Taking responsibility

John Ruggie, the UN’s special representative on business and human rights, talks to Jonathan Alweis about completing his guidelines for managing corporate social responsibility and the world’s changing attitude towards corporate human rights issues.

Corporate social responsibility (CSR) has become such a popular buzz-phrase around boardroom tables of multinational businesses that it is easy to forget that the term is not as freshly minted as it may seem. CSR as a concept has been on the radar since multinationals first started to flex their global muscles some 40 years ago and US business administration guru Edward Freeman effectively constructed the original definition of a corporate ‘stakeholder’ and stakeholder responsibilities in the early 1980s.

But there’s nothing like a major corporate disaster in today’s 24-hour rolling news-dominated world to propel the concept to the top of the political agenda. At half past nine in the evening of 20 April 2010, the sky and waters around the BP-operated Deep Water Horizon drilling platform in the Gulf of Mexico were relatively calm. Life on board the rig for the 126 crew was typically mundane and ordinary.

All that changed 26 minutes later when an accumulation of abnormal pressure resulted in a sundering, massive explosion and fire that killed 11 people and injured another 17. Two days later, the rig sank. Apart from the human cost, the explosion triggered a devastating oil leak 5,000 feet below the surface, a calamity that has not been widely described as the worst environmental disaster in US history.

It was not a good day for BP and its political and public relations handling of the spill resulted in senior heads rolling. Indeed, the events will keep chroniclers of the evolving history of CSR busy for some time yet. But the traumatic story of Deep Water Horizon is just one in a litany of corporate incidents in the last half century – many of which received only a modicum of the publicity that swirled around the Gulf of Mexico spill.

Five years ago, the UN’s Secretary General launched a project that aimed to analyse and assess the interplay between business and human rights. The desire at the time was to move towards a common framework for understanding and managing business-related human rights challenges, which took into account the roles and responsibilities of all relevant stakeholders.

And in 2008, following the unanimous acceptance of the programme, now known as the UN Protect, Respect and Remedy Framework, attention turned to establishing a set of guiding principles. At the end of November 2010, the man charged with arriving at that point – John Ruggie, the UN’s special representative on business and human rights – posted the fruits of five years’ research on the UN’s website.

His Guiding Principles for the Implementation of the UN Protect, Respect and Remedy Framework represent a landmark in the CSR debate. The Harvard-based professor conducted more than 47 consultations, heard of them multi-stakeholder, among other research to compile the principles, which were open for consultation until the end of last month.

How has discussion and debate about corporate social responsibility and the involvement of multinational corporations in human rights issues advanced in the past five years since you...
were appointed as UN Secretary-General's Special Representative for Business and Human Rights. Between those companies that were struggling with the human rights issue in 2005, and civil society actors and governments, there was very little common ground. It was almost constant trench warfare.

My very first consultation in 2005 was on the extractive [mining] industry. There were bullets flying back and forth between the companies and advocacy groups - there was no common vocabulary, no common understanding, no shared principles on which to build.

That has changed profoundly in the past five years. People are talking similar languages, there is greater understanding. Of course, there are still differences, which stem from the objectives that the different organisations and stakeholders pursue. But we do have a common discourse and shared principles that have been endorsed by the UN Human Rights Council regarding an overall policy framework on which to build forward.

Over the course of the past five years, the community of people involved in business and human rights has also managed to generate engagement with non-traditional companies, including companies from emerging markets. There is much greater participation in various initiatives by emerging market companies, typically in their own overseas operations, and less so, but not at a trivial level, in terms of their own domestic operations.

Both among the older companies and the new larger pool of companies, there has been very positive change.

Nonetheless, it is far from job done. Breaches of human rights continue to occur and friction between companies and communities on the ground rumble on. What are the main remaining hurdles? There are hurdles that exist on the one hand of governments and companies. Regarding governments, there is still a way to go for them to understand fully what their duties to protect against corporate human rights abuses entail. It has been a learning experience. With our mandate, we’ve tried to spell out what exactly is implied by the state duty to protect - the regulatory measures, the policy guidance and encouragement, what export credit agencies ought to be requiring companies to do in relation to which investments they support overseas.

