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Oil, Gas & Energy Law Intelligence

Business and Human Rights: A Political Scientist's Guide to Survival in a Domain Where Lawyers and Activists Reign by J.G. Ruggie

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**BUSINESS AND HUMAN RIGHTS:
A POLITICAL SCIENTIST'S GUIDE TO SURVIVAL IN A DOMAIN
WHERE LAWYERS AND ACTIVISTS REIGN**

**REMARKS BY PROF. JOHN G. RUGGIE
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FOR BUSINESS & HUMAN RIGHTS**

**ANNUAL CONFERENCE
INTERNATIONAL LAW ASSOCIATION
(BRITISH BRANCH)
LONDON, 17 MAY 2008**

It is an honor to have been invited to speak at this important gathering of legal experts. I congratulate the International Law Association for selecting the extremely important subject of the role of law in engaging business as a partner in poverty eradication and meeting other global challenges. And I am very grateful to Clifford Chance for hosting this event, and even more so for the extensive and invaluable *pro bono* assistance they have provided to my UN mandate.

But being a mere political scientist by training, I am also somewhat humbled as I stand before you. It is true that my undergraduate college has bestowed on me a doctorate of laws—but the parchment also says *honoris causa*, which is probably some secret vow only other lawyers understand. And although I am an affiliated professor in international legal studies at Harvard Law School, this puts me in the unenviable position of having to teach law students things I was never taught.

In fact, I want to share with you today some reflections on what life is like as a political scientist and policy practitioner who suddenly finds himself immersed in business and human rights—a domain where lawyers and activists reign.

But let me begin by summarizing where my mandate on business and human rights currently stands, how it relates to your discussions here, and what might happen next on the UN front.

As some of you know, I was appointed in 2005, to pick up the pieces from an impasse reached when an expert subsidiary body of the then UN Commission on Human Rights proposed a set of draft Norms on transnational corporations and other business enterprises.

The draft Norms essentially would have imposed on companies, directly under international law, the full range of human rights duties that states have accepted for themselves—from respecting rights all the way up to ensuring their fulfillment. These duties would have taken effect within “corporate spheres of influence,” an amorphous concept that was invoked as though it were an analogue to state jurisdiction, which would have made it impossible to tell who was responsible for what on the ground. NGOs were strongly in favor, business was vehemently opposed, and governments looked for cover—eventually finding me.

So I started again from the beginning. Nearly three years later—after 14 multi-stakeholder consultations on five continents; some two dozen research projects; more than 1,000 pages of documentation; 20 or so submissions from experts and other interested parties; and two interim reports—I just recently submitted my views and recommendations to the Human Rights Council.

One theme ran throughout my consultations. Every stakeholder group, despite their other differences, expressed the urgent need for a common framework of understanding, a foundation on which thinking and action can build in a cumulative fashion going forward.

Accordingly, in my report I propose a strategic policy framework, organized around the three foundational principles of “protect, respect, and remedy”: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for better access by victims to effective remedies. The state duty to protect is critical because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse.

Under each of the framework’s three principles, I also survey ways in which these principles are being, and could be further, operationalized by

states and companies, through changes in national laws, regulatory policies, international instruments and mechanisms, as well as voluntary initiatives.

The first element of the framework is to bring the state back in. It is often stressed that governments are the most appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. But in the area of business and human rights, I question whether governments have got the balance right. My research and consultations indicate that most governments take a narrow approach to managing the business and human rights agenda. It is often segregated within its own conceptual and (typically weak) institutional box—kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, investment policy, corporate law, and securities regulation. This pattern is roughly equivalent to a company setting up a corporate social responsibility unit in splendid isolation from its core business operations. Needless to say, inadequate domestic policy coherence is replicated internationally.

My main recommendation for states is that human rights policies in relation to business need to be pushed beyond their currently narrow institutional confines. Governments need to ensure that human rights compliance becomes part of defining an ethical corporate culture. And they need to consider human rights impacts when they sign trade agreements or investment treaties, and especially when governments provide export credit or investment guarantees for overseas projects in contexts where the risk of human rights challenges is known to be high.

Moreover, ways must be found for arbitration of international investment disputes to become more sensitive to the need for governments to discharge their obligations under international human rights law, and to meet other legitimate public interest objectives, even as they ensure investor protection.

The second component in the framework I have proposed is the corporate responsibility to respect human rights—meaning, in essence, to do no harm. In addition to legal compliance, companies are also subject to what is sometimes called a social license to operate—that is to say, prevailing social expectations, which typically move faster than the law. The baseline expectation of companies is that they respect rights. Indeed, this corporate

responsibility is recognized by virtually all voluntary initiatives companies have undertaken, and it is stipulated in several soft law instruments.

