



navigating a new era of business and human rights

30

ARTICLE | THIRTY

BUSINESS &
HUMAN RIGHTS

Navigating a New Era of Business and Human Rights is a collaboration between faculty and researchers at the Institute of Human Rights and Peace Studies, Mahidol University and Article 30. Article 30 solely commissioned the project and carried out or arranged all editing and design work.

About Article 30

Article 30 promotes innovation and best practices in the field of business and human rights. We do this by producing cutting-edge content and offering expertise on both the letter and spirit of human rights in commercial contexts. Our team combines legal, political, and social practitioners with widely varied backgrounds and experiences. Technical compliance with the UN Guiding Principles is important, but it is only a starting point for Article 30. Article 30 is about the deeper purpose of human rights: meaningful change, reckoning with tough challenges, mobilizing innovative ideas, enabling people to take action on their own behalf, and realizing new levels of buy-in, resiliency and sustainability.

For more information, please visit www.article30.org/

About the Institute of Human Rights and Peace Studies, Mahidol University (IHRP)

The Institute of Human Rights and Peace Studies (IHRP) is the result of a recent merger between Mahidol University's Center for Human Rights Studies and Social Development (est. 1998) and the Research Center for Peacebuilding (est. 2004). IHRP combines the experience and perspective both centers have to offer. IHRP is uniquely interdisciplinary and is redefining the fields of peace, conflict, justice and human rights studies, in the Asian Pacific region and beyond. The IHRP is committed to the advancement of human rights and peace by educating human rights and peace practitioners, promoting outreach programs to community and international organizations and conducting cutting edge research on important issues.

For more information, please visit www.ihrp.mahidol.ac.th/



Navigating a New Era in Business and Human Rights

Dr. Matthew Mullen

Daniel Polomski

Teresa Soares

Joana Cassinerio

Michelle D'Cruz

Vanessa Hongsathavij

Merin Waite and Brian Wadman (Copyediting)

Images appearing in this collection have been obtained through Creative Commons CC0 1.0 Universal (CC0 1.0) Public Domain Dedication. The original Images have been colourized and cropped for use.

For more information on Creative Commons and the CC0 1.0, go to:

<https://creativecommons.org/publicdomain/zero/1.0/>

2019

ISBN - 978-0-578-52117-6

Acknowledgment

This collection was made possible by the many scholars, researchers, and practitioners who contributed their time, perspectives, and experiences. The project team worked tirelessly to develop the New Era collection and make it a reality. Article 30 commissioned this New Era project as our flagship publication.

A New Era Contents in Context

Contributors to this collection took on a challenge. The purpose of this project was to provide stakeholders with a concise and poignant resource with real-world resonance. Contributors bought into the idea of an unconventional publication that spoke to some of the most challenging and sensitive topics of the day. The purpose of the project was to push the issue and add value. Put another way, A New Era was not a safe or conventional undertaking. The insights and language that contributors offer should be seen against this larger backdrop. Chapters should be read as stand-alone personal reflections. Contribution to or promotion of this project should not be understood as a personal or organizational endorsement of any or all content. To reiterate the above, big thanks go out to all contributors for their time and efforts in the spirit of collective learning and advancing the field of business and human rights.

Table of Contents

4	Preface I
6	Preface 2
9	A Compass for an Evolving BHR Landscape
15	Mapping the Field
16	Chapter Synopses
18	When Business met Human Rights: A Brief History of Making Business Accountable, Dr. Mike Hayes
27	Building Allies in the Corporate Social Responsibility Space, Emily Klukas, MPH
33	Human Rights and Transparency Politics in Global Production Networks, Dr. Christian Scheper and Dr. Sabrina Zajak
40	An Interview with Dr. Neil Howard
43	Recognizing Pitfalls
44	Chapter Synopses
46	Not so “win-win”: Unpacking the discursive politics of business, human rights, and sustainable development, Vanessa Hongsathavij , Cannelle Gueguen-Teil and Rajesh Daniel
57	Seizen-setsu and the inadequacy of voluntary frameworks, Prof. Saul J. Takahashi
63	Managerialism in Business and Rights: Lessons on the social impacts of a collaborative Human Rights Impact Assessment of a contested mine in Chile, Dr. Rajiv Maher

70	Invigorating State Champions
71	Chapter Synopses
73	Human Rights, Business, and the Reliance on Elusive State Champions, Dr. Charlie Thame
80	National Human Rights Institutions and Business and Human Rights: Challenges, Opportunities and Next Steps, Sarah McGrath
90	Business and Human Rights in China: An Overview of Policies and Laws on Chinese Overseas Investment, Zhong Huang and Professor Wanhong Zhang
97	The Art of Respecting Human Rights: Guiding Business Enterprises
98	Chapter Synopses
100	Making Human Rights Reporting Meaningful, Mairead Keigher and Michelle Langlois
104	The Spirit of Human Rights and the UNGPs, Dr. Matthew Mullen
110	The Abolishment Paradox and Big Tobacco, Joana Cassinerio
117	An interview with twentyfifty limited, Luke Wilde , Carolin Seeger and Hannah Temple
122	Refined Approaches to Cross-Cutting Issues
123	Chapter Synopses
125	Our River, Our Rights: Extraterritorial accountability in the Mekong, Maureen Harris
133	Refining the Role of Business Enterprises with regards to the Protection of Migrants and Refugees, Giorgio Algeri
138	Child Rights: Rising up the Business Agenda, Dr. Mark P. Capaldi
145	Perspectives of Disability-Inclusive Business and Human Rights, Dr. Ryuhei Sano

151	Securing Freedom in Global Supply Chains, Chloé Bailey and Amol Mehra
157	The UN Guiding Principles and the Informal Economy: A Focus on Homeworkers in Global Supply Chains, Marlese von Broembsen & Laura Alfes
164	An Interview with Fair and Sustainable Consulting, Marjoleine Motz
167	New (and Old) Challenges and Opportunities
168	Chapter Synopses
170	An Interview with Sara Blackwell
172	The Gig Economy: How Freeland Works is Redefining the 21st Century Workplace in the United States, Dr. Chaz Austin
179	An Interview with Ussarin Kaewpradap
181	The Need for a RIoT (Responsible Internet of Things): A Human Rights Perspective on IoT Systems, Prof. Luca Belli
191	Ethical Investment, Akiko Sato
195	Debating Ethical Consumption, Dr. Elisabeth Valiente-Riedl
201	A New Era of Accountability: Towards a BHR Treaty?
202	Chapter Synopses
204	Experimentalist Global Governance and the case for a Framework Convention based on the UN Guiding Principles on Business and Human Rights, Dr. Claire Methven O'Brien
214	Extraterritorial Obligations of States in the Business and Human Rights Context, Dr. Humberto Cantú Rivera
221	An Interview with Prof. Surya Deva
224	Endnotes

Preface I

Vanessa Hongsathavij

Institute of Human Rights and Peace Studies, Mahidol University, Nakhon Pathom, Thailand

A year ago, a group of researchers specializing in business and human rights gathered at the Institute of Human Rights and Peace Studies at Mahidol University to discuss the preparatory stages of a book project. Our purpose was simple and direct: we sought to identify the most salient and pressing issues in the current field of business and human rights, nearly eight years since the United Nations Human Rights Council's endorsement of the Guiding Principles for Business and Human Rights (UNGPs). As the book title suggests, we aimed not only to critically assess the challenges and opportunities, but also to examine the extent to which these represented a continuum of past debates, discourses, and ideas, or (potential) breakthrough—indeed, whether these developments signal a “new era” of business and human rights. We set out to understand what was new about this era. And in the process, we sought to capture and convey a schema for protecting and promoting the essence of human rights in a field inundated with powerful forces.

The book came together in a unique manner, perhaps a testament to the possibilities and impacts of applying a rights-based approach to the academic publication process. Since our initial discussions, we were especially attuned to the need for inclusion and integration of diverse voices and perspectives, drawing together authors who represented academics and practitioners from different disciplines, geographic regions, professional stages of their careers, and of course, their topics of interest. To support and harness the power from this diversity, the principle and practice of academic freedom was embedded in both the foundation and the process of this book in order to provide a space for agency and the free expression of ideas. As such, each author held full discretion over their chapter's content, form, and communicative style.

Amidst this free reigning power, the voices that emerge in this volume point to a common need in this “new era” on business and human rights, namely the necessity of distinguishing the substance from the smoke and mirrors. Undoubtedly, this remains a formidable challenge given the existence of what John Ruggie (2017) refers to the “polycentric governance”, or sets of systems involving different actors, roles, rules and mechanisms that underlie the UNGPs. This polycentrism provides the dynamism within the UNGPs, itself an evolving document that enables a pragmatic approach in its application. Current debates in the field—including the persistent questions of the desirability and viability of a legally binding treaty on business and human rights and the role of civil society in the UNGPs— reveal the multidimensional challenges in governance. Ruggie's imagery of a “regulatory ecosystem”, as opposed to a hierarchy, reinforces that meaningful change will be driven in no small part by non-judicial actions, and will require different types of interventions—legal, political, discursive, among others – to enable greater alignment of business conduct to international norms and standards. The struggle, of course, is to identify the appropriate node through which such an intervention may “pierce the corporate veil.”

At the time that this book came together, much activity was observed in Thailand and throughout Southeast Asia, particularly through the drafting of the National Action Plan on Business and Human Rights in Thailand and the promotion of human rights and business through the ASEAN Intergovernmental Commission on Human Rights (AICHR). The prominence of business and human rights as a subject of concern in this region mirrors the widespread and quick adoption of the UNGPs as a global guiding document for governments,

businesses, civil society, and academics, especially compared to other agenda topics. This momentum generated by all this activity propels this book's publication not only by identifying the current challenges and opportunities in business and human rights, but also by providing a counterweight to claims that the issues identified in this volume are intractable in nature. Too often, formidable challenges in the field of business and human rights are labeled overly complex, justifying deflection or shortcuts as a substitute for meaningful change. The issue seems less a shortage of sustainable solutions and more a lack of buy-in to an agenda that requires a departure from business as usual. The conversations, ideas, and arguments within this book aims to contribute to a critical mass of debate and action that will enable change in this new era for the better protection, respect, and fulfilment of human rights with regard to the role of transnational businesses and other corporate enterprises.

References

Ruggie, John Gerald. (2017). "Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises" in César Rodríguez-Garavito (ed.), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press, 2017).

