

Private Companies and the Public Interest: Why Corporations Should Welcome Global Human Rights Rules

By Lisa Misolⁱ

It has been a decade since Ken Saro-Wiwa was convicted in an unfair trial and executed with eight others in retaliation for protesting Shell Oil's operations in Nigeria. That same year, 1995, the international spotlight fell on American clothier "The Gap" for deplorable working conditions in its supplier factories in El Salvador.

Both companies paid a price: Shell soon faced a lawsuit (still pending) in a U.S. court for alleged complicity in the executions; The Gap confronted nationwide picketing of its stores, which ended only when the company agreed to the demands of anti-sweatshop activists.

These were watershed moments. Many multinational corporations, worried about the costs and consequences for their brand names if they were blamed for the human rights impact of their business practices, woke up and took notice. In response to their critics, some of the companies in the line of fire adopted human rights policies. Others, seeing the writing on the wall, preemptively did the same. Many prominent companies have now adopted voluntary codes of business conduct that include respect for basic human rights.

Because voluntary commitments are insufficient in themselves to prevent corporate implication in human rights abuses, there have been increasingly frequent calls for binding standards. Indeed, regulations already have begun to emerge in some sectors on some issues, but coverage and enforcement is spotty, far short of the kind of comprehensive framework many believe is necessary. Multinational corporations have long responded to calls for any kind of binding human rights standards with the claim that self regulation or voluntary guidelines are enough. But there are signs that this opposition may be beginning to change.

In private, some multinational executives have started to question whether industry's antagonism to regulation makes sense when it comes to human rights. They realize that only binding standards can ensure a level playing field and that, increasingly, the choice facing them is not between adopting voluntary codes of conduct and doing nothing. It is a choice between continuing to compete on an uneven, ever-shifting playing field and participating in the creation of universally binding and enforceable rules that apply equally to all companies.

For most corporations, having clear, consistent rules would be preferable to being subjected to unfair competition and a confusing mix of standards that provides little guidance to companies and little comfort for victims of human rights abuse.

This essay argues that enforceable global standards are desirable, inevitable, and, contrary to received wisdom, good for business.

The Drive for Corporate Social Responsibility

Pressure from campaigning organizations in the fields of environmental protection and human rights helped spur the movement toward greater corporate responsibility. Today, Corporate Social Responsibility (CSR) is a burgeoning field, encompassing corporate ethics, workplace issues, and environmental as well as human rights concerns.

Growing numbers of nongovernmental organizations (NGOs) are monitoring corporate practices against basic standards, including human rights. The news media also increasingly scrutinize corporate conduct. Ethically-minded investors and consumers are demanding more from the companies with which they do business. CSR advocates now find greater numbers of sympathetic listeners in government and corporate headquarters.

In part the ground is shifting because of the impact of globalization on businesses. Companies now commonly operate in a wide variety of locations, not just in their own country or in like-minded locales. Their products and brand names reach all corners of the globe, as do the news media that follow their activities. In some of the countries that host their operations, the clout of multinational corporations rivals or exceeds that of the national government.

There is no sign that these trends are letting up. In the current environment, public advocacy for CSR can only be expected to increase and to spotlight more and more instances of corporations implicated in abuse.

There is plenty to focus on. Workers the world over still struggle to assert their rights in the face of company indifference and government inaction. Harmful child labor, unsafe conditions, and discrimination—not to mention the deprivation of workers' rights to free association and collective bargaining—remain all too common throughout both the developed and developing world.

In areas of violent conflict and instability, the pursuit of profits without human rights safeguards can fuel a range of abuses, including torture, forced labor, war crimes, and crimes against humanity. All too often, companies cozy up to local armed groups to get access to lucrative resources, or buy smuggled goods from killers who use the proceeds to purchase weapons.

In response to increasing public attention to the role corporations can play in facilitating human rights abuse, recent years have seen a proliferation of voluntary initiatives on corporate social responsibility. A number of CSR initiatives explicitly address human rights, along with environmental and other issues. By way of illustration, some 2,300 global companies have endorsed the United Nations Global Compact, a modest voluntary commitment to abide by ten ethical principles, including respect for human rights. Voluntary corporate commitments to human rights, however, can be demonstrably inadequate, as the following example shows.

