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By Invitation:

Standards and practices – Guiding principles for business and human rights

Since 2005 John Ruggie has been working on business and human rights for the United Nations. Here, in a new regular essay section, he outlines his conclusions to date and areas of focus for the next year.

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Increasing the effectiveness of the international human rights regime to deal with adverse effects of globalisation is a challenge of historic dimensions. Indeed, the social sustainability of globalisation, of which the transnational corporation is the most visible embodiment, may hang in the balance.

In 2005, the United Nations Commission on Human Rights (since replaced by the Human Rights Council) asked the UN secretary-general to appoint a special representative on the subject of business and human rights. The mandate was two-fold: to conduct a conceptual and factual ground-clearing, identifying and clarifying current international standards and practices as well as emerging trends; and to submit views and recommendations for consideration by the council and other stakeholders on how most effectively to close protection gaps. The secretary-general appointed me to this post on 28 July 2005.

Fast-moving target

The mandate was established in order to move the business and human rights agenda beyond the stalemate created by the highly contentious debate over the "Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights". This document was adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights, an expert advisory body, but not by the commission, its intergovernmental parent body. While granting that the text contained "useful elements and ideas," the commission noted that it had not requested it and that, as a draft, it had no legal standing.

I submitted the results of my initial work to the council in March this year. This report said that the business and human rights domain was highly fluid and has exhibited considerable legal and policy innovations over a relatively short period. It also demonstrated that significant gaps continued to exist.

Governments responded favourably to the report, both at the council and subsequently at the 2007 G8 Summit. I now have until June next year to explore what measures governments, business, and other social actors could take to improve corporate human rights performance, and to recommend those options I believe would work best.

The mapping of current standards and practices also generated broad insights into how to move ahead. Here, I briefly enumerate four guiding principles for the mandate's recommendatory phase.

First, any "grand strategy", if it is to succeed, needs to strengthen and build out from the existing capacity of states and the states system to regulate and adjudicate harmful actions by corporations – not undermine it. Currently, at the domestic level some governments feel unable to take effective action on their own, whether or not the will to do so is present. And in the international arena, states compete for access to markets and investment funds, which may impede their ability to act on behalf of the international community's overall interests.

These are very real constraints. But the quantum leap taken by the Draft Norms to impose on corporations precisely the same range of duties as states are bound by under international law – from respecting to fulfilling rights – would impede, not advance, the realisation of rights. It would reduce the discretion of, and incentives for, governments to perform their public responsibilities, while turning the modern corporation into a benign version of the East India Company, as a result of which it would not last long as a commercial enterprise. Yes, companies should have human rights duties, but conflating them with the obligations of governments undermines the social roles of both.

Therefore, it seems more promising in the first instance to expand the international human rights regime by further clarifying and progressively codifying the duties of states to protect human rights against corporate violations – their duties individually, as host and home states, and collectively. As a by-product, this will generate ongoing refinements of standards for corporate responsibility and accountability.

It will also create a broader understanding of where the current system cannot possibly function as intended and where more fundamental change, therefore, is required. International legal instruments may well have a significant role to play in this process, but as carefully crafted precision tools leveraging and augmenting the capacity of existing institutions.

Beyond corporate liability

Second, the focal point in the business and human rights debate needs to be expanded

beyond individual corporate liability. This is a critical element that must be addressed in its own right. But an individual liability model alone cannot fix larger imbalances in the system of global governance that create the permissive environment for human rights abuses.

Moral and political philosophers have stressed this point with growing frequency. Iris Marion Young, for example, puts it well in a 2004 paper on labour abuses in global supply chains, saying: "Because the injustices that call for redress are the product of the mediated actions of many … they can only be rectified through collective action." And that, she continues, requires a broader construction of "shared responsibility". Its aim, Young explains, is not to assign blame for discrete acts through backward-looking judgments, but "to change structural processes by reforming institutions or creating new ones that will better regulate the processes to prevent harmful outcomes".

My recent report to the UN notes that such hybrid arrangements as the Kimberley Process Certification Scheme to stem the flow of conflict diamonds, the Voluntary Principles on Security and Human Rights, and the Extractive Industry Transparency Initiative represent important innovations by embodying such a concept of shared responsibility: involving importing and exporting states, companies and civil society actors, as well as integrating voluntary with mandatory measures. Although each has flaws that need fixing, this genre of initiative deserves greater attention, support, and emulation in other domains.

Third, many elements of an overall strategy lie beyond the legal sphere altogether. Consequently, the interplay between instruments of legal compliance and the broader social dynamics that can contribute to positive change needs to be shaped so as to maximise the potential contributions of both. No less of a human rights authority than Amartya Sen, the Nobel laureate, warns against viewing rights primarily as "laws in waiting". Doing so, he argues, unduly constricts social forces other than laws that drive the evolving public recognition of rights.

The implication of Sen's insight for the business and human rights agenda is that any successful system needs to motivate, activate and benefit from all of the moral, social, economic and legal rationales that can affect the behaviour of corporations. This requires providing incentives as well as punishments, identifying opportunities as well as risks, and building social movements and political coalitions that involve representation from all relevant sectors of society, including business. This is already occurring in the environmental field.

The human rights community has long urged a move "beyond voluntarism" in the area of business and human rights. Sen's advice suggests that this be accompanied by willingness on its part also to look "beyond compliance".

Lastly, it follows that the distinction between voluntary and mandatory measures, of which some of the protagonists in this debate are so fond, itself has grown stale and unhelpful. No society has ever survived on voluntary rules alone, while those that have

relied disproportionately on command-and-control regulation often have been bad news for business and human rights alike. The challenge, clearly, is determining the right mix and balance, in which an objective assessment of what works, not ideological preferences or particular interests, ought to determine our course of action – as it will determine my recommendations.

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Next month's essay: how to encourage the laggards.