

The corporate responsibility to respect human rights

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This article discusses my mandate as the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises, focusing on two key issues relevant to business: the corporate responsibility to respect human rights and human rights due diligence.

Background

Business' responsibilities for human rights began to be hotly contested in the 1990s, as a by-product of that decade's wave of privatisation and off-shore production; the fact that extractive and infrastructure companies were operating in increasingly tough neighbourhoods where they faced challenges they had never encountered before; and because companies assumed that getting a legal licence to operate from a government, no matter how corrupt and unresponsive it was to local populations, also provided a social licence to operate – but communities increasingly started to push back.

My mandate had its origins in a divisive debate generated by the 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', presented to the then-UN Commission on Human Rights (now the Human Rights Council) in 2004 by a subsidiary body. The 'Draft Norms' sought to impose on companies, directly under international law, essentially the same range of human rights duties that States have adopted for themselves – to respect, protect, promote, and fulfil human rights. The two sets of duties were separated only by the slippery distinction between States as primary and corporations as secondary duty bearers, and by the elastic concept of spheres of influence, within which companies were proposed to have those duties.

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Business was vehemently opposed to the Draft Norms, human rights advocacy groups strongly in favour. After considering the issue for a year, the Commission declined to adopt the text, declaring that it had no legal status and that no action should be taken on its basis.

Instead, in 2005, the Commission requested the UN Secretary-General to appoint a Special Representative to move beyond the stalemate. Kofi Annan appointed me to the post and Ban Ki-moon has continued the assignment.

The 'Protect, Respect, Remedy' Framework

After three years of global consultation and extensive research, in 2008 I proposed a policy framework for better managing business and human rights challenges, which the Human Rights Council unanimously endorsed. It rests on three pillars: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and access by victims to effective remedy.

The three pillars are distinct yet complementary. The State duty to protect and the corporate responsibility to respect exist independently of one another, and preventative measures differ from remedial ones. But all are intended to work together and reinforce one another as parts of a dynamic, interactive system. So, with the understanding that the corporate responsibility to respect human rights is but one component in a wider system of preventative and remedial measures, I will focus on it here.

The Corporate Responsibility to Respect

The term 'responsibility' to respect rather than 'duty' indicates that respecting rights is not an obligation current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws. At the international level it is a standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Council itself.

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As the world's largest business associations have written, it exists even if national laws are weak or absent¹.

The scope of the responsibility to respect is defined by the actual and potential human rights impacts generated by a company's own business activities and through its relationships with other parties – such as partners, entities in its value chain, and State agents. In addition, companies need to consider the country and local contexts of their operations for any particular challenges they may pose.

Because companies can affect virtually the entire spectrum of internationally-recognised rights, the corporate responsibility to respect applies to all such rights. Some rights will be more relevant than others in particular industries and circumstances. But situations change, so periodic assessments against that entire spectrum are necessary to ensure that no potential human rights issue is overlooked.

Companies will find an authoritative list of such rights in the

International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the International Labour Organisation's core conventions. While these instruments are not directly binding on companies under international law, companies can and do infringe on the enjoyment of the rights that these instruments recognise. Moreover, those rights are the baseline benchmarks by which other social actors judge companies' human rights practices.

Human Rights Due Diligence

How does a company avoid infringing on the rights of others, and address adverse impacts where they occur? By conducting human rights due diligence.

Human rights due diligence is a potential game-changer for companies: from 'naming and shaming' to 'knowing and showing'. Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalisation of that respect by companies.

Drawing on well-established practices for corporate due diligence and combining them with what is unique to human rights, I have laid out the basic parameters of human rights due diligence. Because this process is a means for companies to address their responsibility to respect human rights, it has to go beyond simply identifying and managing material risks to the business, to include the risks a company's activities and relationships may pose to the rights of individuals and communities.

One size does not fit all: there are 80,000 multinational corporations in the world, 10 times as many subsidiaries and countless national firms, many of which are small- and medium-sized enterprises. My aim is to provide universally applicable guiding principles for companies to meet their responsibility to respect human rights, recognising that the tools and processes they employ necessarily will vary with circumstances.

In that spirit, human rights due diligence comprises four components: a statement of policy articulating the company's commitment to respect human rights; ongoing assessment of actual and potential human rights impacts of company activities and relationships; integration of human rights throughout the business to ensure that efforts to meet the responsibility to respect aren't undermined; and, tracking and reporting performance.