Preface II

Vanessa Zimmerman

CEO Pillar II

This book has it all. Romance, abolition, robots, not to mention a healthy spattering of colourful language (and I'm Australian and worked in a mining company), political science speak and some home truths from those working with, and across from, businesses on the frontline. And as the book's introduction notes, it is this diversity of thought and opinion that makes this book so important – businesses are not homogenous and neither are the impacts they may have on human rights. Professor John Ruggie's seminal and oft-quoted (including in this book) statement in the UN Guiding Principles on Business and Human Rights that governments should consider a smart mix of measures to bolster business respect for human rights is not only relevant to States. If we are to keep progressing in strengthening business respect for human rights we will need creative solutions that evolve with changing conditions and expectations. And not everything will work the first time. So it is refreshing to open a book like *A New Era* and see not only diverse views on the challenges but also disruptive ideas on how we're going to address them.

I was incredibly fortunate to be a member of the core team supporting Professor Ruggie to draft the UN Guiding Principles on Business and Human Rights. While at the time we knew not to take anything for granted, least of all the Human Rights Council's endorsement and, perhaps even more importantly, take-up by all relevant stakeholders, I was always optimistic that slowly we would start to see much needed change in how businesses understood and acted on their adverse human rights impacts. Some authors in this book are optimistic, some are not. Some are a bit of both, underscoring that optimism does not mean that we stop our quest for continuous and meaningful improvement. This is also where I sit. After spending the past 8 years working with business to implement the UN Guiding Principles I know that there are many

people within many companies that want to take concrete steps to prevent and address any involvement in harming human rights. I also know that there are other people and other companies that do not think in this way. To convince the latter and hold them to account we will need that smart mix. And I am optimistic that we will get it.

I intentionally do not want to call out any specific authors as I believe that every author in this publication has made an effort to push the discourse forward, helping us not only unpack what this current era of business and human rights means in theory and in practice but also what we can expect in the future. I do not agree with all of their arguments but I applaud their contributions and the debates they will and should spark as a result.

I have, however, pulled out three common themes which I strongly support. They are, in no particular order:

1. An emphasis on collaboration
2. The value of practical and pragmatic regulation
3. The importance of coordinated transformative change

Collaboration

Several of the chapters speak to the need for collaboration between different stakeholder groups, from investors and businesses to governments, civil society and workers organizations. Another one of my favourite quotes from Professor Ruggie is "there is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all actors – states, businesses and civil society – must

learn to do things differently.” From the early days of the mandate we knew though that this was unlikely to occur before these stakeholders actually engaged with each other – because you can’t really see what needs to be done differently until you realise the challenges your behaviour is causing for others.

So Professor Ruggie provided a forum for this engagement- over the course of his UN mandate he held over 60 consultations on 6 continents, mainly multi-stakeholder, to encourage collaboration and coordination. He managed with his wisdom and charm to bring people together who probably never thought they would have a constructive dialogue with each other. The result of course wasn’t blinding unity or completely transformed behaviours. But, as we can see from the take-up of the UN Guiding Principles by so many different stakeholder groups, including many examples described in this book, it was a concrete start. For me personally it was a crucial lesson in stakeholder engagement and shared responsibility. And it’s just as applicable in current debates, including building multi-stakeholder support for mandatory due diligence regulation and of course discussions around a binding treaty.

The value of practical and pragmatic regulation

In 2018 I had the privilege of joining other Australian business representatives in advocating for the federal Modern Slavery Act which, simply put, requires larger Australian companies to report on their modern slavery risk management practices. We encountered many an odd look from stakeholders, including politicians, on both sides of the fence – it was fairly unusual to see businesses actually asking for more regulation. For the businesses I was representing, the arguments in favour of the advocacy were threefold: (1) the legislation would help them to meet growing expectations around transparency; (2) it would facilitate a more level playing field between leaders and laggards; and (3) beyond reporting it would support them to manage the risk of involvement in modern slavery.

For me personally, the reasons to support the legislation also extended to those described so well in several chapters in this book. I knew firsthand that even in the

most progressive companies the role of a human rights specialist can be a lonely one, not necessarily because of lack of belief by colleagues in the importance of the work but because, frankly, this area remains quite intimidating and unfamiliar to many, even though it shouldn’t be. Having practical and pragmatic regulation that provides business with a core foundation on which to start can be enormously beneficial, and for better or worse can give internal activists the opportunity to drive the agenda forward in a way that will last.

Transformative change

Several of the authors talk about the need for further change, with one author highlighting the need for transformative change, “not just minor tweaks here and there in the current neoliberal world order”. I’m no political scientist so I won’t even try to comment on the world order, but closer to the action on the ground I can say with some authority that I wholeheartedly agree with the need for real change rather than quick and minor fixes. You cannot avoid involvement in modern slavery with just a supplier questionnaire, or manage the risk of a security provider using excessive force with only a new clause in a contract. To genuinely understand and act on its adverse human rights impacts a company has to truly embed awareness for human rights within its business and look for a variety of ways to insert checks and balances to avoid and redress human rights harm. These actions have to make sense to the business, including in terms of integration into existing business practices, and they have to be capable of evolving over time. I’m biased of course, but my strong belief is that the UN Guiding Principles provide the necessary framework to propel that type of change. This does not mean we stop searching for ways to improve their implementation, including through regulation.

I hope that you will read this book and learn something new – I did. And I hope that it will motivate you, whatever the work you do, to keep speaking to people with different views to your own and to remember that while it’s a must to think big, smaller steps focused on principled pragmatism, yes another saying Professor Ruggie made his own, can also have a real impact in this wonderful and sometimes frustrating business

and human rights world we call home. Oh and you may want to go and rewatch (because I'm going to assume you've seen this classic – yes I'm a not so apologetic romantic comedy fan) When Harry Met Sally to spot its connections to business and human rights – you'll have to read the first chapter below to know what I'm talking about.

Congratulations to the editors and authors once again.

A Compass for an Evolving BHR Landscape

Dr. Matthew Mullen

Dr. Matthew Mullen recently concluded his tenure at the Institute of Human Rights and Peace Studies, Mahidol University and is the founder of Article 30.

The UN Guiding Principles on Business and Human Rights (2011) marked the 'end of the beginning,' ushering in a new era. A wave of new organizations, policies, and activities have led to hope and opportunities but have also caused trappings and challenges. The task of the day is to keep pace and hear through the noise. Navigating a New Era of Business and Human Rights is an attempt to do just that. In this open-access collection, frontline and forefront contributors provide their insights via ranging formats and styles. Each of the thirty chapters in this collection reckons with a vexing issue in the field of business and human rights (BHR). Individually and collectively, the chapters afford a compass of sorts for stakeholders to orient themselves in an ever-evolving and often overwhelming landscape. Navigating a New Era of Business and Human Rights illuminates the interconnectivity of an array of topics and provides tips on how to diagnose problems and find the right questions.

One will notice common themes and sentiments across chapters: from practical advice such as keeping sight of what ultimately matters, avoiding shortcuts, giving due consideration to power asymmetries, exposing technical solutions to political problems, and enabling people to take action on their own behalf, to more conceptual understandings such as reflecting on how to measure substance and success, pushing into unfamiliar even uncomfortable territory, thinking structurally, and stressing agency and meaningful participation. But there are also points of apparent disconnection: using business friendly language and approaches versus avoiding corporate capture, pushing hard towards a treaty versus focusing on all that can be accomplished in lieu of a treaty. This incongruity is an important premise. It captures the complexities, diversities, and uncertainties embodied by the current state of BHR.

There may be no one way or one path to navigate

this new era of BHR. In fact, this collection is testament to the value of multidisciplinary and contrasting approaches. There appear too many obstacles and unknowns to propose a single rigid way forward. Convention may be fitting in some situations and woefully ineffective in others. The contributors invite stakeholders to think about familiar questions and issues in new ways: What if the marriage between business and human rights is more fragile than we think? In order to understand and confront exploitation, we have to seriously explore what it means and how it feels to those experiencing it. What if human rights has no reliable defense against corporate capture? National Human Rights Institutions seem uniquely positioned to become catalysts of the BHR movement. How are stakeholders to make sense of BHR initiatives that focus narrowly on human trafficking or child labour in isolation of more comprehensive human rights efforts? What are stakeholders and business enterprises to do when states do not champion the BHR agenda? From child rights to automation to ethical investing, this collection does not assume that the status quo is fixed. This new era of BHR is malleable. And the fate of the field will be a reflection of how stakeholders handle these days of flux.

While there may be no steadfast path in such a vast field, many chapters point to the human rights based approach as a possible lodestar. A human rights based approach (HRBA) lens reminds that the essence of BHR is to embed protection systems in and around business activities that confront predatory or otherwise harmful conduct and enable people, particularly the most marginalized and vulnerable individuals and collectives, to exercise their human rights. The emphasis is on agency and tackling risks or areas of concern with layers of preventative measures. Doing this well is an art that requires the right mindset, methodology, and foresight. To be sure, championing the BHR agenda is no easy task. But, those who embrace challenge are

able to see the opportunity to create more resilient, sustainable, and cohesive value chains and ecosystems. With the HRBA as a lodestar and a willingness to adapt and ask tough questions, effective navigation becomes possible. To this end, the following chapter excerpts provide an apt point of departure to begin navigating this new era of human rights:

Mapping the Field

“While we may retroactively put human rights into business history, it can be more engaging to consider why business has done quite the opposite: avoid being governed by rights. The advancement towards a treaty on business obligations shows how much human rights of business has progressed since the first elusive notes in the UDHR. Yet, as commentators have noted, it still does not pin down clear legal obligations to business at the international level...That human rights is becoming the standard of regulations creates an important opportunity, but one which must be recognised only as the latest attempt, and human rights is only a very recent partner.”

Dr. Mike Hayes

“Anecdotally, I have noticed a central difference between the perspectives of those championing CSR and BHR that creates tension in the work – CSR looks outward and says “what can we do that is good to help the world and community (that aligns with our brand)?” and BHR requires one to look inward and say “what are we doing that is harmful to people’s lives and communities.” This outward/inward perspective difference (as well as different framing of CSR’s more feel-good message of “helping and supporting” and BHR’s arguably more critical message around “harm”) can make it seem like we are talking about different goals, when in fact there can be commonalities to build on, albeit with different approaches. However, the underlying myth that CSR has to fully sync with the BHR field for there to be progress has the potential to slow collaborative work, which slows progress overall.”

