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# Business and Human Rights: Bridging the Governance Gap

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28 September 2015

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### Introduction

This is a summary of an event held by the International Law Programme at Chatham House on trends likely to emerge in the field of business and human rights over the next decade.<sup>1</sup> The meeting coincided with the publication of a Chatham House research paper by Dr Jolyon Ford.<sup>2</sup>

The meeting was not held under the Chatham House Rule.

### ‘Respect’ and business self-regulation

Mark Hodge began the panel discussion by addressing the definition of ‘respect’ in the context of the second pillar of the UN Guiding Principles on Business and Human Rights<sup>3</sup> (UNGPs) and the role of business self-regulation in this regard:

- If the only meaningful preventive and regulatory efforts are self-regulation from business, then the major opportunity established by the intergovernmental commitment to the UNGPs – to galvanize states to meet their duties – will have been missed. The major challenge is political will, and not enough attention is paid to this.
- Responsible businesses want more state action especially to address local governance gaps, informality and the creation of a level playing field. This applies to human rights protection and access to remedy. The devil is in the detail, and it is important that states use the full range of policy tools available to them, including their role as economic actors.
- Private industry and multi-stakeholder principles, frameworks and tools that work on the ground need to become public goods and to be scaled by governments. For example, extractive company standards can be used in licensing and as part of tenders for concessions, and private-sector supply chain policies and practices can be used in public procurement. As the research paper sets out, while there is a real risk that business self-regulation can retard the process, including the prospect of state action, self-regulation can also create pathways and institutional habits for later binding rules with better compliance levels.
- The research paper correctly notes that the development of process-oriented regulations runs the risk of establishing symbolic or ceremonial conformity. There is a risk of the ‘respect’ agenda being seen as primarily about technical issues and reporting rather than broader, transformative strategic and commercial thinking.
- Thought needs to be given as to whether there is a shared vision of corporate respect for human rights. This is critical at a time of efforts to track, evaluate, mandate, rank and incentivize corporate respect for human rights and to position the UNGPs next to other issues and instruments like the Sustainable Development Goals (SDGs).
- An expansive and transformative vision of ‘respect’ should be embraced. Based on the realities of corporate efforts in companies that take the UNGPs seriously (although still facing challenges and setbacks), three aspects that deserve more credit are:

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<sup>1</sup> This meeting summary was prepared by Jack Kenny.

<sup>2</sup> <https://www.chathamhouse.org/publication/business-and-human-rights-bridging-governance-gap>.

<sup>3</sup> [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

- Implementing corporate respect for human rights requires companies to bring about widespread, complex and sustained organizational change. Business leaders are beginning to recognize that they need to apply the UNGPs in a diverse – arguably countless and ever-changing – set of circumstances.
- Corporate respect for human rights involves a radical change in a company’s relationship with the women, children and men that it impacts and with which it interacts. This involves diving into the detail of how international human rights are codified, while also retaining the central grain of the human rights movement that is messy, and that is about power dynamics, people on the streets protesting, passionate expression, tension, struggle for basic dignity and amazing displays of ingenuity and resilience.
- Respect for human rights is ultimately about problem-solving. The UNGPs lead companies to tackle entrenched and endemic human rights risks and sustainable development challenges, often via catalysing peers and governments to take action.
- The research paper notes, ‘Across the BHR agenda (and international law), tension exists between seeking neatness and coherence, and being comfortable with open-endedness, plurality and innovation.’ In order to make progress, it is necessary to cultivate the ability simultaneously to retain both ways of seeing the world and thinking about change.

#### Access to Remedy

Phil Bloomer focused his remarks on current obstacles regarding the third pillar of the UNGPs, access to remedy:

- The paper’s assessment of prospects for access to remedy is gloomy. It is hard not to share that overall assessment, although there are real points of light that may be grounds for some optimism.
- Access to remedy and justice is vital for victims of abuse by corporations. But it is also a powerful incentive for the broader delivery of the UNGPs: legal counsel and human rights departments of corporations have to provide a business as well as moral case for enhanced ethical behaviour. The risk of lawsuits helps to focus the minds of senior management.
- The Business and Human Rights Resource Centre (BHRRC) tracks 118 lawsuits around the world. In its last *Annual Briefing*, based on these and many other cases, BHRRC highlighted two key conclusions:<sup>4</sup>
  - Victims of business-related human rights abuse, with no effective access to remedy in their own country, faced fewer venues where extraterritorial claims could be heard. The chilling effect of the *Kiobel* ruling in the US,<sup>5</sup> and the changes to legal aid and compensation in the UK, were palpable: at the time of the *Kiobel* decision there were 19 court cases pending, and since then only one case has been filed under the Alien Tort Statute.