But there is still a way to go in terms of capacity building. For example, that means countries signing investment agreements that protect investors but do not tie their own hands in terms of being able to develop progressive social and environmental policies without being sued by corporations for breaches of bilateral investment treaties or other agreements. There is a great deal of learning that still needs to be done, even in those countries that are at least willing to engage in the proper implementation of the duty to protect - leaving aside the problem of corruption, which is often in play.

On the company side, there is also a great deal of learning to be done. The challenge going forward will be to develop systems that are appropriate for small and medium-sized enterprises. Much of the thinking and recommendations that flow out of most initiatives takes for granted that we are dealing with large multi-national companies. Scaling down those systems is a real challenge - one size does not fit all.

What encouraging signs have you seen in terms of specific programmes being implemented by international business?

What a fairly large number of companies are implementing or at least start testing is the concept of human rights due diligence, which has had a good uptake by companies because it frames human rights in terms that companies can understand. It demystifies human rights. It suggests that human rights are part of a larger set of non-technical and non-financial risks that stem from the company’s own impact on its workers, communities and other stakeholders.

And workers and communities in many countries are pushing back vigorously, particularly communities. For example, the extractive and infrastructure industry, which has a large physical footprint, faces risks that they themselves are interested in dealing with - in part, because it costs them money not to deal with these issues. The human rights due diligence consists of assessing the human rights impact of a company’s activities and its relationships, whether with suppliers or security forces that protect installations. The findings should then be integrated into a management system that also tracks and communicates on human rights performance, so that as a whole...
the company is working to identify, prevent, mitigate and remediate any adverse human rights impacts they cause or contribute to through their activities and relationships.

That is how we frame the challenge for companies and there has been very good uptake and receptiveness to this idea.

How important is the position of senior in-house corporate lawyers in this process?

They play a significant role.

Last December, I spent a day in The Hague with a roomful of corporate lawyers who had gone through the guiding principles with a magnifying glass and they were full of questions.

I'm a political scientist by trade and I don't mean to overgeneralise, but I've encountered two types of lawyers generally. There is one category that seems to obsess about every hypothetically conceivable risk that solutions to problems could pose for the company, no matter how far-fetched the hypothesis is. We've had issues raised that seem incredibly far-fetched.

But I suppose the lawyers feel that they are doing their job by identifying these hypothetical risks. It is almost an institutional culture for some lawyers – and it is replicated by their attitudes towards litigation. There is a striking phrase used by the general counsel of a major global oil company: 'We will litigate until hell freezes over and then we'll skate on it.' That's quite a statement from a senior in-house lawyer.

On the other side, there are lawyers in equal number that adopt the view that there has to be a better way to manage grievances. Lawyers who have dealt with Alien Tort Statute cases in the US have seen some of those cases dragging through the American courts for as long as 12 or more years. They shake their heads, because often there is no real sense of remedy at the other end, there is no closure, there is endless procedural wrangling. How does that help anybody? That group of lawyers is saying 'we already have risks – help us deal with them. Never mind all possible risks posed by solutions – we already face real risks in relation to the problems around us, which we don't know how to deal with'.

So there are very different clusters of lawyerly cultures. My hunch is that the so-called entrenched types haven't had as much experience with real cases as the lawyers who want to deal with existing risks and want to find better ways of dealing with matters for their clients. The first have a 'this is what I was taught in law school and this is what I do' approach. As opposed to the second approach that says: 'I've been involved in four or five of these cases; going through these processes is hell for all parties involved and there must be a better way.'