Limitations of Voluntary Guidelines: The Congo Gold Example

“We are cursed because of our gold. All we do is suffer. There is no benefit to us.”
– Congolese gold miner

Companies operating globally face many challenges: managing across borders, navigating different regulatory regimes, protecting their brands, and dealing with shifting expectations. For companies active in zones of weak governments, the challenges are still greater. These companies must cope with questions about security, immense poverty, and lack of a functioning state, to name just a few. Frequently voluntary guidelines are simply not enough to ensure respect for human rights in these

environments. A report published by Human Rights Watch in June 2005 on the abuses taking place in the gold fields of the Democratic Republic of Congo illustrates the limitations of such voluntary commitments by one of the world's largest gold producers, AngloGold Ashanti, part of the international conglomerate Anglo American.

Northeastern Congo is home to one of Africa's largest unexplored goldfields. It is also a region in a desperate state. Torn apart by years of war, the Congolese economy is shattered, and more than three million of its citizens are dead. The desire to control Congo's rich mineral resources—including gold, diamonds, and other precious minerals—has been central to the war that started in 1998. Brutal killings continue, despite a fitful peace process and a shaky transitional government launched in June 2003. Those unfortunate enough to live in mineral-rich areas have suffered some of the worst atrocities.

In this volatile environment, AngloGold Ashanti decided to explore for gold. The company set up a project camp in Mongbwalu, a gold town ruled by the murderous Nationalist and Integrationist Front (FNI), and developed links with its leaders to gain access to the gold-rich area. The situation on the ground must have been clear. FNI combatants controlled all road and airport access into the town, flaunted their guns in the streets, forced people to work in the gold mines, and conducted killing sprees in nearby villages. Human Rights Watch documented in detail the links between AngloGold Ashanti and the local warlord, showing how the FNI armed group responsible for these atrocities gained financial and logistical support, and, most importantly, political credibility from its ties to the company.

Significantly, AngloGold Ashanti has a corporate code of conduct that includes human rights standards and public commitments to corporate social responsibility. Its commitments are viewed by many other companies as cutting edge. AngloGold Ashanti executives should have ensured that their operations in Congo complied with those commitments and did not adversely affect human rights. They do not appear to have done so.

In response to the Human Rights Watch report, AngloGold Ashanti said it regretted any payments made to the armed group, that the payments were minimal, and that such support was not part of company policy. The company undertook a high level review of its activities in Congo to determine how, and if, it could operate in such an environment with integrity. It also publicly pledged to cease all payments to abusive armed groups in Congo and to pull out of the mine site if the groups attempted to extort funds in the

future. As one company executive later put it, “we learned too late not to ‘do as in Rome.’”

The activities of AngloGold Ashanti in Congo show the limitations of voluntary guidelines and illustrate the need to move beyond rhetoric. If binding standards had been in place, AngloGold Ashanti would have been induced to devise stronger mechanisms to prevent such an ill-advised and ultimately detrimental relationship with abusive warlords in the Congo, secure in the knowledge that its potential corporate competitors would be held to the same standards.

Towards Binding CSR Standards

Companies are increasingly aware that human rights problems are bad for business. Human rights issues are having a decided impact on how companies do business. In a survey of the world’s 500 largest companies, more than a third of respondents reported that human rights concerns had caused them to drop a proposed investment, and nearly a fifth said they disinvested from a country for that reason.

In a number of areas, steps have been taken to move beyond purely voluntary CSR standards. Leading companies have worked to reflect their human rights commitments in corporate practices. In some industries, particularly apparel, companies have agreed to not only codes of conduct, but also independent monitoring to increase the odds that they and their suppliers will live up to their word. The Fair Labor Association has a monitoring process that provides one example.

To a limited extent, enforceable regulations have also begun to emerge, though their reach is spotty. Some stock indices, such as FTSE 4Good, require qualifying companies to comply with basic ethical standards. Certain international financial institutions make similar demands of their loan beneficiaries. For instance, the International Finance Corporation, the private-sector lending arm of the World Bank Group, has said it will require companies to live up to the Voluntary Principles on Security and Human Rights, which provide for human rights protections and some company disclosures about payments. Companies that are complicit in serious human rights abuses risk liability under laws such as the U.S. Alien Tort Claims Act. In extreme cases, corporate executives could even face prosecution by the International Criminal Court. And individual governments, sometimes prompted by trade agreements, increasingly demand that trading partners regulate certain corporate conduct.

