Opinion

The Construction of the UN 'Protect, Respect and Remedy' Framework for Business and Human Rights: The True Confessions of a Principled Pragmatist[1]

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Abstract

This opinion piece explores the human rights responsibilities of companies from the perspective of the UN Special Representative mandated to determine those responsibilities. The author's strategic objective was to achieve the maximum reduction in corporate-related human rights harm in the shortest possible period of time. This piece narrates the approach that was taken, the conclusions that were drawn and the author's hopes for the future in securing an aim of such magnitude. In particular the author explains the "Protest, Respect and Remedy" Framework which seeks to put in place a comprehensive structure for defining and mediating business human rights responsibilities.

Business and human rights became permanently implanted on the global policy agenda in the 1990s. The last two decades of the 20th century witnessed perhaps the most dramatic implosion of space and time in all of economic history. The integration of China into the world economy, the collapse of the Soviet empire, and privatization and deregulation everywhere created the conditions for vast offshore production networks. At the same time, extractive companies, such as oil and gas, were pushing into ever-more remote areas, often inhabited by indigenous peoples resisting their incursion, or operating in host countries engulfed by the civil wars and other forms of serious social strife which marred that decade, and in some areas continue today.

These developments heightened social awareness of businesses' impact on human rights and also attracted the attention of the United Nations. One early UN initiative was the so-called Norms on Transnational Corporations and Other Business Enterprises, drafted by an expert subsidiary body of what was then the Commission on Human Rights, now the Human Rights Council.

Essentially the Norms sought to impose on companies, directly under international law, the same range of human rights duties that states have accepted for themselves under treaties they have ratified. This would have so intermingled the respective roles of states and business that it would have been impossible to determine who was responsible for what on the ground.

[1] This Opinion was delivered as a lecture for the Business and Human Rights Resource Centre on January 11, 2011 as part of the Sir Geoffrey Chandler Speaker Series at The Royal Society for the Encouragement of Arts, Manufacturers and Commerce, London. For more information about the Business and Human Rights Resource Centre, see *http://www.business-humanrights.org* [Accessed 18 February 2011].

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In 2004 the Commission declared that it had not asked for the Norms and that the text had no legal status. It went on to request the UN Secretary-General at the time, Kofi Annan, to appoint a Special Representative to start the process afresh, and he, in turn, asked me to assume this responsibility.

I would like to share with you not only what I have sought to achieve through my mandate. I also want to convey why I chose the path that I did—which in some ways differs from more traditional human rights approaches—and indicate briefly its results to date and my expectations for the future.

The process

The first and most critical step in any such endeavour is to set a clear strategic objective. I set mine as achieving the maximum reduction in corporate-related human rights harm in the shortest possible period of time. This may seem obvious and unexceptional. I would guess that the authors of the Norms shared this aim. But they also sought to subject the entire emerging area of business and human rights to a binding international instrument. Yet there is no *a priori* reason to assume that doing so would meet the maximum reduction/minimum time test.

Louise Arbour cautioned about this in an interview when she was UN High Commissioner for Human Rights: "It would be frankly very ambitious", she said, "considering how long this would take and how much damage could be done in the meantime"—of course, she was speaking of damage to victims.

This temporal challenge is compounded by the sheer magnitude of my mandate: it includes all human rights, all rights holders, all businesses—large and small, transnational and national. And to be effective, any international instrument would have to be implemented by all relevant states or enforced by some new world court for business. I frankly find it inconceivable that any meaningful instrument encompassing all these features could be negotiated and adopted in the foreseeable future.

This is not to say that international law should not and will not play a significant role in the evolution of the business and human rights regime. But I suspect that it will be as precision instruments within a far broader array of policy measures, social strictures and best practices, built from the ground up.

A second feature of my mandate process recalls Marshall McLuhan's dictum: "the medium is the message". In the UN context, I have taken this to mean that, no matter how good your ideas may be, the manner in which they are produced matters greatly. Despite the fact that UN human rights mandates are only minimally funded, I started on a path of extensive research and inclusive consultations.

In 2005, there was little that counted as shared knowledge in the business and human rights domain. There being no authoritative global repository of information, anecdotal evidence ruled. For every bad news story alleged by an NGO, companies had good news stories about how much progress had been achieved by voluntary initiatives. Even the escalating number of cases brought against companies in national courts for alleged human rights abuses abroad settled little because so few reached definitive rulings.

Today, if you visit my portal on the Business and Human Rights Resource Centre website[2] you will find enough research reports produced by the mandate to fill a small library: literally thousands of pages of analysis of legislation, contracts, allegations of abuse, corporate policies and practices, remedial mechanisms, evolving standards of international criminal law and UN Treaty Body commentaries on State obligations. This research has helped inform Human Rights Council debates, nudged protagonists to moderate their more excessive claims and provided a strong foundation for others to build on.

