



Human rights

Tougher laws to improve UK human rights impacts?



Yes please, says Peter Frankental of the Core Coalition and Amnesty International



No thanks, says Ethical Corporation's Peter Davis



Better laws needed

Peter Frankental

Dear Peter D,
Not many readers of Ethical Corporation would be left with the impression that your editorial team is opposed to more and better regulation of corporate impacts. In fact, your article on private military contractors (October 2008) reports approvingly on how "lawmakers in the UK and the US are ready to bring private dogs of war to heel".

The same can be said for your managing editor's article in the same issue on the need for regulators around the world to work together to strengthen the business case against corruption by prosecuting companies that bribe abroad. And your November edition quite understandably calls for measures to regulate the credit derivatives market.

In the field of business and human rights, Ethical Corporation has continuously championed the work of John Ruggie, the special representative of the UN secretary-general. He has been unequivocal in asserting: "The root cause of the business and human rights predicament today lies in

the governance gaps created by globalisation.” He argues that these “provide the permissive environment for wrongful acts of all kinds without adequate sanctioning or reparation”. Perhaps I am being presumptuous in imagining that you would agree with his conclusion that finding ways of bridging these governance gaps presents us with a fundamental challenge?

The point I am trying to make here is that there is no longer much of a debate to be had about voluntarism versus regulation. We have all moved on. The issue is not whether more regulation is required, but what kind of regulation can be most effective in changing corporate behaviour.

The changes of particular concern to the Corporate Responsibility (Core) Coalition of UK NGOs relates to the extra-territorial impacts of UK companies. Sometimes these are detrimental to human rights and to the environment. This raises the question of what steps need to be taken to protect people from such harm.

In the UK, environmental, health and safety and labour legislation has been vital in setting out what is and is not acceptable corporate practice within this country. But

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this legislation does not address the impacts of UK companies operating abroad. Nor do most other states have regulations in place to cover the extra-territorial activities of their companies.

This means that while those of us living in the UK enjoy considerable protection from abuses by companies operating or headquartered here, those living in developing countries, where most corporate abuses occur, enjoy no such protection. There are many reasons why governments hosting foreign investment might be unable to protect their people from corporate harm. A state may be weak or conflict-ridden, lacking an effective criminal justice system to hold companies accountable, or lacking a functioning civil liability system to offer remedies to victims of abuse.

This matters because of the scope and extent of corporate impacts on human rights. While you will be familiar with the most egregious cases, such as Bhopal and



Congo refugees: but would new UK laws help?

the involvement of foreign companies in the cycle of conflict in the Democratic Republic of Congo, there are thousands of other instances of corporate abuse referred to by the Business and Human Rights Resource Centre, an online news source, many of which have adversely affected the lives of large numbers of people.

Existing instruments, such as the OECD Guidelines for Multinational Enterprises, have failed to prevent such widespread abuses from occurring. This is why I believe that new legislation is required in the UK (and elsewhere) to enforce key human rights and environmental standards on UK companies operating abroad.

Regards,
Peter Frankental

Use existing laws better

Peter Davis

Dear Peter F,
Let's be clear to begin with about what we agree on. You are right to point out that we in the UK, and other western countries, “enjoy considerable protection from abuses by companies operating or headquartered here”, and that “those living in developing countries, where most corporate abuses occur, enjoy no such protection”.

If we agree on the preferred outcome – a

situation where companies at least “do no harm” with regard to human rights in developing countries – where we disagree is on how this might be brought about.

I disagree with your advocacy of “more and better legislation” as a useful and potentially effective way forward. Indeed there is confusion in demands for more laws when even campaigners themselves admit that the regulations we already have are not properly enforced. A report last November by the Trades Union Congress and various civil society groups was rightly critical of the inadequacies of the UK's National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises. As the report's supporting press release argued: “Promotion of the OECD Guidelines without effective enforcement is a hollow exercise”.

