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In Defence of the Sphere of Influence: Why the WGSR should Not Follow Professor Ruggie's Advice on Defining the Scope of Social Responsibility

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In Defence of the Sphere of Influence

Why the WGSR should not follow Professor Ruggie's advice on defining the scope of social responsibility

Stepan Wood, May 2010

The Issue

The Working Group on Social Responsibility (WGSR) of the International Organization for Standardization (ISO) will meet in Copenhagen from May 17 to 21, 2010 for what is likely to be its last meeting to work on ISO 26000, an international guide on social responsibility. One of the central challenges for the WGSR is to define the scope of an organization's responsibility for human rights abuses committed by third parties. Should an apparel company be responsible for violations of workers' rights in its suppliers' factories? Should a mining company be responsible for illegal killings and assaults by private security forces contracted to protect its assets and personnel? Should manufacturers of law enforcement equipment be responsible when police use them to suppress lawful assembly and expression? In short, where and how should the boundaries of an organization's responsibility be drawn when actors outside the organization violate human rights?

ISO 26000, approved by a large majority in a recent "Draft International Standard" ballot, answers this question largely in terms of an organization's degree of control or influence over others' conduct. This "leverage-based" approach is based on the concept of "sphere of influence", introduced into SR discourse by the United Nations Global Compact. Professor John Ruggie, the Special Representative of the United Nations Secretary General on Business and Human Rights (SRSG), has warned the WGSR not to take this approach, calling it inconsistent with his three-part "protect, respect, remedy" framework.¹

Although Professor Ruggie's views deserve great respect, ISO 26000 should

maintain its "sphere of influence" approach because:

- *It reflects broad societal expectations*
- *It is consistent with "due diligence"*
- *It does not encourage inappropriate political interference*
- *It does not encourage "gaming"*
- *It is simple and intuitive*
- *It builds on existing ISO standards*
- *It avoids making a false distinction between supporting human rights and avoiding abuses*
- *It is a necessary part of the solution to the business and human rights problem.*

Fulfilling Societal Expectations

Decades of anti-sweatshop campaigns and consumer boycotts show that social actors – citizens, consumers, workers, indigenous and local communities, NGOs – will hold businesses accountable for the way in which they exercise or fail to exercise the influence they have over others to prevent or lessen human rights abuses. As one report put it, "society at large will hold a company responsible for violations occurring in plants from which it sources products or services, and therefore over which it has a degree of influence."²

ISO 26000 reflects this widespread societal expectation when it says that "there will be situations where an organization's ability to influence others will be accompanied by a responsibility to exercise that influence.... Generally, the responsibility for exercising influence increases with the ability to influence."³ This is in line with the Global Compact's E-Learning tool, which says: "the more control, authority or influence a business has over a situation giving rise to human rights abuses (or the means to improve respect for human rights), the greater the business responsibility to act."⁴

Promoting Due Diligence

The "sphere of influence" approach is consistent with and supports the concept of

due diligence which lies at the heart of the corporate responsibility to respect human rights. According to Professor Ruggie, due diligence “comprises reasonable steps by companies to become aware of, prevent, and address adverse impacts of their activities and relationships.”⁵ For him, “sphere of influence remains a useful metaphor for companies to think broadly about their human rights responsibilities and opportunities beyond the workplace” but “is of limited utility in clarifying the specific parameters of their responsibility to respect human rights” because it conflates “impacts” with “leverage”.⁶

In Professor Ruggie’s view, the scope of social responsibility is defined by “the actual and potential human rights impacts generated through a company’s own business activities and through its relationships with other parties,” not by leverage.⁷ Corporations are responsible for their contributions to the actions of others, most importantly in the form of complicity in human rights abuses, which he defines as knowing contribution to another’s abuse of human rights.⁸

What Professor Ruggie fails to acknowledge, and what ISO 26000 and the Global Compact recognize, is that an organization may contribute to human rights abuses by acts of omission as well as commission. When an organization has the ability to prevent or mitigate adverse human rights impacts by exercising influence over an actor with whom it is in a relationship, yet elects deliberately not to exercise that influence, it contributes to the resulting abuse. Its degree of complicity and hence responsibility may be less than if it had actively conspired with the abuser, but it is implicated nonetheless.