Inclusive consultations also matter. All stakeholder groups must be given the opportunity to be heard; victims consulted; and the varying situations of different regions taken into account. Importantly for my particular mandate, recommendations addressed to business have to find resonance there or they will be resisted or ignored.

[2] *http://www.business-humanrights.org/SpecialRepPortal/Home* [Accessed 18 February 2011].

To achieve these ends, by January 2011, I will have convened 47 international consultations, on every continent, and on every major subject relevant to the mandate. My team and I have made site visits to company operations and communities in more than a dozen countries. I am running year-long pilot projects on community-level grievance mechanisms with companies in five countries (China, Colombia, Russia, South Africa and Vietnam), so that my final recommendations on this subject will have been road-tested. The Dutch Global Compact Network road-tested the Framework's human rights due diligence provisions. And I maintain ongoing dialogues about it all with UN Member States through the Council, the General Assembly and in capital cities.

I am immensely grateful for the voluntary contributions from donor governments, and to the more than two dozen law firms around the world conducting *pro bono* work for the mandate, for making possible this intensive and extensive level of activity. Its products are a Policy Framework and Guiding Principles for its implementation: a common platform for action on which cumulative progress can be built, without foreclosing any promising longer-term developments.

The Framework and Guiding Principles

There are many initiatives, public and private, that deal with business and human rights. But none has reached sufficient scale to move markets; they exist as separate fragments that don't add up to a coherent or complementary system. One major reason has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge. Therefore, when I was asked to submit recommendations to the Human Rights Council in 2008 I made only one: that it endorse the 'Protect, Respect and Remedy' Framework I had developed following three years of research and consultations. The Council did so unanimously, marking the first time ever that any UN intergovernmental body had taken a substantive policy decision on business and human rights.

The Framework rests on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others, and to address adverse impacts that occur; and greater access for victims to effective remedy, both judicial and non-judicial.

The Framework addresses the "what" question—what do states and businesses need to do to ensure business respect for human rights. The Guiding Principles address the "how." There are 29 draft Principles in all, each with Commentary elaborating its meaning. Consultations on the draft will continue until the end of January. I will then reflect on all comments made and submit the final text to the Council.

Key features

Let me now turn to some of the key features that the Framework and Guiding Principles have to offer in advancing the practice of business respect for human rights.

First, the Framework is *comprehensive*. Each pillar is an essential component in supporting what is intended to be an inter-related and dynamic system of preventative and remedial measures: the state duty to protect because it lies at the very core of the international human rights regime; an independent corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

Secondly, the Framework and Guiding Principles *differentiate* clearly the distinct obligations and responsibilities of states and businesses, so that the entire edifice will not collapse in on itself the way the Norms would have done. I refer to the state *duty* to protect because treaty obligations require states to protect against business-related human rights abuse within their territory and/or jurisdiction. There are

also strong policy rationales for states acting to prevent business-related human rights harm—for example the principle that states should require adequate due diligence before considering public support for business activities abroad that pose significant risks of harming the rights of individuals or communities.

I refer to the corporate *responsibility* to respect rights, rather than duty, to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies. At the international level, the corporate responsibility to respect is a standard of expected conduct that is acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and which has now been affirmed by the Human Rights Council. The corporate responsibility to respect human rights means to avoid infringing on the rights of others and addressing adverse impacts that may occur. This responsibility exists independently of states' human rights duties. It applies to all companies in all situations.

The ability of a business enterprise to know and show that it respects rights requires it to conduct what the Framework describes as human rights due diligence: to become aware of, prevent, mitigate and remediate adverse human rights impacts that occur through its business activities and through the relationships that service those activities—ranging from suppliers to security forces. In a recent speech, Andrew Vickers of Shell illustrated this requirement with a brilliant analogy. No petroleum or mining engineer, he said, would dream of drilling a hole in the ground without first conducting extensive seismic analysis. Those companies must now acquire what he calls "social seismic skills"—to assess and address their actual and potential adverse human rights impacts on people and communities.

Let me be clear that it is the adverse impact on internationally recognised rights of a business' *own* activities and relationships that it needs to be concerned with. Mere presence and paying taxes in a country where state agents abuse human rights does not in itself contravene the corporate responsibility to respect human rights. Involvement in those abuses would.

Thirdly, the Framework and Guiding Principles do not rely upon any presumed hierarchy of international legal norms. They seek to foster more effective *connectivity* as the surest drivers of better human rights performance—more robust horizontal linkages within states, within business enterprises, between states and businesses, and between businesses and their external stakeholders. This touches on a complex and controversial issue, so let me take a moment to elaborate.