Moreover, public expectations already constrain the behavior of some large corporations. This is mostly the case for major companies based in countries with an active civil society and vigorous news media. In such countries, political leaders often respond to demands for corporate responsibility by endorsing standards for business conduct. These measures, in turn, provide a yardstick against which watchdog groups judge the behavior of the companies based there.

In each of these cases, however, constraints on corporate behavior are limited to those companies that fall under the regulatory or public eye, leaving other businesses free to break the rules. The first point to be made is that global rules would level the playing field. As things stand, more responsible companies sometimes lose economically for doing the right thing or face competitive disadvantages based on the standards applicable to their home country.

A company executive, speaking anonymously under Chatham House rules, acknowledged the difficulty of trying to operate ethically in difficult environments when there are no clear rules and other companies do not feel so constrained. As he put it, “Any regulation is better than no regulation.”

A second point is that companies eager to get ahead of the curve may be signed up to a dizzying number of CSR guidelines, codes of conduct, and voluntary commitments. Complying with these initiatives in their global operations can be time consuming and expensive, especially where monitoring and reporting mechanisms are built in. Rather than having to navigate so many divergent codes and make sense of emerging liabilities, it would be in the interest of these companies to operate under simpler, enforceable rules that eliminate ambiguity.

The current patchwork of rules hardly creates a fair competitive environment: it is piecemeal in its coverage and unpredictable in its enforcement. Different initiatives identify and interpret human rights standards differently, leading to divergent expectations. From the point of view of a corporate executive who needs to plan and manage risks, that should be an unsettling thought.

The Problem of “Rogue” Companies

A compelling reason for prominent or far-sighted businesses to back binding human rights standards derives from the fact that public pressure tends to focus on highly

visible companies, especially ones that have a brand or image to protect. Relatively few companies are so prominent that their behavior is under regular scrutiny from activists and the press. That gives an unfair advantage to less well-known competitors who can operate under the radar screen of public attention.

Well-known companies, worried about the harm that misconduct could cause their reputation, must assume the costs of meeting broadly recognized standards of corporate conduct. For example, a big company might have to accept paying higher wages associated with employing adults rather than children or permit trade unions to operate freely in its factories. By contrast, a no-name company, confident that the public will not notice its misdeeds, may not feel compelled to act as responsibly.

The gold industry again provides an illustration of this. Warlords in Congo, working together with their local business allies, used the proceeds from the sale of gold to gain access to money, guns, and power. Operating outside of legal channels, they worked together with a network of gold smugglers to funnel gold out of Congo to Uganda, destined for global gold markets in Switzerland and elsewhere, where it was bought by multinational companies.

One such company that bought gold from this network was Metalor Technologies, a leading Swiss gold refinery. Metalor knew, or should have known, that gold bought through this network came from a conflict zone in Congo where human rights were abused on a systematic basis. The company claimed it actively checked its supply chain to verify that acceptable ethical standards were being maintained. Yet during five years of buying gold from the network, no serious questions were raised.

After discussions and correspondence with Human Rights Watch and just prior to the publication of the Human Rights Watch report, Metalor announced it would suspend its purchases of gold from Uganda. Fearing possible repercussions for their business, other Swiss gold refineries followed Metalor's lead. The trade in "tainted gold" from northeastern Congo immediately slowed; warlords and their business allies were finding it difficult to find clients for their ore. But the halt was only temporary. In less than two months, other gold refineries less concerned about their reputation stepped into the void. The trade moved from Switzerland to Dubai.

Concerned about the ramifications of pressure from campaigning groups, the gold jewelry industry wants to counter concerns over "tainted gold." Following in the

footsteps of the diamond industry, which has sought to disassociate itself from “blood diamonds,” the jewelry industry aims to set standards for responsible practices, including human rights standards, that will protect its consumer market. To do so they will need to tackle those within the industry who act irresponsibly. This will be tough, if not impossible, to carry out on a voluntary basis. Pitching “clean” products becomes hard when unscrupulous competitors can still play dirty. Attention to the misdeeds of no-name companies can sully the reputation of an entire industry—damaging even larger established brands.