Discouraging Political Interference

Professor Ruggie asserts that it is undesirable “to require companies to act wherever they have influence, particularly over Governments.”⁹ Presumably, what makes this undesirable is the possibility of inappropriate meddling in public policy. Yet surely such irresponsible political involvement would be inconsistent with social responsibility by

definition. Social responsibility includes responsible involvement in politics and public policy, as ISO 26000 recognizes.¹⁰

The only reason to conclude that leverage-based social responsibility is not desirable is if one believes that organizations are bound to exercise their political influence irresponsibly. If this is true, the entire project of social responsibility is in jeopardy. If, on the other hand, organizations can exercise their influence responsibly, there is no reason not to demand they do so.

Discouraging Strategic Gaming

Professor Ruggie warns that “using influence as a basis for assigning responsibility invites strategic manipulation.”¹¹ In his most recent report he explains that

the proposition that corporate human rights responsibilities as a general rule should be determined by companies’ capacity, whether absolute or relative to States, is troubling. On that premise, a large and profitable company operating in a small and poor country could soon find itself called upon to perform ever-expanding social and even governance functions – lacking democratic legitimacy, diminishing the State’s incentive to build sustainable capacity and undermining the company’s own economic role and possibly its commercial viability. Indeed, the proposition invites undesirable strategic gaming in any kind of country context.¹²

The concern seems to be that leverage-based corporate responsibility will give governments an incentive to shirk their responsibilities in the hope that companies will step in to fill the breach. But the state’s responsibility to protect human rights is independent of business’s responsibility to respect. The state’s potential liability for neglecting or violating human rights is not diminished by corporate action to support those same rights. Only the most unscrupulous governments would treat such a

situation as an excuse to shirk their legal responsibilities, and those governments would likely neglect their duty to protect human rights regardless of how the corporate responsibility to respect is defined.

Promoting Simplicity

Sphere of influence may be a metaphor, but it is one that organizations and stakeholders of all kinds can understand intuitively. The idea of concentric circles of influence radiating outward from the organization is simple. It subsumes a wide variety of relationships with different forms and pathways of influence under a single simple principle: the more influence the organization has over processes and outcomes, the more responsibility it has to exercise its influence.

There are various ways to operationalize the concept of sphere of influence, including the principle of “proximity”¹³ and the UN Global Compact’s “Arc of Human Rights Priorities” with its twin axes of human rights impact and connection to the company.¹⁴ Ruggie rejects the concept of proximity because it is unclear (e.g. what does “political proximity” mean?) and in some cases misleading (e.g. “geographic proximity” may obscure the fact that actions can affect people far away). He concludes that “it is not proximity that determines whether or not a human rights impact falls within the responsibility to respect, but rather the company’s web of activities and relationships”.¹⁵

It is hard to imagine how the term “web of activities and relationships” is any clearer than proximity, a concept familiar to lawyers worldwide. Proximity plays a central role in private law in all the common law countries, as well as in international law.¹⁶ Among other things, it is central to legal concepts of causation (“proximate cause”), foreseeability and duty of care. While its meaning is open-textured and context-dependent, millions of legal practitioners and judges employ it routinely to resolve disputes.

Professor Ruggie proposes a three-part process to determine the scope of a company’s responsibility that is at least as abstract and vague as the “leverage-based”

approach he rejects. In his view, to determine the scope of its responsibility a company should:

- understand the country context within which it operates;
- assess the impacts of its own activities; and
- analyze whether it might contribute to abuses through its relationships with third parties.¹⁷

How organizations, let alone their stakeholders, are expected to translate these factors into concrete limits on social responsibility is far from clear. How does a country’s human rights context affect the firm’s degree of responsibility? How does one distinguish between an organization’s “own” activities and those of “others”? Two examples Ruggie gives of a firm’s “own” activities, having “direct impact,” are political lobbying and the provision of security for personnel and assets. These are odd examples, since security and lobbying functions are typically entrusted to third parties. Moreover the impact of lobbying on human rights is indirect since it is the implementation of laws and policies that affects human rights, not the lobbying activities that may have influenced their content. By presenting security and lobbying as activities with direct impacts, Professor Ruggie adds to the confusion surrounding these issues.

