Law and Order Restoration Council, ‘SLORC’). That this enterprise still is present in Burma, supporting the regime by the important economic contribution it makes to its repressives policies, is simply unacceptable and should not be tolerated.

The FIDH considers that the approach of the EU to the question of Burma – strong vocal condemnation, but little desire to actually enforce measures which may hurt European enterprises – illustrates the difficulty to move to effective action where important economic interests are involved. The FIDH regrets this, and it believes that it is both possible and necessary to move further on this issue.

7. Conclusion

The FIDH is aware that, in the current discourse on CSR, two tales coexist. One is that there exists a powerful business case for improving practices based on corporate social responsibility. The logical consequence which follows is that market mechanisms – the sanctioning by the consumers and the workforce in particular – should impose socially responsible practices to corporations, and that therefore regulation to impose CSR ‘from above’ would be, at best, useless, and at worst, counterproductive, as this would discourage voluntary initiatives by enterprises motivated by the desire to attract consumers and retain the most talented employees. A second tale is that imposing strong regulations on corporations, especially on their activities abroad the EU, would be threatening their competitiveness vis-à-vis, especially, other corporations, based in particular in other OECD countries. These tales contradict one another. Either CSR is good for business, and then imposing it rather than relying on market mechanisms to encourage it, may not be damaging for European corporations in the international marketplace; or CSR imposes costs on enterprises, and therefore we should avoid imposing too severe requirement on enterprises in the name of CSR, not to threaten their ability to compete with enterprises from other industrialized countries.

The view of the FIDH however is that not only are these presentations contradictory and self-defeating; they also miss the point. Imposing on multinational enterprises that they comply with internationally recognized standards in the field of labor rights, environment, and human rights, has nothing to do with economic considerations, and all to do with the contribution the EU and its Member States can make to the realisation of an international order in which the rights and freedoms of the Universal Declaration of Human Rights can be fully realized (Article 28, UDHR).