

‘Voluntary or Mandatory: That is (Not) the Question’

A Comment

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Comment to the Contribution of Florian Wettstein und Sandra Waddock

It is clear that we stand at crossroads in the debate about business, human rights, and accountability. There is growing acceptance that companies *should* respect the rights set out in the International Bill of Human Rights¹. The heated debate in recent years, however, has been over how to ensure that companies *are* responsible and accountable. This has become the acute issue, as the Wettstein and Waddock article explains very clearly. Are voluntary initiatives by companies enough? Do we need greater obligation, in the form of a set of binding international legal standards aimed at business? The international debate on these questions has become polarized, especially over the United Nations Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms on business and human rights) drafted in 2003 by experts in the United Nations Sub-Commission on the Promotion and Protection of Human Rights.

Wettstein and Waddock are correct in arguing that the question is not whether we need voluntary or mandatory standards, but rather what mix of the two is needed. Voluntary initiatives are needed to encourage the increasing number of enlightened businesses to incorporate human rights principles into the core of their business thinking. However, some form of mandatory rules, whether national and/or international, are also needed to hold accountable those companies that flagrantly violate human rights or are complicit in serious abuses – often crimes – carried out by governments or armed groups or other companies.

I have set out elsewhere² seven reasons why I, and the International Commission of Jurists, see no alternative but to move gradually towards developing a set of legally binding rules, a set of global standards about the ways in which companies are re-

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¹ The International Bill of Human Rights is composed of three United Nations Documents: the Universal Declaration of Human Rights and two human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

² *Business, human rights and accountability*, Speech delivered by Nicholas Howen, Secretary-General of the International Commission of Jurists, at the ‘Business and Human Rights’ Conference organized by the Danish Section of the ICJ, Copenhagen, 21 September 2005. www.icj.org/news.php?id_article=3778&lang=en.

quired to respect human rights. These should be rules that not only require states to ensure companies do not violate human rights, but which can also apply directly to companies when states are unwilling or unable to enforce them. Wettstein and Waddock explain well how human rights law is naturally evolving in this direction in light of changes of economic and political power in the world.

However, the time has also come to find a way forward through the unhelpful morass of heated debate and polarization. It is time to develop some common ground between three actors: *human rights advocates* deeply concerned about human rights corporate accountability, enlightened *business leaders* who embrace both the business case and the moral case for companies abiding by human rights, and *government leaders* who understand these are fundamental questions of global governance that must lead to greater protection of the ordinary person.

Using the Wettstein and Waddock article as a foundation, I would suggest that the three actors I have described could agree to disagree about whether mandatory international rules are needed, while still agreeing on the urgent need for common, globally accepted human rights standards for business. The emerging consensus could look like this:

First, companies are not only profit-making entities, but also “organs of society” and *should* respect the human rights set out in the International Bill of Human Rights. In many cases it is in the commercial interests of companies and well-functioning market economies to respect, protect, and fulfil human rights. Furthermore, companies should respect human rights independently of whether it gives them a competitive advantage.

Secondly, governments have the primary obligation to respect, protect, and fulfil human rights and the business and human rights agenda should not shift that primary responsibility to business.

Thirdly, business has a secondary obligation not to violate human rights within their sphere of influence and not to be complicit in violations carried out by others. Businesses (such as the ten corporations participating in the Business Leaders Initiative for Human Rights) are still working out in practice, at the operational level, what it means for them to respect and protect the human rights set out in the International Bill of Human Rights and to what extent they should also take positive steps to promote or fulfil human rights.

Fourthly, voluntary codes of conduct and other initiatives have been essential in distilling best practices, building a consensus around some rights (such as no child labour), in helping companies to internalise human rights values and in creating management systems to implement these rights in practice. Some voluntary codes of conduct go beyond the minimum standards set out in the International Bill of Human Rights.

Fifthly, there are now a large number of voluntary codes, some of which contradict each other and leave out important rights in the International Bill of Human Rights, and describe as voluntary some matters that should be mandatory. There is some confusion now about the nature and scope of rights business should respect, including for suppliers who may be required to comply with many different codes of conduct.

Sixthly, there is now a need for governments to adopt a common, authoritative and global statement of the human rights that companies *should* adhere to and for these basic standards to become the minimum that all companies are expected to follow, at least as a matter of a *international public policy*. These minimum standards would be the rights set out in the International Bill of Human Rights.

Finally, a globally agreed set of minimum human rights standards for corporate behaviour would reduce corporate risk, establish a level-playing field, help corporations to manage public expectations, ensure that all companies are expected to invest in management systems and would simplify management of human rights in a complex supply chain.

If one puts aside the question of whether they reflect binding international law, the Norms on business and human rights do stand as just such a useful, if imperfect, public policy statement of these common, universal benchmarks that should guide all companies. Taken in this way they should not be as controversial as they have been portrayed by some business organizations.

There are still many outstanding practical questions about how companies can put human rights into practice. The results of the “road-testing” of the norms by companies participating in the BLIHR will be very instructive. Another confusing area is trying to decide when companies could be said to be “complicit” in human rights violations committed by others. Concepts of “aiding and abetting” are well-established in criminal law and tort law could also apply to many situations of complicity. But there is a need to develop a common understanding of when companies should be held legally, or at least morally, responsible for helping others to commit human rights violations. In early 2006 the International Commission of Jurists will set up an international panel of experts that will work over 12 months to clarify when companies should be held complicit in the most serious human rights violations, those that amount to international crimes. These legal principles will help to fill a vacuum. In the second stage of the project the International Commission of Jurists will consider when companies should be held to be complicit in human rights violations that do not amount to crimes, such as violating the right to freedom of expression or the right to adequate housing.

What divides some companies from many human rights advocates is whether human rights should be a matter of obligation or voluntarism. But what should bring both together is the need, urgently, for a common set of universal standards around which business and human rights advocates and government could agree and move forward. Then the world can see whether voluntary initiatives are enough or whether we need to move towards obligation.