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<sup>4</sup> <http://business-humanrights.org/en/corporate-legal-accountability/publications/corporate-legal-accountability-annual-briefings>.

<sup>5</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), available at [http://www.supremecourt.gov/opinions/12pdf/10-1491\\_l6gn.pdf](http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf).

- An increase in the legal harassment of human rights defenders whose efforts are hampered and subject to legal attacks by companies facing allegations of abuse. The cases of Andy Hall in Thailand,<sup>6</sup> and Rafael Marques in Angola are illustrative.<sup>7</sup>
- Nevertheless, creative lawyers in North America and Europe continue to find avenues to achieve remedies for victims of alleged abuse:
  - In the United States the Alien Tort Statute lawsuit against ExxonMobil regarding abuse by security forces that Exxon hired in Aceh, Indonesia, was recently allowed to proceed, on the grounds that the case sufficiently ‘touches and concerns’ the United States. This is the first case to pass this test established in the *Kiobel* case.
  - Cases have been filed in California’s federal and state courts recently against Mars, Nestlé and Costco alleging that their parent companies have sold food items produced with modern slavery in their supply chains and failed to disclose their dependence on forced labour.
  - In Canada a number of cases are now pending regarding extraterritorial alleged abuses, including by security forces hired by Hudbay Minerals in Guatemala. The Canadian Supreme Court recently ruled that Ecuadorian plaintiffs can proceed in the Canadian courts with an action to enforce an award by an Ecuadorian court for damages against Chevron for oil pollution in Ecuador.
  - In England Zambian communities are seeking compensation in the High Court for alleged poisoning of their water sources and farmland by the copper mines of Vedanta Resources.
  - In September 2015 the Paris court of appeal ruled that the mining company COMILOG (Compagnie Minière de l’Ogooué) should compensate Gabonese workers for summary dismissal without notice or compensation 23 years ago.
- More cases are being taken up in emerging economies such as Brazil, South Africa and Philippines. In China lawyers are acting for workers whose factory owners have absconded with the economic downturn, leaving workers without notice or compensation and often with unpaid wages.
- But in far too many countries with high risks of human rights in business, the courts remain almost unusable – clogged, under-resourced or corrupt, and, too often, all three.
- This is why non-judicial mechanisms for access to remedy are developing: they can often provide more effective and speedier remedy than courts. Examples include: the International Council on Mining and Metals’ Indigenous Peoples and Mining Position Statement;<sup>8</sup> the community grievance mechanism of IPIECA (the global oil and gas industry association for environmental

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<sup>6</sup> <http://www.theguardian.com/world/shortcuts/2014/sep/07/labour-rights-activist-andy-hall-natural-fruit-company>.

<sup>7</sup> <http://www.theguardian.com/world/2015/may/28/angolan-suspended-jail-blood-diamonds-rafael-marques-de-morais>.

<sup>8</sup> <http://www.icmm.com/document/5433>.

and social issues);<sup>9</sup> and Adidas' human rights complaint process.<sup>10</sup> However, very few live up to the norms set out by the UNGPs; Adidas is a notable exception.

- Another non-judicial avenue is the National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises.<sup>11</sup> However, the record so far of delivering remedy via the NCPs has been stymied by their lack of enforcement mechanisms and a loss of trust by victims of abuse regarding their independence.

### The future direction of business and human rights

Professor Sheldon Leader concluded the panel's presentations with an overview of where business and human rights may be heading:

- There is a crossroads ahead: Greater buy-in than ever to the linkage between business and human rights, yet a persistent inability to find broad agreement on the concrete weight to give to human rights norms in trying to solve particular problems.
- This is a paradox: There is a need to be more precise if human rights are to be a useful guide in concrete situations, while at the same time this drive for precision risks unravelling the fragile consensus that exists concerning the links between business and human rights. We need a greater level of detailed engagement in order to move ahead, yet this is what risks driving the parties further apart.
- The likely reactions by practitioners to this paradox are:
  - *Avoidance*, whereby some human rights advocates and their lawyers will stay away from human rights beyond their role in serving as a means of opening the door to addressing potential abuses in a general way. When it comes to litigation, they will continue to rely on e.g. standard tort and criminal law provisions as the bases for an action. As the research paper points out, human rights thereby risk losing some distinctiveness through being absorbed into general strategies on workplace and stakeholder management.
  - *Selective engagement*, whereby some will selectively embrace human rights as concrete contributors to regulating business – at the price of distance from core understandings of the right in question. Sometimes, for example, companies endorse in their labour relations the International Labour Organization's (ILO) commitment to freedom of association, while at the same time refusing to accept the ILO's own interpretation of that right.
  - *A full encounter*, whereby some will look to strengthen the use of human rights as impartial protocols that are also more concrete – which means relying more closely on interpretations in human rights treaty commentaries, and global, regional or national legal jurisdictions. They embrace the risks in seeking greater operational precision in order to deal with particular issues. Among the many challenges on this route there are four worth considering:

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<sup>9</sup> [http://www.ipieca.org/sites/default/files/publications/Community\\_grievance\\_mechanisms\\_manual\\_2015\\_interactive.pdf](http://www.ipieca.org/sites/default/files/publications/Community_grievance_mechanisms_manual_2015_interactive.pdf).

