

HUMAN RIGHTS AND BUSINESS

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Human rights and business are no longer mutually exclusive. The business case for a company formulating a human rights policy or, put another way, adopting a corporate social responsibility dimension, to their activities has become standard practice and is increasingly informing business. A company which acknowledges its human rights responsibilities gains a good reputation, thereby acquiring a competitive edge in the market place amongst consumers and prospective employees. Human rights and business now feature regularly on the international/national agenda as is reflected in the activities of the United Nations and not least in the appointment in July 2005 of a Special Representative to the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises.

In April of 2008 the Special Representative – Professor John Ruggie - submitted his views and recommendations to the Human Rights Council premised on his investigations and discussions with relevant stakeholders, experts and other interested parties.

The mandate of the Special Representative was “to identify and clarify standards of corporate responsibility and accountability with regards to human rights.” The Special Representative was appointed at the time when there was something of an impasse following the proposed *Draft Norms on Transnational Corporations and Other Business Enterprises* (the Draft Norms). The Draft Norms were ambitious in scope and sought to make companies directly responsible under international law for a full range of human rights duties that are traditionally addressed to and accepted by States. The Draft Norms produced a chasm between stakeholders with NGOs supporting compulsory obligations whereas the business world, for the main, protested maintaining that as sufficient the plethora of voluntary codes of conduct accepted by many corporations.

Three years and two interim reports later, Professor Ruggie has now produced his report entitled “*Protect, Respect and Remedy: A Framework for Business and Human Rights.*”

Pursuant to affording protection Professor Ruggie questions whether governments have got the balance correct in the area of business and human rights. Research has suggested governments take a somewhat narrow approach to the management of business and the human rights agenda. Professor Ruggie’s main recommendation is that States, in their human rights policies with regards to business, need to push the boundaries beyond their currently narrow institutional confines. Essentially the Special Representative is

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urging governments to facilitate the creation of an ethical culture with human rights compliance informing corporate conduct.

Respecting human rights in essence means doing no harm. Such a responsibility is already widely recognised and reflected in the numerous voluntary corporate initiatives to which companies have subscribed. The problem which Professor Ruggie identifies is by what means are companies aware that they respect human rights. To what extent do companies have mechanisms in place, which enable them to substantiate their claim that they respect human rights? The Special Representative suggests that to manage and minimise the risks of human rights abuses cognisance should be given to the concept of due diligence. A company should assume a due diligence approach and should put in place processes in which this is reflected. A blueprint for ensuring a basic human rights due diligence process should include *inter alia* impact assessments whereby companies consider the potential implications of their activities before engaging in a particular business activity in a new area. The Special Representative suggests that while these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognised human rights. The findings of an impact assessment would allow a company to refine proposed plans so as to address and avoid potential negative human rights impacts on an ongoing basis.

Regarding access to remedies Professor Ruggie recognises that access to formal judicial systems is often more difficult where the need is greatest and non-judicial mechanisms are seriously underdeveloped from the company level up through national and international spheres.

Accordingly Professor Ruggie suggests some desirable developments on the judicial front and identifies the criteria of effectiveness for non-judicial grievance mechanisms as well as advancing ways in which the current system may be strengthened. It is recommended for instance that States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. Obstacles denying access to justice, including that for foreign plaintiffs should also be addressed, especially where alleged abuses reach the level of widespread and systematic human rights violations.

The Special Representative's remit also included seeking clarification of corporate complicity and sphere of influence. The former is *prima facie* a legal concept, reflected widely in national and international criminal law, whereas the latter is a non-legal concept. In essence the Special Representative found that the sphere of influence concept was too imprecise to provide guidance in defining the desirable scope of a company's due diligence.

Professor Ruggie identifies complicity as an even more complex concept than might appear at "first blush" and recognises the notion has both a legal and non-legal connotation. However as a bottom line a company can in Professor Ruggie's words "strive to avoid complicity by employing an effective due diligence process and this can

apply not only to their own activities but also to the relationship connected with them, relationships with governments and other non state actors.”