Emily Klukas, MPH

“In the context of implementing the UNGPs through National Action Plans, the consideration of transparency politics urges governments and regulators to

actively engage with norms and practices of how information is being gathered, checked and communicated. The question of agency in global production networks becomes crucial here, as often neither workers nor their representatives, nor public regulators, are actively involved in producing policy-relevant knowledge on human rights impacts and risks.”

Dr. Christian Scheper and Dr. Sabrina Zajak

“To maintain the present very individualistic focus, it depoliticizes the systems in which all people live. But if we take a structural focus, we push back against that. We say, look, this isn’t just about any individual instance of something that is problematic. Each of these instances happened because of much wider forces that are the real issue.”

Dr. Neil Howard

Recognizing Pitfalls

“...while it may be a “win” for businesses to show how they have sought compliance with human rights, burnishing their image while safeguarding their profits, this often comes at the expense of civil society and community actors who question whether, in reality, this approach produces a “win” in terms of genuine human rights outcomes. Even more problematic, this emphasis placed by key stakeholders on the first “win” could be more damaging to human rights in the long-term since the question of who and what represents the second “win” in the “win-win” equation remains ambiguous in these policy discussions so far.”

Vanessa Hongsathavij, Cannelle Gueguen-Teil, and Rajesh Daniel

“Some advocates seem to believe that the only way to ensure that companies treat human rights seriously is if they are convinced it is in their best interests. However, the principled argument is precisely the one that we have been using against governments since the beginning of the human rights movement – in general we demand that governments comply with their human rights obligations for the sake of the principle, not for any financial or other benefit they may get from doing so. There is no intrinsic reason that companies should be treated differently.”

Prof. Saul J. Takahashi

“BHR and its key due diligence concept that places dialogue and participation with rightsholders at its core has also been shown to be colonized by managerialism and technicization. This includes the use of checklists, compliance audits, and project management that converts BHR tasks into decontextualized ‘man hours’ amongst others. ... Each case merits a deep and thorough reflection. Companies and their consultants should ask themselves what social consequences will likely arise to community cohesion as a result of their (corporate or collaborative-led) HRIA.”

Dr. Rajiv Maher

Invigorating State Champions

“[W]hat is needed is a fundamental rebalancing of power relations between capital, labour, and the environment. This is a significant challenge in which global civil society plays a role. Yet in the context of broader global trends related to the commodification of nature, profit maximisation, wage labour, and the private ownership of the means of production, we should not lose sight of the fact that collective emancipation will not be achieved through a myopic legal formalism and technical solutions to social ills mastered only by a cabal of well-paid international consultants and civil servants.”

Dr. Charlie Thame

“While the convening role and power of NHRIs was not acknowledged in the UNGPs (Brodie, 2012), the ability and potential to convene a range of groups and stakeholders should not be underestimated. As an independent institution, NHRIs do not have a defined constituency or vested interest, as such they are well placed to bring together a range of actors together and enable the integration of various perspectives on a particular issue or challenge. Given they are often trusted institutions who have connections with the community, they can also create safe spaces for companies and communities to engage and can facilitate partnerships, where appropriate, under goal 17 of the Sustainable Development Goals.”

Sarah McGrath

“While there is somewhat greater space for domestic organizations to become involved in issues relating to

Chinese investment overseas, challenges such as language barriers, lack of local knowledge and trust from the host communities, shortage of resources, fragmentary and disintegrated efforts hinder actors from effectively bridging the gaps. Besides acting as a watchdog over the irresponsible business conduct, international civil society could play a key role in promoting business and human rights agenda in China and among Chinese investment overseas through proactively engaging in emerging responsible business initiatives and sharing good practice in social and environmental governance. It could also help to build constructive dialogues among multi-stakeholders at different levels by raising and empowering the voices of the affected groups.”

Zhong Huang and Professor Wanhong Zhang

The Art of Respecting Human Rights

“Companies can start by taking a rights-based approach to identifying their salient human rights risks, in other words, those human rights at risk of the most severe negative impact as a result of their business operations and value chain¹. This requires them to map all of the potential negative impacts on different groups of people, and then prioritise them for action by determining the severity of the impact and the likelihood of it occurring. Once this list of priorities has been developed, companies should put in place – or strengthen – a due diligence process that will enable them to manage the risks and impacts.”

Mairead Keigher and Michelle Langlois

“Human rights, when properly put in motion, set conditions that stifle predatory or otherwise adverse conduct and enable people to become agents of their own protection and interests... It is one thing to promote fidelity to the spirit of human rights in the BHR field. It is far more desirable to be able to assess fidelity to that spirit. And that is what the HRBA enables stakeholders to do.” Dr. Matthew Mullen

“Strictly applying the UNGPs would result in a call for cessation of [harmful] businesses, as suggested by the DIHR in its assessment of the tobacco company PMI... instead of solely focusing on business cessation, the human rights realm must come up with more realistic,

feasible solutions for effective mitigation and remediation. The UNGPs provide guidelines and answers for this discourse.”

Joana Cassinerio

“[O]ften what we hear from our clients is that actually they are hungry for some regulation. Otherwise it’s a very difficult job to convince internal decision-makers to put their weight behind particular actions when it’s not clear that they are not going to lose out by doing that. There is no guarantee that their competitors are going to do the same thing. What they are really hungry for is a level playing field.”

Luke Wilde, Hannah Temple and Carolin Seeger of twentyfifty limited

Refined Approaches to Cross-Cutting Issues

“The UNGPs, together with the emerging framework on human rights and the environment, offer important tools that can only be concretized through their continued application to particular cases and contexts, revealing significant and persistent barriers to accountability in the process. Dismantling these barriers requires adjusting the human rights lens to expand the expectations placed on states and business enterprises with respect to extraterritorial accountability,”

Maureen Harris

“[B]usiness enterprises have a critical role to play across all domains [of realizing the rights of migrants and refugees]; such as human resources, health and safety in the workplace and relations with the local community, especially in those settings of high vulnerability where migrants may lack resources, family support, access to national protection and/or assistance because of their precarious status, language and cultural barriers.”

Giorgio Algeri

“The relationship between children’s rights and business is much broader than just the issue of child labour and child exploitation and companies’ philanthropy and charitable work is only one aspect of child rights. Other key areas of work requiring attention include the effect on children from marketing strategies, products or services that can lead to harm and community based

factors leading from conflict, displacement or other business operations.” Dr. Mark Capaldi

“In practice, stakeholders’ engagement strategies must consider simple and complex needs of persons with disabilities to make sure persons with disabilities are well represented in the business processes. The principles of universal access and inclusion for persons with disabilities are essential to break barriers in terms of physical environment, information and communication, policy and regulation, and human attitudes and behaviors.”

Dr. Ryuhei Sano

“In order to effect transformational change that percolates through to the roots of the supply chain, business responses to modern slavery should place more emphasis on the adoption of enforceable standards focused on the protection of workers’ rights and access to justice. In particular we believe there is real potential in the broader-scale adoption of the worker-driven social responsibility model that amplifies worker voice and enables workers to directly enforce their own rights through rebalancing the power asymmetries inherent in the globalised supply chain system. Scaling bottom-up solutions in this way is not a panacea, however. It is only through the totality of supply chain efforts - strengthened government regulation, incentives on corporations to act, and worker empowerment – that we will witness a sea change in supply chains.”

Chloé Bailey and Amol Mehra

“To identify rights violations, suppliers and contractors should (1) be required to disclose the names, addresses and contract details of any homeworkers not only to MNEs, but also to organisations and trade unions that are organizing homeworkers; (2) enterprises should include in their supply agreements a requirement that written contracts that include the name of the MNE buyer be concluded homeworkers, and that they be given a copy; (3) MNEs should pay for homeworke organisations to provide ‘know-your-rights’ training to homeworkers in their mother tongue.”

Marlese von Broembsen and Laura Alfes

“[Momentum behind the BHR agenda] might mean more work for us and other consultancies working in

this arena and it might support a lot of trade unions and NGO's that want to set up public-private partnerships in the future. It will be a positive change. In any case, we are still responsible for our own work. We have to ensure that we are working on programmes and projects that our true to us, and make the most of those."

Fair and Sustainable Consulting

New (and Old) Challenges and Opportunities

"There's certainly a risk that governments and companies will fail to follow the principled blueprint laid out by the UNGPs in their efforts around the SDGs, and we've unfortunately already witnessed this happening in some circles. There's a temptation to revert back to what might be "easiest" to contribute to from a capital allocation standpoint, which often boils down to philanthropic activities, rather than what's most meaningful and what results in the most impact. There's a real need to course-correct against this impulse, and those of us in the business and human rights field can help steer the ship by more frequently and consistently linking our work to the SDGs agenda so that these connections are better understood."

Sara Blackwell

"The Gig Economy is forcing workers all over the planet to divorce themselves from the protection of "the company" and the salaries and benefits those entities have traditionally offered. In this new world of work, millions of individuals who never expected to behave entrepreneurially will face a myriad of challenges they never imagined they would be forced to confront. Issues that will need to be addressed individually and by society as a whole include: unionization, portable health insurance, disability benefits, liability insurance, retirement plans, etc."

Dr. Chaz Austin

"Think of the possibilities. These advancements can lessen hazards and increase productivity. But this is precisely why we have to be relentless about protecting the interests of labour as new technologies come about. We have to push back against efforts that are initiated to kill the workforce and push the workers into informal sectors."

Ussarin Kaewpradap

"[S]tates and business enterprises that are involved in the Internet of Things systems must act in synergy, analysing risks and elaborating and implementing effective policies, regulation and adjudication, prompting a Responsible Internet of Things (RIoT), where people's privacy and security are at the centre of the new digital ecosystems. It is important to stress IoT systemically in order to understand the complexities, risks and benefits of such phenomenon and frame it responsibly."

Dr. Luca Belli

"In complying with UNGP, investors should be asked to meet the same commitments as other private entities: release the commitment to human rights from the top management, identify human risk throughout its value chain, mitigate that human rights risk, and provide access to remedy (see UNGP 15). Similar to companies who constitute multiple suppliers, investors must explore human rights risks of borrowers accordingly since any human rights violation attributed to the investment could also be the responsibility of investors."