Human rights discourse is animated by the premise that human rights "trump" other types of claims. I support this fully as a moral argument and cherish its effectiveness for advocacy and empowerment. However, the presumed hierarchy carries over into the international legal realm in only limited situations, such as violations of what are called *jus cogens* norms—customary norms of general international law, such as the prohibition of genocide or slavery, which are generally agreed to permit no derogation and to trump any contrary norm, including contrary treaty provisions. But that does not take us far in business and human rights because most business-related human rights abuses do not fall into this category.

At the same time, the International Law Commission has identified a prevalent feature in international law that is enormously consequential for business and human rights: the international legal order is becoming increasingly fragmented into specialised and autonomous bodies of law and tribunals. In its influential 2006 report to the UN General Assembly, the group concluded that "No homogenous hierarchical meta-system is realistically available", to resolve the problem of incoherent and incompatible provisions.

A recent investment tribunal ruling in a case brought against Argentina by an international water consortium illustrates the point:

> Argentina and the amicus curiae submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under [bilateral investment treaties] and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations. The Tribunal does

> not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, i.e. human rights and [BITs] obligations, and must respect both of them equally.

In other words, even where binding obligations exist, ways still have to be found to resolve the clash of norms that is an inherent feature of so multi-dimensional a domain as business and human rights. That is why more effective connectivity is so essential in practice to achieving corporate respect for human rights.

The need for better connectivity within states is illustrated by another recent bilateral investment dispute involving human rights, the *Foresti* case. European investors sued South Africa under binding international arbitration, claiming that certain mining provisions of South Africa's Black Economic Empowerment Act amounted to expropriation for which the investors sought compensation. A government policy review examined why it had agreed to such BITs provisions in the first place, which now threatened its single-most important social legislation. Among other reasons, the review found that "the Executive had not been fully apprised of all the possible consequences of BITs." In other words, the branch of government charged with investment promotion was disconnected from its counterpart whose job it was to redress economic inequalities historically suffered by the majority population. Such disconnects exist in all governments, and they can severely undermine their own human rights commitments and obligations.

A similar need for more effective connectivity holds within companies. Where responsibility for human rights is segregated in an outward-facing corporate social responsibility (CSR) department, cosmetic compliance is the most likely response. Meaningful change happens when the responsibility to respect is integrated into all relevant business functions, and the results reported back to wherever oversight for real compliance rests within the firm.

Better connectivity is required between states and firms—not necessarily more regulation, but smart regulation. We are emerging from an era in which many governments assumed they were doing business a favour by failing to provide adequate guidance for managing the human rights impact of business activities—even in the most high-risk contexts. Some governments also mistakenly believed that by outsourcing the delivery of social services to the private sector they thereby outsourced any human rights obligations connected to those services. The distinctions between public and private spheres, and between mandatory and voluntary measures, became near absolute, serving neither public nor private interests well. They need to be re-imagined and recalibrated.

Better connectivity is also required between firms and the communities in which they operate. Here, in addition to the important role played by stakeholder engagement generally, I have stressed the utility of legitimate and effective operational-level grievance mechanisms—and I have identified the criteria that make them so. Those mechanisms serve as early warning systems, providing companies with ongoing information about their current or potential human rights impacts from those who are impacted. By analysing trends and patterns in complaints, companies can identify systemic problems and adapt their practices accordingly. Additionally, such mechanisms make it possible for many grievances to be addressed and remedied directly, thereby preventing harm from being compounded and grievances from escalating. Of course, this does not preclude access to judicial mechanisms.

Fourthly, the Framework and Guiding Principles acknowledge variations in *context and size*. For example, there will be situations where national law conflicts with international standards and where compliance with national law actually may undermine the corporate responsibility to respect. In such contexts, companies are expected to find ways to honour the spirit of international standards without violating national law—unless, of course, legal compliance results in breaching international sanctions or involves companies in the commission of, or contributing to, international crimes.

Moreover, while the corporate responsibility to respect human rights applies to all business enterprises, the means through which a business meets its responsibility will be proportional to its size and the gravity or scale of its human rights impacts. Small and medium-sized enterprises may have less capacity as well

as more informal processes and management structures than larger companies. So their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have significant human rights impacts, which will require corresponding measures regardless of their size.

Fifthly and finally, both the Framework and Guiding Principles address the reality of *global* business operations today. A core challenge of business and human rights lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors that span borders, and the capacity of societies to manage their adverse impacts within those borders. Therefore, any credible response must address the thorny but important question of the extraterritorial application of national jurisdiction—applying your rules to govern activities that take place in another jurisdiction—known as ETJ to the cognoscenti. As I noted in my 2010 report to the Council, complex and legitimate issues are at stake here. They are unlikely to be resolved anytime soon, but they cannot be ignored and must be better understood.