How has the report been received? NGOs on the one hand have been somewhat circumspect in their response as is reflected in the *Joint NGO Statement to the Eight Session of the Human Rights Council* (the Joint NGO Statement). This Joint NGO Statement emanating from some 12 NGOs including *inter alia* Amnesty International, Earth Rights International and Oxfam International, while applauding the work of Professor Ruggie maintain there is a need to broaden the focus beyond the elaboration of the *Protect, Respect and Remedy Framework*. It is maintained there is a need to move to a more in depth analysis of specific situations and cases so as to provide greater visibility and a voice to those whose rights are negatively affected by business activities and to deepen understanding of the drivers of human rights abuses. This, the Joint NGO Statement maintains, could underpin the elaboration of the framework and proposed policy responses. The Joint NGO Statement emphasises that a corner stone of human rights is combating impunity but that to date the Special Representative’s mandate has placed little emphasis on the means for holding companies, including those which operate transnationally, to account.

The business world on the other hand has responded more favourably. Business endorses that to promote only binding norms would slow up the process and cause considerable delay. Procrastination should be avoided as the need to both influence corporate behaviour and the time to do so is now. The Joint Initial Views of the International Organisations of Employers, The International Chamber of Employers and the Business Advisory Committee to the OECD characterises what the Special Representative has postulated as a “well constructed and clearly articulated framework for addressing business and human rights.” In particular the recognition of the corporate responsibility to respect human rights being distinct from that of the State is particularly welcome. Such recognition illustrates a company cannot assume the responsibility of a State. The Joint Initial Views also heralds the call to carry out due diligence in relation to human rights as a “useful and practical part of the framework.”

In the debate between mandatory and non-mandatory the Special Representative has come down on the side of the latter. Of course a criticism of codes of conduct is that they are voluntary. However treaties are also voluntary in that a State is not required to adopt a treaty and a State is only held bound by treaty provisions to which it has given its consent. The mechanism of a reservation further reflects the consensual element of treaties. A reservation allows a State to ‘opt out’. A treaty demands an international enforcement mechanism.

Essentially what the Special Representative has done is not postulate one system as being better than the other but has attempted to decipher which one of what mix works best in particular circumstances. The Special Representative also acknowledges it is difficult to analyse the extent to which the absence of binding international standards is a fatal flaw in the current system. There is a plethora of voluntary codes on labour yet workplace abuses abound. The advantage of the Special Representative’s Report is that

the Report does not create any new legal obligations, it does not introduce radical changes and possibly most importantly it acknowledges that the human rights regime rests upon the bedrock role of States. The participation of the State is recognised as pivotal in the proposed human rights business framework.

As the report concludes there “is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors - States, businesses, and civil society - must learn to do many things differently. But those things must cohere and become cumulative, which makes it critically important to get the foundation right 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, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness.”

The Human Rights Council has responded to the report by extending the Special Representative’s mandate for a further three years, and has specifically called upon the Special Representative to *inter alia*: provide views and recommendations on how to strengthen the fulfilment of the State duty to protect all human rights from abuses by, or involving, transnational corporations and other business enterprises; elaborate further the scope and content of the corporate responsibility to respect all human rights and provide concrete guidance to business and other stakeholders; explore options and makes recommendations for enhancing access to effective remedies for those whose human rights are affected by corporate activities; integrate a gender perspective throughout his work and that he gives special attention to those who are characterised as belonging to vulnerable groups, in particular children. The Special Representative is also called upon to identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and in the first instance to organise under the auspices of the Council, a two-day consultation with all interested stakeholders to discuss ways and means of essentially activating the Special Representative’s framework.

The extension of the Special Representative’s mandate endorses the significance of the report as being the clarification it has shed on certain issues, thereby providing a springboard for further discussion *and* action. Discussion and action that is which will lead to the appropriate adaptation of the human rights regime so that individuals and communities can be afforded the most effective protection against corporate-related human rights harm.