Akiko Sato

"[E]thical consumption is vulnerable to corporate cooptation as well as the manifestation of 'ethics lite' over meaningful advocacy. Yet its power lies in harnessing the potency of consumption as a driver of social and political change through embedding market relations with broader values including human rights. Moreover, its potential transformative capacity suggests that human rights practitioners and advocates invest in ethical consumption as a long-term project, with a view to help shape its integrity and effectiveness as a meaningful advocacy tool."

Dr. Elisabeth Valiente-Riedl

A New Era of Accountability

"Impasse threatens. Yet there may be light on the horizon. Significant players have acknowledged a framework convention on business and human rights ("BHR"), that is, a treaty based on broad principles, to be supplemented by more detailed standards on particular topics devised over time, as a possible point of convergence (e.g. Gallegos 2018)."

Dr. Claire Methven O'Brien

“[A] divide between the public international law-based position of States to assert that jurisdiction is primarily territory-based, is confronted to the private international law-focused attempts to hold business enterprises accountable in their countries of origin –or potentially in other fora, under legal figures such as forum necessitatis (forum by necessity, a forum that may exercise its jurisdiction when victims may face a denial of justice for lack of access to justice in other jurisdictions)– for activities or conduct having taken place outside of their jurisdiction. In this regard, it is necessary to ensure that both perspectives are jointly taken into account when analyzing the potential of expanding conventional human rights law in that direction, in order to ensure that evidence supports the idea that is pushed forward in academic and diplomatic spheres, in a way that can provide more effective access to remedies for victims of business-related human rights abuses.”

Dr. Humberto Cantú Rivera

“It was quite satisfying to interact with affected individuals and communities in the process of writing a report (A/72/162) that unpacked what an effective remedy means under the UNGPs. The report, which I had the honour to present to the UN General Assembly in October 2017, articulated several key elements integral to effective remedy, e.g., remedial mechanisms and remedies should be responsive to the diverse experiences and expectations of rights holders; remedies should be accessible, affordable, adequate and timely; the affected rights holders should have no fear of victimization in the process of seeking remedies; and a “bouquet of remedies” should be available to rights holders affected by business-related human rights abuses. In short, the report articulated a transformative idea of remedies which keep rights holders central to the entire process.”

Prof. Surya Deva



Mapping the Field

Chapter synopses: Mapping the field

Dr. Mike Hayes offers an entertaining but thorough and critical historiography of business and human rights. Hayes problematizes the desire to give the historical backdrop of BHR a “romantic quality.” The chapter’s point of departure follows:

“There is a tendency to look back at the sectors of human rights and business and imagine that there has always been some kind of connection between them. But how did they get together? Are they meant for each other? For many in the human rights community it is a match that is meant to be. They’ve fought against the forces keeping them apart and now they are wed together. But for others it is at best a shotgun wedding, or a marriage of convenience, simply to keep the critics at bay.”

Hayes advises “immediate caution” when imagining the history of BHR as a troubled romance that is ultimately working out because “they were always meant to be together.” The chapter notes that a “quick review shows there is little in-depth research on the history of business and human rights, and so this gap is filled with a narrative familiar to everyone today, a universal set of values has always attempted enforce accountability on business.” So, how should one think about the history of BHR?

Hayes proposes that the marrying of business and human rights “not inevitable, but just a very recent happening in a long history of debates and attempts to put limits and standards on businesses.” This is a reality check of sorts that challenges the assumption that BHR are permanently wed; that this relationship is destined to work out. The chapter cites several examples of missed opportunities to connect universal human rights to business, such as the adoption of the UDHR, the global consumer boycotts around Nestlé’s “dubious methods of promoting milk formulae in Africa in the late 1970s,” the public outrage on pollution in Minamata Bay, the private sector’s role in the Vietnam War, and a 1975 attempt to draft a code of conduct by the Commission on Transnational Corporation. These

missed opportunities are important because they come and go or “disappear.” The history of BHR is less a coming together and more a history of avoidance and polarization, prompting Hayes to evoke James Scott’s (2009) *The Art of Not Being Governed*. Hayes effectively reorients the historical backdrop and leaves stakeholders with a value point of reflection. If this is not fate, then what needs to be done to ensure that BHR stands the tests of time?

Collaboration “can require a true culture and perspective shift in how we as stakeholders see our own roles in advancing human rights, as well as our collaborators’ roles and unique potential.” Emily Klukas, MPH, reflects on what it might take to build effective alliances and collaboration between BHR and CSR. Klukas does not downplay the tensions between these communities and approaches. Rather the chapter aims to put this friction into perspective. This is done by laying out a myth, a truth, and some practical strategies. The myth: “Corporate social responsibility has to fully sync with the business and human field for there to be progress.” The truth: “You do not need to compromise who you are and what you stand for in order to collaborate.” The practical strategies: 1. “Start collaborative relationships with open discussions on purpose and roles – and the difference between CSR and BHR.” 2. “Conduct ‘perspective-getting’ informally and formally to strengthen partnerships.” 3. “Balance collaborative goals between quick wins and long-term impact.” This is a blueprint that compels reflection and challenges the notion of collaboration as compromise. Klukas compellingly argues that it is precisely the differences between BHR and CSR that make effective collaboration so desirable.

Dr. Christian Scheper and Dr. Sabrina Zajak explore the topic of transparency politics in this new era of business and human rights. Scheper and Zajak point out that while corporate transparency is understandably seen as important, as disclosure and reporting allows the field to assess compliance and improvements and “presents an opportunity” for public supervision, “transparency as such is neither an automatic mech-

anism for preventing human rights violations, nor is it necessarily linked to new opportunities for violations.” Rather, the chapter argues, it is “the politics of transparency, which connects it to human rights improvements or violations.” At every level (collection, translation, selection, confirmation and usage) information and disclosure is “power-laden and contested” and heavily reliant on business rationales. Recognizing the politics of transparency is a first step. The question then becomes how to navigate transparency politics when interrogating alleged truths and trying to foster institutional environments that enable “public regulators and rights-holders... to gather, check and communicate about human rights conditions and impacts of corporate activities.”

In a lively interview, Dr. Neil Howard raises critical points concerning the structural underpinnings of the BHR field. These type of questions and considerations are too important to ignore. Exploitation is an often-used axiom that is never defined. Howard argues that this is very deliberate: “exploitation has been actively non-defined by the international institutions... [b]ecause to define it is very, very threatening to the status quo.” This does not mean that it is impossible to frame exploitation, and that is precisely what Howard’s forthcoming research attempts to do. Howard will be exploring how people at the margins themselves understand what it means to be exploited and intends to test the following working hypothesis:

“...there isn’t going to be a universal definition that people share, but to the extent that we are able to draw out a common thread, it will come back to relationality. In other words, the specific task that the person is performing won’t constitute exploitation, but the nature of the relationship between them and the person they’re working for, the people they’re working with, that is where the nugget of emotional experience of exploitation will lie.”

Challenging the status quo is common thread in Howard’s work. When questioned why issues like human trafficking seem to be gain disproportionate attention, Howard notes, “it is more politically and economically convenient for the holders of social and economic power to look at what they define to be the worst of worst...

[as] they kind of sweep under the carpet the everyday forms of injustice that form the bedrock of the global economy.” Howard’s message is clear. Performing “give-a-shitness” is not enough. Howard speaks about rooting out structural and cultural violence, concepts from Peace Studies that have plenty of resonance and utility in the BHR field. Flagging the shortcuts and anti-politics that threaten the BHR agenda does not prevent Howard from being optimistic about the fate of the field: “...there is definitely hope. Being super-critical of what is doesn’t blind me to the possibilities of what could be.”

When Business met Human Rights: A Brief History of Making Business Accountable

Dr. Mike Hayes

Dr Mike Hayes is a lecturer at the Institute for Human Rights and Peace Studies (IHRP) at Mahidol University's Salaya Campus. He is the Director of the APMA program in Human Rights and Democratization. He is involved in research on migration, human rights education, and development.

Looking back from the present, where business is developing more accountability through its responsibilities to human rights, there is the questions of where did it all begin, and why we have ended up here? Given the current dominance of the human rights paradigm as the universal standard of what is right (but noting its lack of success), we tend to think that throughout history what is right has always been measured up against a sense of human rights. And perhaps this is how to understand the long battle to force the private sector to act responsibly. Not treating workers as slaves, not forcing children to work, not polluting habitats, all emerge from a universal rights standard, from human rights. While this seems sensible from our position looking back over history, it is giving the history a romantic quality. There is a tendency to look back at the sectors of human rights and business and imagine that there has always been some kind of connection between them. But how did they get together? Are they meant for each other? For many in the human rights community it is a match that is meant to be. They've fought against the forces keeping them apart and now they are wed together. But for others it is at best a shotgun wedding, or a marriage of convenience, simply to keep the critics at bay. The choice to describe this relationship in this way is deliberate: business and human rights could be imagined like a romance. Much like the narrative of *When Harry Met Sally*, at first Harry and Sally were acquaintances, not really moving in the same circles, but there was something about that first meeting that drew them together, as if they were meant to be. They kept popping up at the same parties or events and talking, but never hitting it off until one fateful day the realization dawns that even though they have different views, opposites attract and they cannot live without each other. Similarly, business and human right just seems like such a good fit, how could they

not be together?

There should be an immediate caution when viewing their history this way. A quick review shows there is little in-depth research on the history of business and human rights, and so this gap is filled with a narrative familiar to everyone today, a universal set of values has always attempted enforce accountability on business. Highlighting the trope of the romance makes us aware that there is a tendency to simplify the history. Seeing through the romantic lens naturalizes the relationship as if they were always meant to be together. It assumes oppositions are more points in common. It assumes human rights and business have always been in contact, much like Harry and Sally's paths keeps crossing in their story. This short introductory paper on the history will, to a certain extent, challenge these preconceptions around rights and business. That they have ended up together in the Guiding Principles and potentially the Treaty on Business and Human Rights is not inevitable, but just a very recent happening in a long history of debates and attempts to put limits and standards on businesses. The purpose is to demonstrate a couple of points: firstly, that we cannot assume human rights is the answer – or one true love – for business. Rather it is only the last in a line of attempts to impose standards on international business. Human rights certainly has its charms, but these may not be enough to keep business committed. Secondly, there are lessons to be learned from the previous relationships business has had with commitments to international standards. Why these have failed, and importantly how business has avoided the commitments, give clues to addressing accountability and the respect for rights.