Company grievance mechanisms are also important: under the tracking and reporting component of due diligence they



John Ruggie with local children during a visit to a Colombian Army human rights training centre

provide ongoing feedback that helps identify risks and avoid escalation of disputes; they can also provide remedy, a method of alternative dispute resolution.

Why Bother?

Some companies may wonder why they should undertake human rights due diligence. Doesn't all this just add burdens on business? My answer is decidedly no, for three reasons.

I've already noted the first: due diligence can be a game-changer for companies. Knowing and showing is necessary for companies to demonstrate they respect human rights. If they don't know, and can't show, any claim of respecting human rights is just that – a claim, not a fact.

Second, human rights due diligence can help companies lower their risks, including the risk of legal non-compliance. For example, there are situations in which companies currently harm human rights and, at the same time, may be non-compliant with existing securities and corporate governance regulations. Why? Because they are not adequately monetising and aggregating stakeholder-related risks, and therefore are not disclosing and addressing them.

Such risks stem from community challenges and resistance to company operations, which often occur on environmental and human rights grounds. The evidence to date comes largely from the extractive and infrastructure sectors, especially where companies operate in conflict-affected or otherwise contested contexts. But such internal control and oversight gaps are likely to exist in other sectors as well.

Stakeholder-related risks to companies include delays



Photo: United Nations



John Ruggie with UN Secretary-General Ban Ki-moon

in design, siting, permitting, construction, operation and expected revenues; problematic relations with local labour markets; higher costs for financing, insurance and security; reduced output; collateral impacts such as staff distraction and reputational hits; and possible cancellation, forcing a company to write off its entire investment and forgo the value of its lost reserves, revenues and profits – which can run into billions of dollars².

A Goldman Sachs study of 190 projects operated by major international oil companies shows that the time for new projects to come on stream has nearly doubled in the past decade, causing significant cost inflation. It attributes delays to projects’ ‘technical and political complexity’³. An independent and confidential follow-up analysis of a subset of those projects indicates that non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the single largest category. It estimated that one company may have experienced a US\$6.5-billion ‘value erosion’ over two years from such sources, amounting to a double-digit fraction of annual profits.

These costs seem to be spread across different internal functions and budgets, and not aggregated into a single category that would trigger the attention of senior management and boards. But when added up, some of these risks would undoubtedly count as ‘material’ on even the narrowest definitions, and thus should be of interest to shareholders and regulators.

This is a lose-lose-lose proposition: human rights are adversely impacted, serious corporate value erosion occurs, and disclosure requirements as well as directors’ duties may be implicated. Human rights due diligence can avoid all three.

Third, conducting human rights due diligence could provide protection against mismanagement claims by shareholders. And in Alien Tort Statute and similar suits, proof that a company took every reasonable step to avoid involvement in alleged violations can only count in its favour.

Conclusion

I am pleased that the UN ‘Protect, Respect, Remedy’ Framework as a whole, and the human rights due diligence component specifically, have been well-received by all relevant stakeholders.

A number of countries have utilised the Framework in conducting policy assessments, ranging from Norway to the UK and South Africa. Several major global corporations are already realigning their due diligence processes based on the Framework. Civil society actors have employed the Framework in their analytical and advocacy work. Other UN Special Procedures have drawn on the Framework in their analysis of corporate issues, as has the UK government in findings under the OECD Guidelines⁴.

From the outset of this mandate, I have stated that there is no silver bullet solution to solving the very complex challenges at the intersection of business and human rights. All social actors must learn to do many things differently to ensure that global business is sustainable. Those things must generate an interactive dynamic of cumulative progress – precisely what the UN ‘Protect, Respect, Remedy’ Framework is intended to help achieve. □

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This article is adapted from Professor Ruggie’s keynote address, ‘Engaging Business: Addressing Respect for Human Rights’, at an event sponsored by the US Council for International Business, the US Chamber of Commerce, and the International Organisation of Employers, hosted by The Coca-Cola Company in Atlanta, 25 February 2010.

1. “Business and Human Rights: The Role of Business in Weak Governance Zones”, submission to Professor Ruggie’s mandate by the International Organisation of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, December 2006.

2. World Resources Institute, ‘Development without Conflict: The Business Case for Community Consent’, 2007.

3. Goldman Sachs Global Investment Research, ‘Top 190 projects to change the world’, April 2008.

4. All materials related to Professor Ruggie’s mandate, including official reports, speeches, research, and commentary and submissions from others can be found at: <http://www.business-humanrights.org/SpecialRepPortal/Home>.