

Human Rights: From Practice to Policy

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The Development of Arguments for the Accountability of Corporations for Human Rights Abuse

Presentation by Christopher Avery

I am going to try to give a quick survey of what I will call the “business and human rights movement” and standard setting in that arena. Progress in this field has been somewhat messy. It has not been a linear process and the human rights movement has not always been in the driving seat. The business and human rights movement has been led by a series of events, personalities and coincidences. Nonetheless, the human rights movement has always kept the issue moving forward—driven by the hard work of committed people and the public outrage that has built up against abuses by corporations.

There is a tendency to regard business and human rights as a recent development, but its history goes back quite a ways. I’ll start with the emergence of the OECD (Organisation of Economic Co-Operation and Development) Guidelines for Multinational Enterprises in 1976. This move by Western governments reportedly was not the result of a push by the human rights movement but instead a reaction against the UN Conference on Trade and Development (UNCTAD), which was drafting a code of conduct for multinational corporations at that same time which made the West very nervous. At the time, there was talk of a new international economic order, criticism about the power of multinationals generally, criticism of the role of multinationals in Chile and in relation to sanctions-busting in Rhodesia, and criticism of the role of multinationals in South Africa. The move by the OECD to adopt these guidelines in 1976 was seen as a defensive move.

In 1977, an interesting document emerged: the ILO (International Labour Organization) Tripartite Declaration of Principles concerning Multinational Enterprises. Article 8 of this declaration states that governments, employers, and trade unions must respect the entire Universal Declaration of Human Rights and the International Covenants. It was a declaration not just about labor rights, but about all human rights. This was consistent with the ILO’s approach: that labor rights could not really be protected unless all human rights were protected.

Fundamental labor rights are articulated in the Universal Declaration and the two Covenants; if you look at the human rights movement historically, trade unions have always been part of that movement. Trade union and labor rights work focused on companies has been going on for many, many decades. So read broadly, the business and human rights movement goes very far back to the start of the trade union movement.

In the 1970s, 1980s, and early 1990s there was not an organized business and human rights movement. Efforts were ad-hoc but important, and tended to be around specific cases of companies generating outrage, for example: the role of multinationals in South Africa during the apartheid period; the involvement of United Fruit Company and the U.S. Central Intelligence Agency in the Guatemalan coup in 1954; the role of some multinationals in the Chilean coup in 1973; and the reported participation of local managers of Ford conspiring with Argentinean security forces to detain and torture trade union members in the 1970s. Tracy Ulltveit-Moe, former Latin America researcher at the International Secretariat of Amnesty International, recalled that Amnesty worked on a case in Guatemala in the late 1970s involving a Coca-Cola bottler alleged to have been complicit with Guatemala security forces and death squads in the killing of trade unionists. While Amnesty International was not at that time working programmatically on business and human rights per se, it may have directly approached Coca-Cola at that time.

These events were the prelude to the outrage that occurred in 1984 when the catastrophe at Union Carbide's Bhopal pesticide plant in India killed thousands. In 1996 a lawsuit was brought against UNOCAL (Union Oil Company of California) alleging that the company knew or should have known that human rights violations would result from its joint venture with the Burmese Government to build a pipeline that would be guarded by Burmese security forces. In 1999, massive protests took place when the World Trade Organization (WTO) met in Seattle. Two important initiatives were undertaken soon thereafter: 1) development of the UN norms; and 2) the International Council on Human Rights Policy report, "Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies."

The Development of the UN Norms

The “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” were drafted under the auspices of the United Nations. Many assume the idea of drafting the Norms came from David Weissbrodt, the member of the UN Sub-Commission on the Promotion and Protection of Human Rights who ended up leading the initiative. According to David Weissbrodt, the idea to draft the norms came from his Senegalese colleague on the Sub-Commission, El Hadji Guissé of Senegal. El Hadji Guissé contacted David Weissbrodt to suggest that their Sub-Commission working group address the issue of multinationals and human rights. David Weissbrodt suggested that the working group should draft some standards on the subject before undertaking other work relating to multinationals. El Hadji Guissé suggested that David Weissbrodt take the lead in the process of drafting the standards. David Weissbrodt started the drafting process in 1998, initially without much involvement of human rights NGOs. Over the years of drafting, however, more and more NGOs became interested and began participating in the discussions—along with business representatives, government representatives and others. The NGOs that participated extended beyond Amnesty International, Human Rights Watch and the International Commission of Jurists to include other NGOs not previously thought of as being part of the “human rights movement” at the United Nations: Oxfam; Christian Aid; Save the Children; Greenpeace and others. The “human rights movement” was broadening to include development and environmental organizations. The norms were approved by the UN Sub-Commission in 2003, and were considered but not adopted by the UN Human Rights Commission in 2004 as explained below.