Few writers have covered what happened before the 1990s in the broad surroundings of business and

human rights. Those that do more commonly see the accountability as either a history of Corporate Social Responsibility (CSR) or business ethics, as both of these concepts predate the development of modern human rights. Yet, even in these investigations the history is limited to primarily post WWII. Carrol's history of CSR (Carroll 2008) places its emergence primarily in the 1950s, though he notes that there were elements of CSR in the 1800s industrial revolution through ideas that productivity was related to worker satisfaction, and there was both a need, and an economic incentive, to improve the conditions of work. The actions of business were a mixture of "humanitarianism, philanthropy, and business acumen" (Carroll 2008: 21) with companies engaging in philanthropy (such as their support for orphanages or the YMCA) or in social welfare.² Alternatively, a history of business ethics as written by Richard de George (George 2012) sees it either as always present (through, for example, religious values), or as a phenomenon of the 1960s through its position in business studies at university. One writer, Nadia Bernaz (2017) does a longer history starting with the Atlantic Slave Trade in the 1700s which she sees as important in terms of a moment when international law addresses the accountability gap of business. She follows this up with investigations of the rise of labour standards through the ILO and then finally to German industrialists facing war crimes charges after WWII. Bernaz echoes Ruggie's claim that "business and human rights, as a substantive issue, go back forever. The Slave trade, was about business and human rights" (Bernaz 2017: 10).³ An interesting point, but this may be falling into the trap of a romantic reading, projecting our current idea of human rights back in history to before it ever existed, much like assuming that when Harry first met Sally there was a romantic spark, but maybe they were just in the same room at the same time.

The history of the "accountability gap" as Bernaz (2017) calls it, is long. Since the emergence of a private sector of business - which for debate's sake we can place in 16th century Europe⁴ - there have been competing goals. The importance of being able to conduct businesses freely, with freedom of expression and free markets, underpins the private sector. However, this very freedom is open to abuse and exploitation done in the pursuit of profit. This does not mean that

business is always opposing regulations. The modern corporation almost always works with laws which limit activities, outlaw crimes, and enforce some standards. For many businesses to operate successfully they need this: a free and fair marketplace, freedom of expression to advertise, and a functioning court system and rule of law ensure they (and their workers) are treated fairly. It is not accurate to conceive that business opposes accountability.

Another important qualifier in defining the relationship between human rights and business in this paper is that human rights is defined here as universal rights, and not rights in constitutions or other national laws.⁵ When companies comply with labour rights or minimum age requirements, which they have done since the mid 1800s, this was not in acknowledgment of universal human rights, but in compliance with national laws. These laws may have been termed rights, or even human rights, but not human rights as we understand them today: as universal and legally binding obligations. The movement to stop child labour across Europe in the 1800s was a significant victory in the name of rights. But this was mostly done through national laws such as labour and factory acts for children in the country. It was not done in the belief of universal rights, for at the same time children were forced to work, often as slaves in other countries around the world. There was no outcry about minimum age requirements in labour practice in the colonial companies. Similar arguments can be made of other labour regulations. It was not till the founding of the ILO in 1919 that labour standards were considered international, and it can be debated they were still nationalized because States would have to volunteer to incorporate standards by ratifying them, and the universalization of the 'fundamental' core treaties were not announced till 1998.⁶ While we now see ILO conventions, labour standards, and the work of trade unions as part of human rights, this only emerged recently. For this reason, the work of trade unions or the elimination of child labour, is not in this history of human rights and business, though some romantically associate it this way. This is not to deny the importance of these advances to human rights, as in many cases national laws were universalized,⁷ and human rights could go from the bottom up - from national to international standards. However, the focus of

this paper is how human rights as a universal standard was used to make business accountable. National laws are battles over rights, and they may have been considered human rights by some, but they are not the battle of universalizing human rights.

From the very emergence of private business and corporations in the 16th Century there have been responses to its excesses, even though excessive behavior was rarely illegal, and even if it was it would not have been known to the public. The treatment of people in colonized nations under European imperialism is a good example. Indians under the British East Indies Tea Company – where land was appropriated, people worked in slave like conditions, and workplace brutality was common⁸ – did not receive much sympathy nor did the company get much criticism. News about the mistreatment of Indian labour was not common knowledge in England, and it could be assumed that given people's beliefs in racism and imperialism, they accepted that Indian workers deserved few rights, slavery was semi-legal, and enforced labour was 'civilizing.' Yet, in some areas people did protest, most strongly in the anti-slavery movement. A quick examination shows how accountability was forced on business from a variety of sectors, but not through human rights. The businesses of slavery faced widespread criticism across Europe and generated an early consumer boycott, when the English, and then later other European consumers boycotted slave-produced sugar.⁹ While there is still debate on the efficacy of the boycott, its legacy is important. Firstly, boycotts always link the violation directly to the business, something which legal advocacy does not necessarily do: abolitionist laws were not business laws. Secondly, the boycott was linked to the creation of what was considered the first NGO, Anti-Slavery International, and contributed to the global campaign to legally outlaw slavery through domestic and international treaties. There were limited ways to enforce standards on a company if there were no laws and the government was not interested, consumers were compelled to use what power they had through the purchase of goods. Thus, there has been a connection between accountability and civil society from the earliest days of business which is still present today (and some would argue are the reason why there is human rights accountability). Third, the boycott was

largely organized by women, working through the private sphere of their homes and neighborhoods (Midgley. 1996). The gendered origins of many human rights campaigns tend to be forgotten, such as the importance of the women's liberation movement in the 1960s which led to anti-discrimination workplace laws around the world. Indeed, the Montgomery bus boycott, one of the most famous boycotts in the world, was initiated by a woman, Rosa Parks. The ongoing project to ensure business' compliance with rights is significantly energized by women because they disproportionately are affected by business violations: the feminization of labour, the impact of pollution on women and children, and the failure of consumer protection of women, such as the scandals of Nestle baby formulae, Thalidomide, and Corning breast implants.

In response to increased accountability through legal enforcement, business itself shadowed these with its own legal developments. The first was the invention of the limited liability company. Originally conceived as a way of ensuring that investors would not risk their entire capital, it also came to protect company owners from criminal liability.

The end of the colonial companies during the 19th century only saw small increases in accountability. In response to increased accountability through legal enforcement, business itself shadowed these with its own legal developments. The first was the invention of the limited liability company. Originally conceived as a way of ensuring that investors would not risk their entire capital, it also came to protect company owners from criminal liability. A common complaint of those protesting the violations of business is the challenge to see people on trial for corporate criminal acts. While limited liability itself should not prevent this, it is uncommon to find owners of businesses which commit crimes facing criminal justice, especially for much of the 19th and 20th century.¹⁰ The second adaption to the legal

restrictions is the ability for business to transcend the national laws enforcing accountability by operating at an international level, thus avoiding strong domestic regulations. An example of this is the concerns arising from 'Banana Republics,' a term used to describe a country dependent on a transnational company for its economic livelihood, occurring around the early 1900s. First identified as Central American countries such as Honduras, whose economy was dependent on the export of plantation bananas. Significant rights violations were used in the Banana Republics, such as stopping rights to assemble and join trade unions, poor labour conditions, and the appropriation of land, in order to ensure company profitability. However, little could be done (and little was done) because the corporations often had the ability to craft laws in the countries, or even have politicians and parties elected to protect their interests. National jurisdictions overrode any international standards. The legal advances to enforce accountability at the international level had reached a dead end. Companies could escape by becoming transnational.

When law had failed to enforce accountability other methods were sought. Civil society was active against the excesses of corporations. One example at the international level was the persistent criticism of the profiteering from war by business, leading the USA to establish the Nye Commission in 1934, and reinforced with President Eisenhower's famous 'military industrial complex' speech in 1961. During this period between the late 1800s to the mid 1900s, it was mainly consumers that campaigned. Most of these were domestic, such as consumer activism around child labour (which can also be seen in popular culture through characters such as Oliver Twist).¹¹ The challenge for these movements was with no law to use they needed other justifications for restricting business. In many cases this was done by resorting to ethics and morality. Business has mostly acknowledged a belief that they should act ethically, as George notes there has been an ongoing conversation between business and ethics through religion (George 2012: 340). It was not till the 1960s that ethics started developing into a code more familiar to human rights, and then not till the 1970s that business ethics gained prominence partially through the academic study of business ethics which grew

alongside the development of business studies as a discipline in the 1960s (George 2012: 343).¹² However, ethical behavior is not necessarily rights compliant. Imperialism was ethical to some as was the value of hard labour; however, these could be seen as invasion or slavery to others. The campaigns against business in this period, then, are not related to enforcing human rights on business because, as ethics, they are not legally binding in nature, nor do they have the universality of human rights.

However, one event was to eventually reshape this: the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The appearance of the UDHR did not suddenly turn the world rights compliant, and it would take decades before it was taken on by governments around the world and entered everyday discourse. However, it is important to point out where it opened a space for larger accountability for business. This is found in three articles of the UDHR, and arising from the conflict between western drafters who wanted to acknowledge the role of the private sector in achieving rights, against the Soviet drafters who were interested in seeing the establishment of a strong central State.¹³ These are Art. 22, where in recognizing the right to social security, the role of "organizations" are mentioned; Art 28 which details the international context for these rights to be met; and Art. 30 which notes that everyone, including "States, groups, and people" cannot destroy the rights of others.¹⁴ The articles set up the possibility for business to be seen as a duty bearer, and have a direct role in the realization of rights. However, in these articles the role of business is implied - as in Art 28 which speaks merely of an "international order" - or it could be categorised under 'groups' or 'organizations.' Accounts of the drafting have noted the role of the private sector was part of the deliberation process, but given the priority of the UDHR was making States accountable there was little urgency to define and elaborate on the duties of the non-State sector.¹⁵ For the first time there is a potential to connect business to rights, but none is made.