Only enforceable rules, applicable to all companies regardless of prominence, can avoid this double standard.

The Way Forward

Social responsibility is not the first issue for which corporations have begun to recognize the advantage of enforceable standards with broad reach. A similar dynamic emerged after the U.S. government’s adoption in 1977 of the Foreign Corrupt Practices Act, which made it illegal for companies operating in the United States to bribe foreign officials. The U.S. law was adopted in the wake of a domestic corporate scandal but, once in place, put U.S. companies at a competitive disadvantage because their foreign competitors remained free to continue securing business through bribery. In response, U.S. firms pressed for—and got—a multilateral treaty to even out the competitive environment.

After years of complaints, the Organization for Economic Cooperation and Development (OECD) in 1997 adopted a treaty requiring all its member states to criminalize such bribery. The OECD’s thirty members account for some two-thirds of the world’s goods and services and 90 percent of global private capital flows. China remains outside the treaty, but as its companies increasingly operate overseas its exclusion will become legally less tenable.

The OECD already has set out corporate social responsibility standards. Its Guidelines for Multinational Enterprises have been endorsed by a total of thirty-nine countries, including nine non-OECD members. The adhering countries are home to ninety-seven of the world’s top one hundred multinational companies. The OECD Guidelines are voluntary but do have an implementation process run by governments, and are widely used to judge corporate conduct. For example, a U.N. expert panel publicly chastised a number of Western companies operating in Congo for failing to comply with the OECD Guidelines. In addition, NGOs have lodged formal complaints against some of these companies under OECD procedures.

OECD member countries, following on the anti-bribery effort, should move to make their CSR standards binding. They should adopt a treaty under which they agree to enact laws similar to the OECD Guidelines that would be enforceable under national criminal or civil codes, carrying penalties such as fines or, in extreme cases, imprisonment. Like anti-bribery laws, this national legislation would bind any company operating in that nation's jurisdiction.

In addition, the United Nations, which has already drafted non-binding norms on corporate conduct, might provide a forum to negotiate a universally applicable treaty. U.N. discussions on business and human rights have tended to be highly polarized, but a new approach may emerge. In 2005 the United Nations' human rights body launched a two-year process to examine these issues. The Commission on Human Rights created a mandate for a high-level expert, appointed in July 2005 by the U.N. Secretary-General, to raise awareness of the human rights responsibilities of companies, look at the tough issues that have blocked progress to date, and map a way forward. An advantage of this U.N.-led process is that it is explicitly focused on human rights and brings together governments, companies, and concerned civil society groups from around the world.

The U.N. mandate—if focused appropriately—has the potential to move beyond a purely voluntary approach toward effective human rights protection that combines elements of voluntarism with enforcement potential on core rights issues. It carries risks as well. Unless human rights are taken as the point of departure, the process could degenerate into a consensus around weak “standards” that are lower than those derived from human rights law and principles.

Though any such agreements or treaties will take time, it is crucial to begin to move down that road. The next few years offer a valuable opportunity to break the current impasse on the corporate accountability debate. Already, many corporations are engaged with other stakeholders in various processes to debate and refine CSR standards. These companies are working on several fronts to develop CSR standards and widen their application within and across different industries.

Given the momentum behind the CSR movement, the continuing proliferation of different standards, and the problem of an unequal playing field, it is clear that business has a vital interest in helping to define human rights norms. By doing so, it can help ensure that the resulting requirements are clear, practicable, and fair. Industry also has a direct stake in seeing that these requirements are applied to all companies, regardless of

where they are based, and that they are effectively implemented and enforced. Ultimately, that means making the rules universal and mandatory.

Sometimes it pays to take the initiative. For hard-headed businesspeople, the smart move is to face up to global human rights standards early and make them work by making them stick.

¹ Some of the arguments and language used in this essay first appeared in a *Financial Times* opinion article (“Rules on Corporate Ethics Could Help, Not Hinder, Multinationals,” June 21, 2005) by Human Rights Watch Executive Director Kenneth Roth. Anneke Van Woudenberg, senior researcher in Human Rights Watch’s Africa Division, contributed material for the Congo case study.