In the past year, the UK government's failure effectively to enforce the 2001 Crime and Security Act (to sanction companies accused of corruption) has also been strongly criticised. There seems to be precious little point in pressing for more regulation when that which we already have is not properly utilised.

Advocacy for new legislation conveniently ignores real practical obstacles that would have to be overcome. As you point out, “many countries where human rights exist have ineffective local institutions capable of bringing wrong-doers effectively to book”. In such circumstances, how might

investigators possibly collect evidence that would stand scrutiny in the UK courts when prosecutions were brought?

But maybe this is the heart of the problem: the introduction of legislation on business and human rights would enable those party to it to be able to say that something had been done, whether or not the legislation was effective. The call for regulation has become totemic – a symbol of commitment to promotion of human rights, with those of us who

There no point pressing for more regulation when what we already have is not properly utilised

question its value seen as in some way apologist for bad corporate behaviour.

But not only is focusing solely on a legislative agenda too simplistic, it is also conceptually wrong-headed, based as it is on the presumption that the only form of intervention that can change corporate behaviour is the regulatory stick. Certainly corporate actions are guided to a significant extent by regulation, but so are they by myriad other factors: responsiveness to customers and employees, changing technologies, and awareness of the social and political circumstances where they operate, to name but a few.

As Ruggie says, 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.” To focus simply on legislation misses the chance to use a

OECD guidelines for multinational enterprises

The OECD guidelines for multinational enterprises are a set of voluntary principles and standards for **responsible business conduct**. They apply to multinational companies operating in or from countries adhered to the OECD Declaration on International Investment and Multinational Enterprises.

The declaration and the guidelines were adopted by the OECD in 1976 and were **last revised in 2000**.

Countries that adhere to the guidelines include the 30 members of the OECD, plus 10 others such as Argentina and Brazil. Each adhering country agrees to set up a **national contact point** to promote the guidelines at the national level, and handle all enquiries and complaints about how they are being implemented.

whole range of other avenues to help companies to learn to do this.

The vast majority of people working in the corporate sector are not bad people who want to go out and cause human rights abuses; they simply do not have sufficient tools or awareness to be able to assess and manage the human rights impacts of their actions.

Therefore, rather than pressing for laws that may prove anyway to be ineffective, it would be a much better use of civil society groups' time to work with companies and their people to help make good this gap. A range of interventions that encourages managers to grasp the importance of human rights, and proactively to manage the impacts of their activities, would have an infinitely larger impact on companies' behaviours in this area than an inevitably simplistic piece of legislation.

Regards,
Peter Davis



Voluntary efforts are weak

Peter Frakental

Dear Peter D,

I agree wholeheartedly with your destination – “a situation where corporations at least ‘do no harm’”. But I take issue with your central point that as legislation isn’t working in so many contexts, we should try other approaches until we find something that works better. This is what we have all been doing for years – jumping on and off the merry-go-around of initiatives in the hope that eventually this will take us somewhere.

From the triple bottom line to the gamut of multistakeholder initiatives, we are continually asked to buy into approaches that, however well intentioned, invariably fail to deliver. All parties, including investors, consumers and civil society, find it difficult to assess the usefulness of such initiatives. Some are inherently problematic, while others either lack the incentives to make them work, or are not properly governed. Companies are able to sign up knowing that their commitments won’t be monitored and that there is little prospect of sanctions for non-compliance.

Nevertheless, you are right to be wary of tokenistic legislation and to support Ruggie’s assertion that there is no silver bullet solution to institutional mismanagements in the business and human rights



Supporting innocent victims is the key

domain. But if governmental and inter-governmental institutions are failing in this sphere, then their will and capacity need to be strengthened. Market-led solutions alone

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cannot succeed in resolving the predicament of business impacts on human rights.