The next generation of attempts to limit business starts in the 1960s under the broad scope of the New International Economic Order (NIEO) which targeted inequalities in the international economy between the

First and Third worlds. While the main targets of NIEO were States (especially colonial States) and not business, the misdeeds of transnational companies during this period were also highlighted. There was a climate for criticising business. The 1960s saw the concerns raised about pollution (for example the poisoning of Minamata Bay), and the continuing criticism of the military industrial complex especially in relationship to the Vietnam War.¹⁶ These would eventually lead to the more famous organized responses such as the consumer boycott of Nestle because of its dubious methods of promoting milk formulae in Africa in the late 1970s. This is the first period where human rights potentially could have been implemented as a standard for corporations, but it appears it never was. Recent research has re-written the history of human rights in the 1960s by emphasizing the role of various Third World states in the Non Aligned Movement (NAM).¹⁷ Their ambitions were mainly eliminating racism, decolonization, and to a lesser extent religious freedom. Remembering that human rights were central to the NAM movement¹⁸ brought business and human rights into close proximity: the reactions to business through the NIEO, and the support of human rights by NAM meant they were both in the same room. Yet much like any romantic movie, they did not hook up at this stage.

Two important developments occurred. Firstly, the discussion of business accountability enters the United Nations for the first time, an inclusion which would eventually end in the Ruggie Principles forty years later. Secondly, human rights are mentioned in relationship to business perhaps for the first time, but importantly obligations were not on the business sector as yet. The first significant response of the UN towards business standards was the establishment of a Group of Eminent Persons to conduct a study for the UN General Secretary in July 1972. Their report which came out in 1974 did mention human rights a handful of times in its 168 pages (DESA 1974). However, these mentions were not about the human rights obligations of business, but the obligations of host and home countries, including the recommendation:

The Group recommends that home and host countries should ensure, through appropriate actions,

that multinational corporations do not violate sanctions imposed by the United Nations Security Council, for example, on countries suppressing human rights and following racist policies. (DESA 1974: 55)

Or when defining responsibility:

Nevertheless, we believe that the international community should bear major responsibility for eradicating racist policies, inhuman working conditions and violations of the human rights of workers. (DESA 1974: 84)

Rights were mentioned in various capacities, such as worker's rights, property rights, patent rights and so on, but no mention is made of the human rights obligations of business. Again, we see human rights and business present in the same room, but nothing that links the two together.

In fact, it was much later in the 1990s that a connection is made. The first clear association between the two may be the UN Secretary General's report on human rights in the 1996 UN Yearbook, which states:

The Secretary-General considered human rights issues related to ... the international framework relating to TNCs, the need for a new international regulatory framework and relevant norms related to international cooperation (Coleman 348)

At this point the contemporary history of human rights and business starts.¹⁹ Yet how and why did they meet here? In order to see the connection it is necessary to return to the 1970s and the Third World's attempts to impose accountability on business through various UN bodies.

From the 1970s, given the politics at the UN at this time, the UN saw business, in particular Trans National Corporations (TNCs), as either a new imperialism (to the Third World) or advocating the freedom of business to operate internationally (from the First World).²⁰ In this period, detailed by David Coleman (2003), there was the establishment of the Commission on Transnational Corporations in 1974, which examined issues such as separating Foreign Direct Investment (FDI) and Overseas Development Assistance (ODA), basically

monitoring FDI while wanting to increase ODA, and drafting a code of conduct, which was a recommendation originating in the Eminent Persons report. The code has a long history, as attempts to draft it started in 1975, and over the next two decades it was debated at the Commission, before, as Coleman neatly states, it “disappeared from UN record” (347). The disappearance is emblematic of the curious history of human rights and business. Firstly, the code is not based on human rights. As Seymour Rubin summarizes the duties of TNCs were to “contribute to the development of the host country; they should refrain from restrictive business practices; and finally, TNC’s should respect the cultural identity of the host country” (Rubin 1995). Commentaries at the time cite main issues are corruption, trade, FDI, and economic relations with South Africa. There are no clear responsibilities to human rights in the code. Secondly, there is no clear connection between the code and what was about to happen, the Global Compact, where human rights are first associated with business. There is a tendency in the romantic history to see these two stages as linked, as if the compact replaces the code, but it is more accurate to say a code disappears – from some point in 1995 no one writes about it anymore - and the compact pops up in another part of the UN pushed by other interest groups. The compact is supported by the International Chamber of Commerce (ICC) around 1998, and later taken on by the Secretary General Kofi Annan when he announces the Global Compact in January 1999, two bodies quite distant from ECOSOC and the then recently closed Commission on Transnational Corporations. As Coleman notes, it is the ICC which calls for a “global regulatory framework” (Coleman 2003), and it is Annan who announces that part of the regulatory framework in the principles of the Global Compact will be human rights. At this point we see human rights meeting business.

The history from the Global Compact to the Guiding Principles has been well documented.²¹ Like a pendulum, obligations have swung from voluntary and self-reporting in the Global Compact to enforced and legally binding in the Norms, settling somewhere in-between with the Guiding Principles. What marks this period is the universal acceptance that human rights, in some way, sets the standard of conduct, whether they are

principles in the Compact, legally binding in the Norms, or to be respected in the Guiding Principles. What is remarkable about the history is how business could until quite recently (and only 20 years if this paper is to be believed), avoid human rights standards. While we may retroactively put human rights into business history, it can be more engaging to consider why business has done quite the opposite: avoid being governed by rights. Some clues to this can be taken from James Scott’s work on how Southeast Asian hill tribes have avoided governance for centuries in his book, *The Art of Not Being Governed* (Scott 2009). In it he talks about techniques and strategies of the hill societies in mainland Southeast Asia to avoid the State (found mainly along the low land river valleys). Hill societies do not develop a sedentary agriculture which can be captured; they do not have leaders who can sell out to the State. This is akin to business developing mobility to avoid the territorial jurisdictions of States, or creating limited liability to avoid the accountability of its directors. But Scott also considers how these developments must shadow each other:

This dialogue is, in important respects, constitutive of both hill societies and their padi-state interlocutors. Each represents an alternative pattern of subsistence, social organisation and power; each ‘shadows’ the other in a complex relationship of mimicry and contradiction. Hill societies operate in the shadow of lowland states. By the same token, the lowland states of South-East Asia have been surrounded, for the whole of their existence, by relatively free communities in the hills, swamps and labyrinthine waterways that represent, simultaneously, a threat, a zone of ‘barbarism’, a temptation, a refuge and a source of valuable products (Scott 2009: 182).

We can think about business and human rights in a similar way to identify the methods business has developed of not being governed. As Scott points out, this is a reflexive relationship, one in which the ways of not being governed adapt and modify to the attempts to do so. But also, to use Scott’s words, those who want to make States accountable are surrounded by business: it is a threat, a barbarism, and a temptation. Maybe this relationship is not so much a romance, where the two

meet and argue and get back together again, because it is more elusive and oppositional. It is one where business is in the shadow of the laws, ethics, and regulations. Ultimately the laws and regulations, such as human rights, form the shadow, but a shadow is a wholly different thing.

It is interesting at this point to consider this relationship alongside the recent actions to implement a Treaty on Business and Human Rights. The advancement towards a treaty on business obligations shows how much human rights of business has progressed since the first elusive notes in the UDHR. Yet, as commentators have noted, it still does not pin down clear legal obligations to business at the international level.²² We have seen that throughout history business has adapted to CSR, ethics, and codes of conduct, as it appears to now be adapting to an international treaty. As Deva notes, “the zero draft should be alive to the sad reality that some states and/or some businesses are unlikely to do what is expected of them” (Deva 2018), but the draft has not yet acknowledged corporate obligations under international law. That human rights is now becoming the standard of regulations creates an important opportunity, but one which must be recognised only as the latest attempt, and human rights is only a very recent partner.

References

- Addo, Michael K. (2014) "The Reality of the United Nations Guiding Principles on Business and Human Rights." *Human Rights Law Review* 14: 133-147
- Alston, Philip. (2005) "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda." *The European Journal of International Law* 16.3: 467-480
- Avery, Christopher. (2000) *Business and Human Rights in a Time of Change*. London: Amnesty International.
- Bernaz, Nadia. (2017) *Business and Human Rights. History, Law and Policy – Bridging the Accountability Gap*. London: Routledge, 2017.
- Bernaz, Nadia. (2018) "The Draft UN Treaty on Business and Human Rights: the Triumph of Realism over Idealism." Reflections on the Zero Draft. Blog Post. Business and Human Rights Resource Centre. <https://www.business-humanrights.org/en/about-us/blog/debate-the-treaty/reflections-on-the-zero-draft>
- Carroll, Archie B. (2008) "A History of Corporate Social Responsibility: Concepts and Practices." *The Oxford Handbook of Corporate Social Responsibility* Edited by Andrew Crane, Dirk Matten, Abigail McWilliams, Jeremy Moon, and Donald S. Siegel.
- Carasco, Emily F. and Jang B. Singh. (2010) "Towards holding transnational corporations responsible for human rights," *European Business Review*, 22.4: 432-445.
- Coleman, David. (2003). "The United Nations and Transnational Corporations: From and Inter-national to a 'Beyond State' Model of Engagement." *Global Society* 17.4: 339-357.
- DESA: Department of Economic and Social Affairs. (1974) *The Impact of Multinational Corporations On Development And On International Relations*. New York: United Nations: E/5500/Rev.1 ST/ESA/6.
- Deva, Surya. (2018) "The Zero Draft of the Proposed Business and Human Rights Treaty." Reflections on the Zero Draft. Blog Post. Business and Human Rights Resource Centre. <https://www.business-humanrights.org/en/about-us/blog/debate-the-treaty/reflections-on-the-zero-draft>
- Eide, Asbjørn. (1999) "Article 28." *The Universal Declaration of Human Rights: A common Standard of Achievement*. Eds. Gudmundur Alfredsson and Asbjørn Eide. The Hague: Martinus Nijhoff: 597-632
- Feeney, Patricia. (2009) "Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda." *Sur* 6.11: 161-175
- George, Richard T. de. (2012) "A History of Business Ethics." *Values and Ethics for the 21st Century*. BBVA/Open Mind: 337-362.
- Glendon, Mary Ann. (2004) "The Rule of Law in the Universal Declaration of Human Rights." *Northwestern Journal of International Human Rights* 2.1: 2-19.
- Glickman, Lawrence. (2009) *Buying Power: A History of Consumer Activism in America*. Chicago: U of Chicago P.
- Gupta, Ranajit Das (1981) "Structure of the Labour Market in Colonial India." *Economic and Political Weekly* 16. 44/46. November: 1781-1806.
- Heald, Morrel. (1970) *The Social Responsibilities of Business: Company and Community, 1900-1960*. Cleveland: Press of Case Western Reserve University.
- Jensen, Stephen. (2016) *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values*. Cambridge: Cambridge UP.
- Midgley, Clare. (1996) "Slave sugar boycotts, female activism and the domestic base of British anti-slavery culture." *Slavery & Abolition: A Journal of Slave and Post-Slave Studies*. 17.3: 137-162.
- Morsink, Johannes. (1999) *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. Pennsylvania: U of Pennsylvania Press.
- Moyné, Samuel. (2010) *The Last Utopia: Human Rights in History*. Harvard: Harvard UP.
- Rubin, Seymour J. (1995) "Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between

International Legal Cooperation and Economic Development.”
American University International Law Review 10.4: 1275-1289

Ruggie, John. (2007) “Business and Human Rights: The Evolving
International Agenda.” The American Journal of International Law
101.4: 819-840

Santoro, Michael A. (2015) “Business and Human Rights in Historical
Perspective.” Journal of Human Rights 14: 155-161.