<sup>10</sup> [http://www.adidas-group.com/media/filer\\_public/3a/a8/3aa87bcf-9af9-477b-a2a5-100530e46b19/adidas\\_group\\_complaint\\_process\\_october\\_2014.pdf](http://www.adidas-group.com/media/filer_public/3a/a8/3aa87bcf-9af9-477b-a2a5-100530e46b19/adidas_group_complaint_process_october_2014.pdf).

<sup>11</sup> <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

- *Embedding a human right:* The approaches taken by human rights law need to be built into instruments as diverse as investment treaties and corporate constitutions, and hence a melding of normally distinct domains of law. This in turn raises the challenge of finding coherence in the scope and weight given to these rights across these domains, a major theme for the UN Forum on Business and Human Rights to be held in November 2015.
- *Special demands:* There will be an increased flow of special demands made on business, arising from the new SDGs. These include the call for making special provision for the least well-off. To take an example, for private businesses providing water and sanitation, the UN Special Rapporteur on the human right to safe drinking water and sanitation has called for special attention to be given to those in informal settlements arising from recent mass migration. Companies might then be called on to shoulder the extra expense of this targeted provision, and may have to provide less to settled communities – which also lack adequate supplies, but less acutely.
- *Rights competition:* It will become vital to work out effective principles for managing fair competition among rival basic rights. At least two domains of such competition can be expected:
  - Companies claiming basic rights versus the rights of those damaged by corporate activity.
  - Competing claims within affected communities – the rights of those gaining from e.g. cheaper energy provided by a coal mine have to be balanced against the losses of those at risk of displacement from their land without adequate compensation.
- *Putting competition among states in its right place:* It is essential to keep separate the need to encourage competition between enterprises within a set of regulatory standards, and competition between states managing such standards themselves. A recent plea on this point has been made by John Morrison of the Institute for Human Rights and Business.<sup>12</sup> The latter form of rivalry can lead to an unhealthy race to the bottom, in which each state worries that another will attract more business by weaker human rights standards, and weakens its own in turn. This is one strand in the impetus to have a treaty on business and human rights.
- There can be no standing still. It is to be hoped that a full encounter between businesses and human rights standards – avoiding the attractions of either bypassing or engaging selectively with these rights – will be sufficiently compelling to allow the real potential of human rights in this area to be realized.

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<sup>12</sup> [http://www.ihrb.org/pdf/2014-03-18\\_State-of-Play\\_HR-Political-Economy-States.pdf](http://www.ihrb.org/pdf/2014-03-18_State-of-Play_HR-Political-Economy-States.pdf).

## Questions and further discussion

Points of discussion following the panellists' presentation included:

- The risk of human rights becoming a luxury of Western firms. How to avoid a double standard?
  - The World Bank's advice via the International Finance Corporation on conditions for lending was cited: if the law is silent, there is a space to be filled by international norms such as these, which help to avoid double standards. The BRICS bank (the New Development Bank), and the transfer of key elements of the International Finance Corporation (IFC) to it, were also raised. The importance of support for civil society in states such as China was also mentioned, in that support would help civil society organizations work with companies to ensure the latter are aware of their human rights obligations. In Myanmar CNPC (China National Petroleum Corporation) has been subject to a series of suspensions, and came to BHRRC for advice on the scope of their obligations. It was also noted that the OECD and Global Witness now have a partnership with the China Chamber of Commerce of Metals Minerals and Chemicals Importers & Exporters (CCCIMC) to deliver guidelines for Chinese overseas mining companies that incorporate human rights and the UNGPs.
- How best to transition from 'show and tell' mechanisms, such as reporting requirements, to measuring the real impact of human rights obligations on companies.
  - It was suggested that it is harder to measure impact than input. While the UK's Modern Slavery Act 2015 is in many ways a positive development, it was also argued that more is necessary than just reporting requirements to ensure that companies abide by the UNGPs. Benchmarking can be helpful, to enable companies to compare their records with others, and to create positive competition between them on human rights performance. But at the same time it was argued that ambitions need to be set higher. It was suggested that measuring impact requires companies to delve into what business and human rights means for them, which often requires a change of mindset.

## Contact information

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*This meeting was generously supported by Allen & Overy LLP*