Let me float a compromise proposal currently being considered by the Core Coalition – the creation of a UK commission on business, human rights and the environment to provide oversight of UK companies’ activities abroad, as well as assistance in clarifying standards and responsibilities. The modus operandi and functions of the commission would be



framed in a way that would advance legitimate initiatives that can drive change, including those you refer to. But it would also have investigatory and sanctioning powers, as well as a role in dispute resolution and policymaking.

I think there is a problem in putting too many of your eggs in the basket of giving businesses the tools and awareness to be able to manage their human rights impacts. Such an approach assumes that all companies would avoid harm if only they knew how. But what about the laggards in industry that commit human rights abuses as the inevitable consequence of their chosen business model? What we need is a mixed economy of approaches, including measures to increase corporate accountability and to offer greater access to justice for victims.

Regards,
Peter F

Learn from best practice

Peter Davis

Dear Peter F,
I think the key phrase you use is “tokenistic legislation”: my central concern is that legislation to govern business behaviour on human rights would end up being just that – designed more to be a totemic victory over the corporate sector than something designed genuinely to bring about real change.

As I have already argued, companies’ behaviours are guided by many things, of which regulation is only one. The problem is that it can be a very blunt tool which seeks to punish unacceptable behaviour, rather than encourage a proactive engagement with issues such as human rights.

Nor is the track record of legislation on what one might term “ethical” issues encouraging. Sarbanes-Oxley in the US was put in place to try to remedy the failings that had led to the Enron and WorldCom scandals. The problem is that, no matter how well intentioned the legislation might have been, its success in changing hearts and minds has been limited. Rather it has created a tick-box bureaucracy that may even hinder some companies engaging more positively with the important issues that the legislation covers.

However, no one can sensibly argue that well-conceived regulation is not a valuable tool – indeed all the evidence

Legislation has created a tick-box bureaucracy that may even hinder company engagement

suggests that companies themselves prefer to operate in environments where the regulatory framework is clear and predictable. What is needed is legislation that encourages companies genuinely to engage with the issues. But legislation needs to be seen as one element of what you term “a mixed economy of approaches”.

The challenge is how to do this. Allow me to suggest a way forward.

While the various multistakeholder partnerships such as the Voluntary Principles and Extractive Industries Transparency Initiative have not been without their problems, they have served to provide excellent examples of good practice on a range of complex issues such as corruption

Core campaigns

Formed in 2000, the **Corporate Responsibility (Core) Coalition** pushes for changes in UK company law to minimise companies’ negative impacts on people and the environment and to maximise companies’ contribution to sustainable societies.

Core members include **Amnesty International, Action Aid, Friends of the Earth, Traidcraft, War on Want** and **WWF (UK)**.

Core was one of the loudest voices pressing for reforms to UK company law through the **Companies Act** to include greater responsibilities for companies to account for their social and environmental impacts.

Under the new law, which came into force in October 2007, directors of UK-listed companies have a duty to consider the impact any decision they take will have on employees, customers, suppliers, the community and the environment.

Core demands better access to justice for victims of corporate abuse outside of the UK, enabling them to seek redress in UK courts. Models for this already exist. The **US Alien Tort Claims Act**, for example, allows victims of human rights abuses committed by US companies in foreign countries to seek redress in American courts.

and human rights. Surely the best way forward is to learn from such good practice. This would allow any legislation to be demonstrably workable and pragmatic, and so underpin best practice. However, it will also demonstrate clearly what other factors bring about improved corporate behaviour, and how these might be developed.

The possible creation of a UK commission on business, human rights and the environment offers the opportunity to find further examples of good practice. If such an entity could identify best practice on different topics in different geographies, it would be immensely valuable in providing both the basis for workable legislation and a range of other interventions that would bring about sustainable improvements in corporate behaviour in relation to human rights.

Regards,
Peter D

Peter Frankental is chair of the Corporate Responsibility (Core) Coalition and economic relations programme director at Amnesty International UK.

Peter Davis is Ethical Corporation’s politics editor and a director of the Ethical Corporation Institute.