Scott, James C. (2009) The Art of Not Being Governed: An Anarchist
History of Upland Southeast Asia Yale: Yale UP.

Seldman, Derek. (2017) “Researchers Against the War Machine: The
Story of NARMIC.” LittleSis, October 24. [https://news.littlesis.
org/2017/10/24/researchers-against-the-war-machine-the-sto-
ry-of-narmic/](https://news.littlesis.org/2017/10/24/researchers-against-the-war-machine-the-story-of-narmic/)

Spar, Deborah L. (1998) “The spotlight on the bottom line: how multi-
nationals export human rights.” Foreign Affairs 77.2: 7-12.

Building Allies in the Corporate Social Responsibility Space

Emily Klukas, MPH

Emily Klukas is driven by a strong personal commitment to community-driven solutions around human rights and stigmatized illnesses and identities. She currently provides consulting services with several firms based in the U.S., specializing on the connections between program design, evaluation, and communication. Previously, she served as Deputy Director of Research and Evaluation and co-directed a national capacity building program for AIDS service organizations. She completed her masters of international community public health at New York University and is a member of the Delta Omega Honorary Society for Public Health.

Introduction

This “new era” represents a natural pause for reflection and realignment. There is momentum building in the business and human rights field to evolve how sectors collaborate for a more sustained and impactful response. This can require a true culture and perspective shift in how we as stakeholders see our own roles in advancing human rights, as well as our collaborators’ roles and unique potential – including people in the corporate social responsibility space. In this chapter, I will share reflections that have come from my multi-sectoral work with civil society, academia, and corporate social responsibility. The intent is to open up a conversation on a myth that inhibits collaboration, a truth that grounds collaboration in our core strength and values, and practical strategies to build mutual trust and collaboration. Ideally, this time of individual and collective reflection will fuel more potent collaborations across sectors acknowledging the urgency of addressing human rights in the globalized business sector.

Before diving into these reflections, I wish to disclose the impetus for this chapter. As a multi-disciplinary, community-focused practitioner, I have had the opportunity to work on issues of human rights from different perspectives and roles – working with civil society organizations, non-governmental organizations, academia, corporations, and government agencies alike. This afforded me with the opportunity to get to know a wide array cultural differences between sectors and fields. In the interest of transparency, business and human rights as a field has not been my primary area of expertise. My passion and career is focused on issues of human rights that affect people living with HIV and other stigmatized conditions and identities.

I have learned an incredible amount from the HIV community globally that influences how I work in the field of business and human rights. For instance, the HIV community is an especially powerful force to look to for inspiration, in terms of collaboration and innovation in the face of political non-willingness and fierce differences in stakeholder desires. These partnerships and friendships, along with my training in developmental psychology and public health, have shaped my view that there is room for solutions at multiple levels with multiple stakeholders. Because of this mix of experiences that don’t fall neatly into one “field,” Matthew Mullen (the editor of this volume) asked me to put some of these reflections into a chapter. What various stakeholders are doing in business and human rights requires not only thinking outside the box of our differing roles, sectors, and disciplines, but also to more fully utilize the space between the boxes for collaboration.

What various stakeholders are doing in business and human rights requires not only thinking outside the box of our differing roles, sectors, and disciplines, but also to more fully utilize the space between the boxes for collaboration.

In the remainder of this chapter, I will deconstruct a myth that prevents us from collaboration by seeing our roles as inherent differentiators, shine light on a truth that elevates the potential of stepping into relationships that fuel honest collaboration, and share several strategies to step into this space.

Myth: Corporate social responsibility has to fully sync with the business and human field for there to be progress.

While international and state-level implementation and regulation regarding the UNGPs are probably the most important action needed to advance human rights in business practices, true implementation with compassion and integrity to the UNGPs requires a mix of culture shift and practical tools. A key concern among some human rights practitioners and academics is that the corporate social responsibility (CSR) agenda inherently undermines the human rights agenda and poses a threat to advancing human rights. Some CSR can certainly be used as a distraction from the urgency and importance of human rights work. However, in some instances, CSR programs may in fact be an asset for the culture shifts needed for the sustainability of business and human rights (BHR) practices.

CSR is already accepted and expected by many societies – it is an arguably stable corporate infrastructure with some value-driven overlap with BHR. Broadly speaking, consumers in diverse settings around the world want corporations to give back to the community. Some cultures have a strong value for people or companies that are “making it” enough to give back to the people, especially in a religious context. For instance, giving a percentage of one’s wealth or assets is alued formally in many religions such as alms-giving in Buddhism and Hinduism, zakat in Islam, ma’aser in Judaism, and tithing in Christianity. Some countries incentivize giving back though tax benefits which has an influence on the culture of sharing.

These infrastructures have been used successfully by community-based, local NGOs. Corporate money, despite its reputation, can be much easier for community-based NGOs to funnel into innovative, yet-to-be-tested programs and advocacy that the government won't

(or can't) fun. In some instances, NGOs have found ways to collaborate with industry that indeed advance human rights.

Within some corporations, CSR can also elevate employees' awareness of human rights issues, sparking some to further investigate and potentially instigate ways to further human rights in the business context or throughout the value chain. Those engaged in the CSR space, as executives, employees, academic consultants, or community, can be crucial allies in advancing BHR from both a cultural and pragmatic perspective. Finding and leveraging these opportunities can benefit an internal culture that values BHR processes such as identifying salient issues with key stakeholders.

Anecdotally, I have noticed a central difference between the perspectives of those championing CSR and BHR that creates tension in the work – CSR looks outward and says “what can we do that is good to help the world and community (that aligns with our brand)?”²³ and BHR requires one to look inward and say “what are we doing that is harmful to people’s lives and communities.” This outward/inward perspective difference (as well as CSR’s more feel-good message of “helping and supporting” and BHR’s arguably more critical message around “harm”) can make it seem like we are talking about different goals, when in fact there can be commonalities to build on, albeit with different approaches. However, the underlying myth that CSR has to fully sync with the BHR field for there to be progress has the potential to slow collaborative work, which slows progress overall.

Truth: You do not need to compromise who you are and what you stand for in order to collaborate.

Everyone has an important role.

- Monitor companies for violations – yes.
- Prosecute human rights abuses – of course.
- Develop and test internal systems to track worker complaints and grievances – definitely.
- Conduct research and assessments on salient issues – crucial.
- Write an op-ed calling out misconduct – yes.

- Write an op-ed highlighting new and promising practices – yes.
- Scale up charitable programs that have BHR-related benefits – absolutely.

The health and human rights space affords many examples (both successful and unsuccessful) of staying strong in our values, while collaborating with a range of actors for social, political, and cultural change. For instance, advocates and activists living with HIV have played a key role and have been the impetus for large-scale changes on the societal and business levels. Their role is often seen as being the consistent, powerful voice that can pull strategy back on target to make impact. Pharmaceutical companies also play an important role in the HIV epidemic – the medicines they develop save lives and prevent HIV transmissions. Do they want to make money? Of course. Everyone knows this, but many people in the HIV space also recognize that these companies have money and this is an opportunity for community development.

Most activists also know that to fight HIV, pharmaceutical companies need to invest their money in new HIV medications, vaccines, and cure research. In the meeting rooms, activists, leaders of NGOs, and even the media, do not back down from their values and consistently remind everyone why we, as a field, are here and how to constantly include people most affected in the conversations and decisions. There are people that push hard and loud and there are people that wait until they feel there is a winnable battle – all these approaches are needed. Including those working for corporations, who often go back to their managers and fight the same fight.²⁴ For example, it is not uncommon in the HIV space for pharmaceutical companies to financially support key conferences for the people to gather, learn, and strategize with each other. At the same time, conference attendees will hold “die-ins” and vocally call out drug companies for high prices, lack of diversity in clinical trials, and other issues of injustice²⁵ – a clear case of holding one’s truth while collaborating. Ultimately, while HIV is still a major issue worldwide, there are 51% fewer deaths in 2017 compared to the peak mortality rate in 2004 (UNAIDS, 2018). This on-going advancement requires many people to step into

roles in their own way with their own voices.

Now is the time to refine ways of collaborating that both honor individual roles and create a space for action and change. It is now undisputed that the key issues that affect the most vulnerable people are intersectional and intersectoral in nature – they involve housing, labor, education, political freedoms, racism, homophobia, and climate change. In addition, most people agree that collective approaches are critical to addressing these types of issues. As similar fields are addressing similarly complex issues among people with different values and ways of working, the business and human rights field has the added benefit of these years of lessons learned on how to build shared space and collective action. Within the ecosystem of a corporation, the CSR department (which may just be one person) can serve as an entry point into a larger network of potential allies that have a shared value of advancing business and human rights. While some of these allies may be in departments that seem unimportant in the wider cause, there is often unintended positive outcomes from the simple step of connecting. In the next section, I share three strategies that I have found useful in my own work, and that I have seen as helpful for others.

Within the ecosystem of a corporation, the CSR department (which may just be one person) can serve as an entry point into a larger network of potential allies that have a shared value of advancing business and human rights.

Strategies for Multi-Sectoral Collaboration with a Shared Vision

Strategy 1. Start collaborative relationships with open discussions on purpose and roles – and the difference between CSR and BHR.

The work of human rights is inherently emotional, connecting to our core identity and survival as individ-

uals and communities. Human rights are about being treated fairly, treating others fairly and having the ability to make genuine choices in our daily lives. By zooming out to this level of understanding, finding a shared purpose can be easier. However, as collaborators zoom in on what human rights and responsibilities should look like in societies, communities, and organizations, tensions and differing opinions (and differing realities) arise. This can shut down conversations and progress.