The “Beyond Voluntarism” Report

During the same period that the norms were being developed, the International Council on Human Rights Policy was drafting a report called, “Beyond Voluntarism: Human Rights and the Developing

International Legal Obligations of Companies.” David Petrasek and Nick Howen played a key role in the drafting of this report. According to Robert Archer, then the Council’s Director, of all the Council’s reports this one was among those that had the most impact in an enduring and explicit way because NGOs got hold of it and used it, and because the report addressed some of the complicated legal issues that had previously been holding NGOs back. The report opened the way for NGOs to push forward without fear that they would be fundamentally blocked by international law arguments. Also during this period, Human Rights Watch was drafting some excellent reports including one on Enron’s complicity in human rights violations in India and another on the complicity of oil companies in abuses in the Niger Delta. In 2003 Amnesty International produced an excellent report on human rights concerns relating to BP’s Baku–Tbilisi–Ceyhan pipeline project.

The Establishment of a UN Special Representative on Business and Human Rights

When the UN Sub-Commission’s “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” reached the Human Rights Commission in 2004, the Commission expressed its appreciation to the Sub-Commission, saying that the norms contained some useful elements and ideas for consideration, but the Commission did not adopt the norms. Instead, governments brokered an agreement to create a Special Representative of the UN Secretary General on Business and Human Rights. Professor John Ruggie was appointed to this post. Professor Ruggie’s focus has not been on “hard law” standard setting, rather on developing a framework and a set of guiding principles. Ruggie’s framework includes the following: 1) the state duty to protect human rights including by regulating companies; 2) the corporate duty to respect human rights; and 3) the victims’ right to remedies. From the outset Professor Ruggie emphasized that he was aiming for incremental and pragmatic progress and not for hard standards; he declared the “draft norms” to be “fundamentally flawed.” Ruggie and his team have held a large number of consultations, issued a large number of studies, and solicited a great deal of written input during his mandate as Special Representative.

[Postscript: On 16 June 2011, the UN Human Rights Council endorsed Special Representative Ruggie's "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework." In the same resolution, the Council voted to establish a working group on business and human rights "consisting of five independent experts, of balanced geographical representation, for a period of three years, to be appointed by the Human Rights Council."]

Recent NGO Activity on Business and Human Rights

While business and human rights work has progressed in many ways over the past five years (2005-2010), because Professor Ruggie has dominated the UN process during this period, NGO work on standard-setting on business and human rights has not been moving forward much at an international level. There has been notable NGO activity going on though. For example, at the national level Amnesty International UK is pushing for a new UK Commission for business, human rights, and the environment. Next week (7-10 October 2010) the international conference of national human rights institutions (meaning national human rights commissions or similar bodies) is meeting in Edinburgh under the theme "business and human rights." The International Coordinating Committee of National Human Rights Institutions has set up a working group on business and human rights that is encouraging more of the national commissions to start looking at the private sector, using the work done on business and human rights by the South African, Kenyan, and Danish National Human Rights Institutions as examples. Further, some standard setting has been progressing during recent years. For example, the Swiss Government, the International Committee of the Red Cross and some NGOs have been moving standard-setting forward with regard to regulation of private military and security companies. The experts on UN human rights treaty bodies are asking more questions about the private sector when they reviewing periodic reports by governments. Some UN Special Rapporteurs have done interesting work relating to business and human rights, including Paul Hunt, UN Special Rapporteur on the Right to Health, who issued guidelines for pharmaceutical companies in relation to access to medicines. Paul Hunt made a ground-breaking move when he went on a mission to a company—GlaxoSmithKline.

The Future?

1. In the long-term, the business and human rights movement will need to progress the standard setting on business and human rights.
2. Robert Archer suggests that the human rights movement needs to step back and have a more serious discussion on the relation between macro-economics and human rights. What should the role of business in society be? This extends beyond only condemning human rights abuses by business to a human rights discussion about the proper role of business in terms of taxation, employment, and education—a more holistic discussion.
3. We need to think about the question, “What is the human rights community?” The hundreds of NGOs across the world that our organization, Business and Human Rights Resource Centre, regularly hears from include among others: the International Rivers Network; Students and Scholars Against Corporate Misbehavior (Hong Kong); Friends of the Earth Nigeria; CEE Bank Watch (Eastern Europe); Oxfam; a new joint initiative by UNICEF, Save the Children, and the UN Global Compact on the subject of business and children; International Dalit Solidarity Network; the South African Human Rights Commission; and Treatment Action Campaign working in South Africa for access to medicines. A group like Treatment Action Campaign might not be thought of as part of the traditional human rights movement, but they are basing their work on the South African Bill of Rights, and the South African Bill of Rights is based on international human rights standards. NGOs like this are doing outstanding work and can be great allies in the international human rights movement.

The next couple of decades could be quite exciting in this field, but there are negative as well as positive signs. Starting with the negative, host state governments still have no great incentive to regulate multinational companies because they want inward investment. Home governments—where companies are headquartered—want their multinationals to go out to other regions and make money. As a result, they have no great incentive to regulate. Therefore while it is good that

Special Representative Ruggie's framework proclaims that the state's duty is to protect, when neither the home nor host state has an incentive to protect it will be challenging to secure full respect for this duty. Not only do the home and host governments not have an interest in regulating, it is often the reverse—they have an interest in not regulating.