Nor is it clear what kind or degree of contribution to abuse through an organization’s relationships is sufficient to attract responsibility. On one hand, Professor Ruggie writes that “[a]voiding complicity is part and parcel of due diligence for ensuring that companies respect human rights”.¹⁸ On the other hand, he suggests that other forms of involvement might also give rise to responsibility.

One example is knowingly benefiting from another’s abuse of human rights, which Professor Ruggie suggests is included in the scope of the corporate responsibility to respect human rights even if the firm did not contribute to the abuse.¹⁹ He also seems to suggest that a company’s mere presence in a

setting where human rights abuses take place may give rise to responsibility: “operating in contexts where abuses occur and the appearance of benefiting from such abuses should serve as red flags for companies to ensure that they exercise due diligence”.²⁰ Other forms of involvement are suggested by his admonition that a company should “assess whether it might contribute to *or be associated with* harm caused by entities with which it conducts, or is considering conducting business or other activities” and “ensure that the company is not complicit, *or otherwise implicated in* human rights harms caused by others”.²¹

In short, for all his emphasis on due diligence and complicity, Professor Ruggie is ultimately unclear about what kind and degree of connection to third-party human rights violations is sufficient to engage corporate responsibility.

As Professor Ruggie acknowledges, determination of the scope of the responsibility to respect is bound to be inductive and fact-based.²² This is no different from the “sphere of influence” approach he rejects. The latter, however, offers the advantage of conceptual simplicity: a firm’s leverage varies on a continuum from no influence to complete control, and its responsibility varies with its degree of leverage: the more leverage, the more responsibility.

Building on Existing Standards

The sphere of influence approach fits well with existing widely accepted standards, including ISO 14001. ISO 14001, the world’s leading environmental management system standard, recognizes that to be considered environmentally responsible, an organization should identify and manage the environmental aspects of its activities, products and services that it can control and those it can influence. The European Union’s voluntary Eco-Management and Audit Scheme (EMAS) does likewise.

While there is a lively debate over how to operationalize the principle of control and influence, and how far up or down the value chain it extends, the worldwide

environmental management community is in agreement on the basic proposition: an environmental management system should address the environmental aspects over which an organization determines it has control or influence. ISO 26000 should take a page from ISO 14001 and affirm that to call itself socially responsible, an organization should answer for human rights abuses it can control and those it can influence.

Avoiding False Distinctions

“Asking companies to support human rights voluntarily where they have leverage is one thing,” writes Professor Ruggie, “but attributing responsibility to them on that basis alone is quite another”.²³ This statement presupposes a sharp distinction between the purely voluntary activity of promoting human rights and the obligatory responsibility of avoiding human rights abuses.²⁴

But promotion of human rights and avoidance of abuse are regions on a continuum, not the two mutually exclusive parts of a dichotomy. The transition between them is gradual and continuous, not abrupt. Leverage over other actors is just as relevant to defining the one as it is to the other, as ISO 26000 recognizes when it says “an organization has the responsibility to respect human rights, including in its sphere of influence”.²⁵ The utility of the concept of sphere of influence is not limited to the context of voluntary human rights promotion.

Solving the Business-Human Rights Problem

Ultimately, an approach that limits corporate responsibility to positive acts of commission while ignoring acts of omission is bound to fail. An approach that calibrates responsibility to an organization’s degree of control and influence over adverse human rights impacts is needed to solve the business-human rights problem. Acting responsibly within an organization’s own workplace is the least of the problems facing social responsibility (not that it is a small problem).