Yet how do companies know they respect human rights? Do they have systems in place enabling them to support the claim with any degree of confidence? It turns out that relatively few do. Accordingly, my report suggests the elements of a due diligence process for companies to manage the risk of human rights harm with a view to avoiding it.

Access to remedy is the third principle. Even where institutions operate optimally, disputes over adverse human rights impacts of companies are likely to occur and victims will seek redress. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped—from the company level up through national and international spheres. My report notes some desirable developments on the judicial front. And it identifies criteria of effectiveness for non-judicial grievance mechanisms, as well as drawing on them to suggest ways of strengthening the current system.

My mandate also required me to clarify the meaning and implications of the concepts of corporate sphere of influence and corporate complicity. Sphere of influence, as I've noted, is meant to delimit the physical or transactional space within which companies are assumed to have human rights responsibilities. And complicity concerns the indirect involvement by companies in human rights abuses by other actors.

These are enormously complex subjects, and I cannot do justice to them here. Suffice it to say that I found the sphere of influence concept to be too imprecise to serve as a guide in delineating the desirable scope of a company's due diligence. To cite just one problem, the concept lumps together two very different meanings of influence: one as "impact," where the company may be the cause of harm; the other as whatever "leverage" a company may be able to exert over other actors with which it may or may not have a business relation. Impact falls squarely within a company's responsibility to respect human rights; leverage may or may not, depending on circumstances, and we want to be very careful in drawing boundaries around how companies do use the leverage they have over others.

Complicity is even more complex, and both its legal and non-legal meanings continue to evolve. Broadly speaking, complicity in this context

means knowingly providing practical assistance that has a substantial effect on the commission of human rights abuses by others.

Bottom line: a company can strive to avoid complicity by employing an effective due diligence process. This should apply not only to their own activities, but also to the relationships connected with them—relationships with governments and other non-state actors.

The Council will consider my report at its June session, and it will also decide whether to renew the mandate in order to move the discussion from the level of general principles to greater operational detail. If the Council responds favorably to the proposed framework, it would mark an important step by the United Nations, and enable all parties to achieve greater conceptual coherence, policy guidance, and cumulative progress in area that has lacked all three. Moreover, it would not foreclose any future options, including further development of international human rights law.

I want to pick up that last point because whatever disagreements there are with my approach—and, they are not widespread—they concern what I am alleged to have done or not done in relation to the law.

On one side are some of my friends in the NGO community who are disappointed that I did not advocate binding standards for companies under international law. On the other side, a Wall Street law firm recently sent out an alarmist client memo warning that I have proposed “expansive obligations” and “sweeping duties” that would impose on corporations the responsibilities of states, while exposing business to “enormous liability.”

The second argument can be dispensed with quickly. I have not invented or proposed any new legal principle. I have merely examined existing legal as well as voluntary principles; I have demonstrated that neither governments nor business appear fully to grasp what these principles imply in practice; and I have provided examples of some of the ways in which both sets of actors can, and in some cases already do, manage the risk that their actions or inactions may contribute to human rights harm.

But that, in turn, reinforces the first charge, that I did not advocate or propose binding international standards. And to this I plead guilty. I’ll try to untangle several related reasons why. They all involve in some manner my

understanding as a political scientist and policy practitioner of how the international human rights regime works—and how to make it work better in the context of globalization.

One issue has to do with the presumed polarity between voluntary and mandatory measures. There are obvious differences between the two, but the distinction also can be exaggerated and take on a life of its own. It is true that companies do not have to join voluntary initiatives, and that this is a weakness of voluntarism. But treaties are also voluntary in the sense that no state can be forced to adopt one. When they do, they often attach extensive reservations, understandings, and declarations to their ratification. These can reduce and even negate treaty provisions. Finally, treaty enforcement often can be highly problematic; indeed, in the case of UN human rights treaties, there is no formal international enforcement mechanism as such.

At the same time, so-called voluntary initiatives may include legislative or contractual requirements, such as the Kimberley Process and the Voluntary Principles on Security and Human Rights, respectively. And even companies participating in initiatives with no mandatory elements at all still are subject to the “Hotel California” rule: for those of you who don’t remember that Eagles song, the words go “you can check out any time you like but you can never leave.” That is to say, systematic non-compliance or exiting is not costless.