Another reason to be pessimistic is the argument, presented by Joel Bakan in *The Corporation*—that if companies take human rights and the environment as seriously as they should, and sacrificing profits in the process, they would end up violating their duty to shareholders under corporate law.

On the positive side, some companies want higher international human rights standards because it is in their own self interest. For example, some of the more professional private military and security companies are pleased that the Swiss Government and the International Committee of the Red Cross are taking the lead in developing standards to regulate their industry, because they are confident that they will meet the standards and that some of the “cowboy” firms in their sector may have difficulty doing so.

Another reason to be positive is that companies tend to be sensitive to human rights criticism, indeed even more sensitive to public criticism than governments. This creates significant leverage for the human rights movement.

Finally, over the past five years, NGOs in the global South have increasingly been turning their attention to the private sector. While most of them still focus on human rights abuses by government, they are now also addressing abuses by companies. This development is not only changing things on the ground in those countries but is important for the international business and human rights movement.

Chris Avery is the Founder and Director of the Business and Human Rights Resource Centre, which tracks the human rights impacts of more than 5,000 companies in 180 countries. He formerly served as Legal Advisor and then Deputy Director of Research at Amnesty International's International Secretariat.

Glossary

AI (and Amnesty) – Amnesty International. Founded in 1961, AI is one of the oldest and most prominent transnational human rights organizations, with international headquarters in London. The organization relies on 3 million members and supporters in 150 countries to carry out its work, and policies are vetted through complex processes and structures that involve membership in the decisions. (See *ICM*, *IEC*, *IS*, *AI mandate*, and *Secretary General* below.)

ICM – International Council Meeting, AI’s highest organizational decision-making body.

Held every two years, the ICM today brings together approximately 500 members and staff for the purposes of planning and reviewing the direction of Amnesty International’s human rights work. The ICM also elects the International Executive Committee (IEC).

IS – International Secretariat. Based in London, UK, it is responsible for the majority of the organization’s research and campaigning work.

AI Mandate - For many years, an internal “mandate” limited Amnesty International’s work to a relatively small number of issues, including the release of prisoners of conscience, fair trials for political prisoners, opposition to torture, disappearances and the death penalty. The mandate was amended several times, and was ultimately replaced in 2002 with a broader mission statement linking AI’s work to the full spectrum of rights enshrined in the UDHR.

Secretary General – AI’s executive director of worldwide operations.

HRC – Human Rights Council. An inter-governmental body within the United Nations (UN) system created in 2006 to replace the Human Rights Commission, which had become highly politicized and was generally recognized as non-functional. An intergovernmental organization created within the UN body in 2006 by the UN General Assembly.

HRW – Human Rights Watch. A prominent international human rights NGO that originated as a series of US-based “watch committees.” The first such committee was charged to monitor Soviet compliance with the 1975 Helsinki Accords. Subsequent committees were formed to monitor human rights concerns in Latin America, Asia, Africa and the Middle East. Before consolidating as “Human Rights Watch” in 1988 the organization was known as the Watch Committees.

ICCPR – International Covenant on Civil and Political Rights. A core human rights treaty that together with the UDHR and the ICESCR comprise the bedrock of international human rights law. It commits ratifying countries to respect, protect and fulfill civil and political rights. Adopted by the UN General Assembly in 1966 and in force since 1976.

ICESCR – International Covenant on Economic, Social, and Cultural Rights. A core human rights treaty that together with the UDHR and the ICCPR comprise the bedrock of international human rights law. It commits ratifying countries to respect, protect and fulfill economic, social, and cultural rights. Adopted by the UN General Assembly in 1966 and in force since 1976.

IHL – International Humanitarian Law (or *laws of war, international humanitarian law of war*), the body of customary and treaty law that defines the conduct and responsibility of nations at war, relative to each other and to civilians. It includes most prominently the Geneva Conventions and the Hague Conventions, but also the 1997 Landmine Treaty.

ILO – International Labor Organization. An inter-governmental organization dealing with international labor issues and standards.

Mandate – See *Amnesty International*.

NGO – Non-governmental organization. In the human rights context, NGOs are organizations comprised of private individuals working to protect and promote human rights, either domestically or internationally.

Special Rapporteur – An individual charged by the United Nations Human Rights Council to investigate a specific set of human rights concerns. (See *Thematic mechanisms*.)

Treaty body – A committee of independent experts charged to monitor implementation of the core human rights treaties, such as the ICCPR and the Convention Against Torture.

UDHR – Universal Declaration of Human Rights. The first and most fundamental human rights standard approved by the United Nations (1948). Its thirty articles elaborate a wide range of civil, political, economic, social, and cultural rights. Even though it is not a legally binding document, the UDHR is considered the cornerstone of international human rights law.

UN Human Rights Division – The UN Secretariat's initial office devoted to human rights, replaced in 1993 by the Office of the UN High Commissioner for Human Rights.