In the extractive industry, infrastructure and a large physical footprint pose risks for companies that they themselves are interested in dealing with ... because it costs them money not to deal with these issues

Do corporations need to come to terms with the point that dealing with matters that appear quite small – and that they may feel have no legitimacy – are nonetheless best dealt with before they escalate into larger more serious issues? In other words, is it better to nip problems in the bud, even if it sticks in the corporate craw to do so?

The companies that are adopting operational level grievance mechanisms have all come to that conclusion.

We are running year-long pilot projects on community-level grievance mechanisms with companies in five countries: China, Colombia, Russia, South Africa and Vietnam. In one country, there is a coal mining business that runs trains through the countryside between its mines and the ports – they are all automated and they kept hitting the goats of local herdsmen.

A lot of the grievances that local communities bring to large multinationals are triggered by what some might view as relatively minor things – that's not to suggest that some corporations don't do major things that are bad. And when things blow up, you'll generally find that quite apart from the affected persons, company representatives wish they had acted a whole lot earlier.
Does there need to be greater international governmental co-operation regarding the enforcement of human rights or on multinational corporations?

Enforcement can take many forms – regulatory and policy measures, court proceedings. Regarding transnational corporations, often they have investment assistance from international finance corporations, from a national export credit agency and investment insurance guarantee agency. Those are all leverage points for governments to ensure that companies have adequate systems in place and only to support those that do have adequate systems. It isn’t an after-the-fact enforcement system, but it certainly has the effect of raising the level of attention paid to compliance issues inside companies.

In terms of legal issues, specifically at the UN level, it is unlikely that the UN will adopt a single standard for companies across the entire range of internationally-recognised human rights. It is too large and too diverse a universe. But there may be interest – and this is supported by some companies themselves – in having far greater clarity than currently exists on whether and how international standards of gross violations that may amount to international crimes apply to companies.

What we are seeing is very different court rulings in various jurisdictions. They all claim to be interpreting international standards but they are reaching very different conclusions. This creates a great deal of uncertainty for victims and it generates uncertainty for companies as well.

So, in the area of gross violations or acts that amount to internationally recognised crime, there may be some movement towards greater clarity at the international level.

There have been cases brought in the UK, the Netherlands and the US courts. The challenge is making sure that the standards are actually applied in similar ways in the different jurisdictions rather than contradicting each other.

The EU is unique; it has a capacity for collective action, which no other region in the world has. And under the various legal frameworks, there are mechanisms available that simply aren’t available anywhere else in the world.

Are different sectors or parts of the world worse than others in relation to human rights and breaches of social responsibilities?

Economic development evolves at different paces. I was once asked at a press conference about the position of Chinese businesses. I said when North American mining companies first went into the Andean regions, people behaved like they were cowboys from Denver or Calgary. That was only 20 years ago – they don’t behave that way anymore.

There is a time lag. Chinese mining companies or other Chinese companies in places such as Africa are beginning to learn the lessons that North American and European companies learnt 20 years ago. But it is a time lag issue, not a country attribute.

Now that the work on your mandate is drawing to a close at the end of June, what will be the next developments from the UN in this field?

I hope we will have accomplished our mission, which is to create strong foundations on which cumulative progress can be achieved. Follow-up measures should focus on specific challenges rather than defining an overall framework.

There is the small and medium-sized enterprise issue that needs to be dealt with.

Another element for follow-up activity will be to look into ways of dealing more effectively with company-community grievances, the possibility of establishing a global network of local mediators who are trained in dealing with community grievances regarding corporate abuse.

There is also the issue of legal clarification in the area of international crime. And there is a desperate need for capacity building, both in the business sector and at the local country level.

I was in the largest province of a developing country not long ago – there must be 20 or so mining operations there – and there are three environmental inspectors in the region. What’s more, they work out of the mining ministry, not the environmental ministry. There is an enormous amount of capacity building to be done and a diversity of mechanisms that we will be exploring and recommending.

But I hope the basic framework will be endorsed so that we will have a global foundation on which to build.