The point, then, is not to privilege one approach over another on *a priori* grounds, but to see which one, or what mix, works best, given the circumstances at hand—and where in the current system of global governance each set of measures is most effectively deployed.

A second and closely related question concerns the wisdom of moving toward an overarching business and human rights treaty at this point in time, imposing obligations directly on companies under international law. I have addressed this at greater length in the current edition of *Ethical Corporation* magazine, noting several reservations. To start with, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. We cannot simply tell victims of human rights abuses that rescue will be on the way a generation from now—if all goes well. In addition, a treaty-making process now risks undermining other steps to raise business standards on human rights, by diverting attention and resources,

and pulling standards down to a lowest common denominator. Even if treaty obligations were imposed on companies, very serious questions remain about how they would be enforced, and by whom.

A third reason for not advocating binding standards to the Council is that I am not certain precisely in what areas, and under what circumstances, the absence of binding international standards is the fatal flaw in the current system. It can hardly be in the area of labor standards, for example. The International Labor Organization has been in existence since 1919. As of yesterday, it has accumulated 7,758 ratifications of its conventions, covering all aspects of working conditions and labor practices. These have binding effect on the states that have ratified them. Moreover, most countries have respectable-looking labor laws on the books, which in turn have binding effect on companies. And yet, workplace abuses abound. Clearly, a shortage of laws is not the problem; enforcement is.

Advocates of binding international standards will say that the standards should apply directly to companies, not only to states, and that this would solve the problem. Perhaps it would. But it also begs the question of why states that are not enforcing their existing obligations would ratify a treaty imposing those same obligations directly on their companies—or on foreign companies operating in their jurisdiction.

All the while, the best voluntary workplace initiatives—such as the Fair Labor Association—have developed sophisticated and mandatory supply chain monitoring systems, and they train factory managers, and in some instances even state labor inspectors, on how to do their fulfill their responsibilities to respect workers' rights. Yet still, leading NGOs criticize these initiatives for demonstrating the weakness of voluntarism and as proof of the need for binding international standards. I am genuinely puzzled by the logic of these inferences.

A fourth issue goes deeper. Human rights lawyers and activists appear to draw their insights and methodologies from the experience with the state-based system of classical international human rights law—of how states were led to accept human rights obligations for themselves through treaty-making and related processes. They now apply this model to companies. Analogies have their use, to be sure, but where the respective spheres lack isomorphism, analogies can also deceive. States are sovereign entities. They

have no legal superiors. Therefore, there is no alternative means of imposing obligations on states other than through treaties or the gradual and more contested accretion of customary international norms.

But the same is not true of corporations. They do have legal superiors. They are responsible for compliance with a variety of bodies of law, not only in host but also in home states, if they are transnationals. They are responsive to an array of regulatory requirements. At least in the case of publicly listed companies, their directors have fiduciary responsibilities that are subject to regulatory and judicial review. And they are impacted by market-based factors, above all consumer and investor preferences. All constitute available tools for inducing rights-compliant corporate cultures. They should all be drawn on as appropriate.

In sum, I find it ironic that both those who fear that I am doing too much and too little share the same misconception of the international human rights regime as a centralized command-and-control system. It is anything but. The abolition of the slave trade did not start with an international treaty, but with legislation in one country. And the drive to criminalize business-related corruption did not start with a UN convention; it concluded with one.

At bottom, these differences in approaches to business and human rights also contain a philosophical element. Human rights are all about what moral philosophers call deontology: that we should hold to a principle or take an action because it is intrinsically right or just, irrespective of any other considerations. The alternative moral philosophy position is called consequentialism: that the consequences of principles or acts for the greatest number should form the basis for valid moral judgments about them. Like everyone else who believes in human rights, I am a deontologist at heart. But in view the quest for practical solutions must also include a strong dose of consequentialism, at least beyond the realm of some core—let us say, of non-derogable—rights. In my first interim report, I described my approach as “principled pragmatism.” It is principled in the objective of preventing corporate-related human rights harm and providing redress for when it does occur, but pragmatic in selecting whatever combination of strategies and tools promise to be most effective in getting there.

The international community is still in the early stages of adapting the human rights regime to provide more effective protection to individuals

and communities against corporate-related human rights harm. There is no single silver bullet solution to the many challenges in the business and human rights domain. Instead, all social actors—states, businesses, and civil society—must learn to do many things differently. We cannot push the forces and consequences of globalization back into the templates of the classical system. What we should do is to make sure that human rights become more deeply embedded in the new global reality. That is what the “protect, respect, and remedy” framework is intended to help achieve.

Thank you.