My friends at Amnesty International find the ETJ references in the Guiding Principles to be "entirely inadequate", claiming that they understate current international legal obligations of states. In contrast, my friends at Talisman Energy, through the law firm that has defended them in a US Alien Tort Statute case, find that the Guiding Principles go too far, that they exaggerate existing standards. To me, the juxtaposition of the two suggests that on ETJ the Guiding Principles pass the Goldilocks test: "Ahhh", she exclaimed happily, "this porridge is just right".

What's in the porridge? What do the Guiding Principles actually say on ETJ? In essence, three things.

First, I make the empirical observation that, at present, states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. But nor are they prohibited from doing so provided there is a recognised jurisdictional basis and that the exercise of jurisdiction is reasonable. Within this permissible space, states have chosen to act only in exceptional cases when it comes to business and human rights, and they do so unevenly. This is in contrast to other areas related to business, such as anti-corruption, anti-trust, money-laundering, child sex tourism and some environmental regimes, several of which have become the subject of multilateral agreements.

Secondly, I argue that some measures that typically get lumped into the ETJ category should not be there at all—that they are properly described as domestic measures that have extraterritorial effects. For example, securities regulators are entirely at liberty of imposing listing requirements to protect domestic investors, no matter what their spatial reach may be. Specific requirements may be considered onerous or counterproductive and can be challenged on those grounds, but not as unwarranted ETJ. The same is true for parent company-based regulation—for example where the state requires a parent company to exercise greater scrutiny of its own subsidiaries' human rights impacts overseas. Again, a particular requirement may be a good or bad idea in practice, but I do not see a strong jurisdictional issue.

Thirdly, I asked the question what we want to be saying to people who live in areas affected by armed conflict over the control of territory, resources or a government itself—where the most egregious corporate-related human rights abuses occur and illicit enterprises flourish. What do we say? Sorry? Too bad? Work it out yourselves? Or that states, business and civil society should come together to make sure that these are not law-free zones, preferably through multilateral agreement?

In short, I believe that the Guiding Principles get the ETJ porridge just right.

Conclusion

I set as the strategic objective of my mandate achieving the maximum reduction in corporate-related human rights harm in the shortest possible period of time—by establishing a common platform for action, on which cumulative progress can be built, without foreclosing any promising longer-term developments. This approach—which I have called principled pragmatism—appears to be bearing fruit.

The "Protect, Respect and Remedy" Framework has acquired a life of its own even before the Guiding Principles for implementation are finalised. Within the UN human rights system, it has been used by the Special Rapporteurs on the right to food, water, health and on the rights of indigenous peoples, and by the mandate on toxic wastes.

Beyond UN precincts, the Framework served as the basis for the human rights chapter in ISO26000—a social responsibility guidance recently adopted by the International Organization of Standards with 94 per cent of ISO member bodies voting in favour, including China. The Framework also played a significant role in persuading the Organisation for Economic Co-operation and Development (OECD) Council of Ministers to consider adding a human rights chapter to the OECD Guidelines for Multinational Enterprises, with the current negotiating draft closely tracking the relevant Framework provisions.

Countries ranging from Norway to South Africa have utilised the Framework in their own national policy assessments; human rights organisations ranging from the Cambodian Centre for Human Rights to Amnesty International have drawn heavily on it; workers' organisations have invoked it; and there has been a welcome outburst of activity among leading companies to determine if their policies are "Ruggie proof"—a phrase they invented. You will find a "Framework in Action" section on the website, monitoring uptake and demonstrating that a broad spectrum of countries, businesses and civil society has found it useful.

The tasks for the next phase are clear: further embedding and disseminating the Framework and Guiding Principles; sustaining multi-stakeholder dialogue and support; helping to build capacity of relevant actors, including small and medium-sized enterprises; and fostering improved conflict management and dispute resolution.

I am under no illusion that this will bring business and human rights challenges to an end. But if we succeed in June 2011, that *will* mark the end of the beginning. We need Human Rights Council endorsement of the Guiding Principles to lock down the gains and sustain the momentum. And for that to happen, all hands must be on deck, rowing in the same direction. This is no time to let the elusive quest for perfection—however you define it—to become the enemy of the good. This is no time to allow narrow institutional interests—of whatever segment of society you represent—to stand in the way of achieving results that benefit all. Nor is it the time to subject hard-won consensus to unrelated political bargaining. Progress is precious; we must not let it slip away when we are this close.