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Human Rights -- A Growing Risk For Companies Doing Business In Tough Places

Yousuf Aftab is the Principal of Enodo Rights, a corporate human rights strategy firm based in New York. He advises leading global businesses and investors on practical implementation of the Guiding Principles on Business and Human Rights. Before launching Enodo, Yousuf specialized in international disputes at eminent law firms in Toronto and New York.

Christopher P. Skroupa: What has been the most crucial shift in the nature of corporate responsibility risks that multinational businesses face? What is driving this change?

Yousuf Aftab: The biggest change is the emergence of unconventional corporate responsibility risks, which are legal, financial and political. Traditionally, corporate responsibility risk was purely a public relations issue. It flowed entirely from whether stakeholders—local communities, non-governmental organizations (NGOs) and consumers—thought a company was a good corporate citizen. That led to reactive and communications-focused corporate strategy. Now, not only can companies harm their brand with corporate responsibility failures; they can also face substantial lawsuits and lose access to capital and political support. To navigate these emerging risks, companies need to implement far more sophisticated and structured corporate responsibility systems.

The source of this change is the United Nations Guiding Principles on Business and Human Rights, which are voluntary standards adopted by the UN Human Rights Council in 2011. They have become the global benchmark for how companies manage their social impacts in and beyond the workplace. The Guiding Principles provide a clear and practical definition of what it means for a company to respect human rights. That definition is process-focused: a responsible company tries its best to identify all potential impacts on human rights and respond appropriately. The definition also enables plaintiffs, investors and governments to hold businesses accountable for due diligence failures around human rights issues in a way they never could before. We have therefore seen a proliferation of lawsuits in the U.S., Canada and Europe, and a wave of pressure from institutional investors on multinational companies related to their human rights processes.

The flipside of this risk, however, is opportunity. The Guiding Principles are precise. They therefore enable businesses to anticipate and manage corporate responsibility risks efficiently. Instead of waiting for crises to arrive, modern companies can ensure long-term resilience by implementing a Guiding Principles-aligned system, to address all dimensions of corporate risk.

Skroupa: If the Guiding Principles are voluntary, how do they create legal risk?

Aftab: The Guiding Principles are interesting because their legal status is not black and white. Although they are not directly binding, they have an indirect and substantial legal effect because they shape a powerful legal concept: the "reasonable business." Corporate liability, in most jurisdictions, is shaped by what a reasonable business should do. That concept evolves constantly. The Guiding Principles have become the new standard for the reasonable business because they have been endorsed by industry organizations, leading multinational businesses, states—including the United States—and a number of international organizations. In other words, the reasonable modern business respects human rights by implementing a due diligence system to identify and respond to all potential impacts, to the best of their ability. Failure to do this can ground substantial legal liability under both national and international law. As a result, although the Guiding Principles are not law, they are not exactly voluntary.

Skroupa: How does a company ensure that it is addressing and implementing the right human rights strategy?

Aftab: The key contribution of the Guiding Principles is that they create a systematic definition of what it means to respect human rights. Professor John Ruggie, lead author of the Guiding Principles, often notes the importance of "knowing and showing"—that is, being able to prove that your company respects human rights. That proof lies in a coherent system of human rights policies, due diligence processes, and remediation efforts. In that sense, there are many similarities with corporate anti-corruption compliance programs. In both contexts, the key requirement is that the company will be able to demonstrate that it is rigorously committed to a corporate culture of compliance, with reference to its system of policies and processes. While there are many ways to implement the Guiding Principles effectively, where possible, we aim to leverage our clients' existing anti-corruption processes to develop practical human rights systems.

Skroupa: How effective do you think this approach is? Do you think it might lead to bare-minimum compliance?

Aftab: To the contrary. I think that the Guiding Principles' system focus advances much more robust protection for vulnerable individuals and communities. For a long time companies addressed corporate responsibility in an ad hoc way, catering arbitrarily to those with the loudest voices. The Guiding Principles shift the focus to those whose rights are impacted. A rigorous system is the best way to ensure that their concerns are properly integrated into corporate actions. A check-the-box approach would never satisfy the Guiding Principles. We focus corporate human rights strategy on systems to ensure that companies can back up their words with actions; so that they explain how they made certain decisions and prioritized particular impacts; so that they can demonstrate the rigor of their due diligence. Not surprisingly, the companies with the best systems also happen to be the best at minimizing their negative social impacts.

Skroupa: Where is the field of corporate responsibility, specifically business and human rights, heading in the near future?

Aftab: We are heading into the era of Guiding Principles 2.0. It will be characterized by increasingly sophisticated and precise corporate human rights systems and a proliferation of unconventional corporate responsibility risks. Leading multinationals across the world have accepted that they need to respect human rights. Now they are asking the difficult questions, about how to design coherent due diligence processes, how to define their scope of responsibility precisely and consistently, and how to implement

Guiding Principles-aligned grievance mechanisms. As leading companies from all sectors tackle these issues earnestly, I expect we will see great leaps forward in the practical design of human rights strategy in the next five years.

We are also going to see far more human rights-related pressure from courts and investors across the world. Mandatory human rights disclosure requirements are spreading quickly—from California to the United Kingdom and the European Union. Such legislation will force companies to say something about what they are doing for human rights. And those corporate statements will ground an array of lawsuits. At the same time, institutional and activist investors will keep actively encouraging companies to adopt human rights policies and report on due diligence. The pressure on corporate laggards will only increase.