The real challenge of social responsibility lies in an organization’s

relationships with contractors, suppliers, customers, local communities and end users. Organizations often have substantial influence over the decisions and actions of these actors.

While ISO 26000 is right to acknowledge that an organization “cannot be held responsible for the impacts of every party over which it may have some influence,”²⁶ it should equally acknowledge that the problem of human rights abuses cannot be solved by allowing organizations simply to wash their hands of abuses perpetrated by actors with whom they have a significant relationship and over whom they have a significant degree of influence.

Only by affirming that a firm’s responsibility varies with its ability to influence decisions and actions will social responsibility standards galvanize the sort of changes that are needed to improve respect for and realization of human rights.

Conclusion

The concept of sphere of influence is central to ISO 26000’s definition of social responsibility. It is integrated throughout the document. While its use in ISO 26000 suffers from some awkwardness and inconsistency (as do many other aspects of the document), it sends the right general message. With the greatest respect for Professor Ruggie, the WGSR should not change ISO 26000 to accommodate his concerns.

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¹ Special Representative of the United Nations Secretary-General for Business and Human Rights (John G. Ruggie), “Note on ISO 26000 Guidance Draft Document” (November 2009), online: <http://www.business-humanrights.org/SpecialRepPortal/Home> (Ruggie, ISO 26000 Note).

² Peter Frankental and Frances House, *Human rights: Is it any of your business?* (London: Amnesty International UK and Prince of Wales Business Leaders Forum, 2000) 17, online: <http://www.iblf.org/docs/IsItYourBusiness.pdf>.

³ ISO/DIS 26000, clause 5.2.3

⁴ UN Global Compact Human Rights and Business Learning Tool, online: <http://www.unscc.org/web/hrb/Default2.asp>, Section 2.1: Sphere of Influence and the Global Compact Principles.

⁵ Special Representative of the United Nations Secretary-General for Business and Human Rights (John G. Ruggie), Clarifying the Concepts of “Sphere of Influence” and “Complicity” (15 May 2008), UN Doc. A/HRC/8/16 at 8 (Ruggie, Sphere of Influence).

⁶ *Ibid.*, 5-6.

⁷ Special Representative of the United Nations Secretary-General for Business and Human Rights (John G. Ruggie), Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework (9 April 2010), UN Doc. A/HRC/14/27 (advance edited version), para. 58 (Ruggie, Operationalization).

⁸ Ruggie, Sphere of Influence, 9.

⁹ Ruggie, ISO 26000 Note, 2.

¹⁰ ISO/DIS 26000, clause 6.6.4.

¹¹ Ruggie, ISO 26000 Note, 3.

¹² Ruggie, Operationalization, para. 64.

¹³ For example, Report of the United Nations High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises, UN Doc E/CN.4/2005/91.

¹⁴ Mike Baab and Margaret Jungk, *The Arc of Human Rights Priorities: A New Model for Managing Business Risk* (Road Testing Version) (Copenhagen & New York: The Human Rights Project and UN Global Compact, June 2009), online: http://www.unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html#Arc.

¹⁵ Ruggie, Sphere of Influence, 6.

¹⁶ For example, Ilona Cheyne, “Proportionality, Proximity and Environmental Labelling in WTO Law” (2009) 12 *J. Int’l. Econ. L.* 927 at 946-50.

¹⁷ Ruggie, Sphere of Influence, 7.

¹⁸ *Ibid.*, 9-10.

¹⁹ *Ibid.*, 22.

²⁰ *Ibid.*, 21.

²¹ *Ibid.*, 7 and 22, emphasis added.

²² *Ibid.*, 6.

²³ Ruggie, ISO 26000 Note, 2.

²⁴ See, for example, UN Global Compact, “The Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,”

http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRS_G_and_the_UN_Global_Compact.html.

²⁵ ISO/DIS 26000, clause 6.3.1.2.

²⁶ *Ibid.*, clause 5.2.3.