Consider two things: first, there are companies out there that want to put society and the environment in the center of their work. They may be at different stages of readiness in terms of how to put this desire into action. And secondly, continued ‘collaboration’ in what one deems as a fruitless endeavor will eventually erode morale and take time from work that is truly important. Of central importance is to determine – “Are we as a collaboration here to do CSR (a typically top-down approach to social impact), BHR (typically more of a bottom up orientation that sets out to identify the ‘salient issues’ that a company must address through rights-based actions), or a hybrid model?”²⁶ Giving enough time during the early stages of a collaboration to discuss these issues broadly and define the project specifically provides an opportunity for everyone to decide to be there or decide to walk away.²⁷ For me, I make this decision to stay or go every time I walk into a room. If after some time, I see that my organization is in a collaboration where all partners don’t share the same goals or where it becomes evident that human rights is not a common north star – my organization should question the value of continued collaboration straight away.

Strategy 2: Conduct “perspective-getting” informally and formally to strengthen partnerships.

From a young age, many of people in personal and professional lives are taught to ‘stay in your lane.’ In professional development, one can develop a strong identity as an academic, practitioner, executive, lawyer, activist, etc., and focus on learning how to be most effective and respected in that role. Furthermore, in many societies “work” (paid or unpaid) is a core part of identity. This can be a subconscious barrier to under-

standing what it’s like to be in a different sector, especially if one considers that sector to be counter to one’s values and identity.

In social psychology, this can be related to ‘social perspective taking.’ Children develop this cognitive ability when they are taught “how would you feel if ...” This socio-cognitive development is specifically related to empathy and social bonding – which can help in collaborative work. However, research has found that perspective taking can also amplify misunderstandings, increase distrust, and enhance selfishness. One also needs ‘perspective-getting’ on people in other sectors by directly asking people their wants, feelings, and thoughts (Eval et al., 2018).

Consider ways that you can constantly learn more about your partners directly, both formally and informally. As a side-benefit, creating time to ask questions and listen with curiosity can also help build trust.

FORMAL PERSPECTIVE-GETTING	INFORMAL PERSPECTIVE-GETTING
Conduct key informant interviews, ensuring you are talking to people at different levels (i.e. with different power and responsibilities)	Make it a point to talk with people in different sectors during breaks and after meetings
Debrief as a group after cross-sector meetings and ask what is working and what is not	Go to events where people in different sectors attend and ask questions
Hire a collaboration evaluator	Read news sources relating to different sectors and ask people about their perspective on pertinent issues
Incorporate “pause and learn” activities into your annual plans	Get to know people personally – what brought them to this work, what keeps them in this work
Provide truly anonymous ways for people to provide feedback	

Strategy 3: Balance collaborative goals between quick wins and long-term impact.

From day one, determine where there are areas for 'quick wins' – and go for them. Quick wins are important for boosting morale and collective self-efficacy of the collaborators. It also provides evidence²⁸ to top decision makers that investing in BHR collaborations will lead to action and change. At the same time, a large portion of what the field is working for requires significant time, planning, political will, and resources. During kick-off meetings and annual planning, build agendas that provide enough time to brainstorm and decide on project objectives and activities that provide your group with an opportunity to make incremental movement towards long-term goals, which includes quick wins.

Conclusion

Collaboration is different from compromise. As the business and human rights field advances the UN “zero draft” treaty on business and human rights, on the ground implementation will certainly require approaches beyond the carrot and the stick – approaches that have the power to shift organizational culture. In some cases, CSR may be a key asset in this cultural shift not only to initiate BHR, but also sustain practices in places where state-entities may not be protecting rights to the fullest of the UNGPs. What has worked so far and what will continue to move the needle for business and human rights requires thinking outside the box and into the collaborative space between.

References

Eyal, T. Steffel, M., & Epley, N. (2018) Perspective mistaking: Accurately understanding the mind of another requires getting perspective, not taking perspective. *Journal of Personality and Social Psychology*, 114, 4, 547-571.

UNAIDS. (2018) Global HIV & AIDS statistics –2018 factsheet. Available at: <http://www.unaids.org/en/resources/fact-sheet>

Human Rights and Transparency Politics in Global Production Networks

Dr. Christian Scheper

University Duisburg-Essen

Dr. Sabrina Zajak

Ruhr-University Bochum & German Center for Integration and Migration Research

Introduction

Transparency concerning human rights policies and impacts has become an important requirement for transnational corporations. The United Nations Guiding Principles on Business and Human Rights (UNGPs) recommend that states encourage and require companies to disclose their human rights policies and impacts. Companies themselves are also encouraged to actively communicate policies and impacts to fulfill their due diligence. Effective company disclosure practices, indeed, seem like a fundamental precondition for protecting against corporate misconduct on a transnational scale. In business and human rights debates corporate transparency is mainly discussed as a source of legitimacy, accountability and as encouraging positive human rights impacts. In contrast, this chapter stresses the ambivalent nature of corporate transparency in global production networks. We discuss transparency as an ambiguous and contested concept with multiple normative and ideological dimensions, reflecting both hopes, like for the enhancement of freedom and democracy, and dangers, such as the threat to privacy and the misuse of information. This means transparency as such is neither an automatic mechanism preventing human rights violations, nor is it necessarily linked to new opportunities for violations. Instead, we argue it is the politics of transparency, which connects it to human rights improvements or violations.

This is why we suggest speaking of ‘transparency politics’. To us it includes both a strong normative demand for transparency from a human rights perspective as well as the power-laden and contested character of information and its disclosure. In global production networks we distinguish between four levels of trans-

parency politics²⁹: the level of 1.) collecting data; 2.) translating information through the production network; 3.) using information for public policy making; and 4.) using information for private transnational legitimacy strategies. At each level, conflicts about data and communication on human rights issues between buyers, suppliers, NGOs, trade unions, workers, auditors, state agencies, multi-stakeholder initiatives or business associations are possible. We argue that the consideration of these four levels and their interconnection are useful to better understand the political nature of transparency in global production networks.

In many global production networks major technologies and practices of knowledge production, i.e. the collection, translation, selectivity and usage of information about human rights conditions, are heavily shaped and dominated by corporations and their business rationales, leading to an increasing marketization and commodification of information as a basis for human rights governance and policy decisions. Transparency politics, therefore, are of key relevance in respect to the wider dynamics of relations of power, political conflicts, and social change in the global political economy. Reflecting about the political nature of transparency is also a critical effort to bring forward the international business and human rights agenda. We suggest that a political view on transparency in this field requires looking into the technologies and practices of information collection, translation, and usage as well as inherent mechanisms of exclusion and inclusion connected with them. We see a rising necessity for this political view and an according research agenda in times of pervasive forms of private regulatory governance, combined with the ongoing digitalization of supply chain management and related new technologies of knowl-

edge production. Both transformations fundamentally affect corporate governance, its transnational legal environment and civil society activism for human rights.

Transparency requirements by the UNGPs: From norms to politics

The UNGPs recommend that transnational enterprises, to fulfill their ‘corporate responsibility to respect human rights’, publicly communicate about their human rights policies, their impacts on human rights and how they address these impacts (OHCHR, 201: pp. 15f). Looking more closely into the ways through which the UNGPs become effective in transnational, often rather opaque structures of production networks, one could argue that rules for corporate reporting and transparency – rather than being one recommendation amongst various others – form a pivotal backbone of the UNGP’s functionality: it is often only through corporate reporting about their activities and impacts that further public regulatory efforts, like legal sanctions or market incentives, can become effective.

Furthermore, since the UNGPs are an instrument of international Soft Law, their effectiveness in practice largely depends on state governments and international regulatory institutions to transfer the Principles into legal regulations. Accordingly, states are increasingly building up regulatory frameworks, albeit with highly varying rigor. Examples include the US Dodd-Frank Act, the French ‘Loi de Vigilance’, the new EU regulation on corporate non-financial reporting (Directive 2014/95/EU, also called “transparency law”), the California Transparency in Supply Chains Act and the UK Modern Slavery Act. All of these include requirements for corporate disclosure on human rights policies and impacts. We can also find varying demands for corporate transparency in the so-called National Action Plans (NAP) to implement the UNGPs. As the OHCHR NAP-Guidance suggests, states should encourage corporate disclosure policies and develop legal requirements on non-financial issues (OHCHR, 2016: p. 23). Next and largely prior to state regulation, the demand for transparency about human rights has also been established through private reporting standards, most prominently the Global Reporting Initiative (GRI;

see Brown et al., 2009). The key normative idea behind these laws and standards is that information about corporate activities and impacts, once publicly available, presents opportunities for public control of companies, both through state regulation as well as through industry self-regulation, as companies will try to avoid sanctions (by state governments or through markets).

But if we look more closely, we see that the issue of transparency and corporate disclosure is highly political, normatively ambiguous and embedded in power inequalities. We move from transparency as a norm in the international human rights system to transparency politics in global production networks: Transparency optimists hope that public disclosure and struggles resulting from them provide an important transnational governance mechanism. Transparency pessimists argue that such mechanisms provide a new opportunity for business actors to increase their capacities to control information and knowledge about global production networks. Where this becomes the basis for public human rights policies, they fear an erosion of trust and democracy. We therefore suggest a framework that analyses transparency as a political issue related to power inequalities and legitimacy struggles (see Zajak and Scheper, 2019).

Four levels of corporate transparency politics

The quest for transparency about human rights issues is grounded in strong normative beliefs in the role of transparency in lifting the ‘corporate veil’ that creates human rights predicaments and covers responsibilities in global production networks. These networks are structured in ways that have enabled brands and retailers to distance themselves from traditional labor relations and their responsibility for large parts of the work force. By externalizing the labor-intensive aspects of production, global sourcing companies have also outsourced their immediate responsibility for most workers involved in the process (Egels-Zandén and Merk, 2014). The UNGPs’ idea of the corporate ‘responsibility to respect’ and its core concept of due diligence represent attempts to adjust the human rights system to this situation. The need to lift opaque

governance structures constituted by transnational contracts, corporate structures and organizational hierarchies is obvious. It also reflects the everyday experience of activist work, in which the notorious lack of transparency in many transnational industries makes it difficult to challenge corporate misconduct and support workers' rights.³⁰ Not revealing their sourcing partners gives lead firms countless opportunities to distance themselves from misconduct in their supply chains. For instance, while 14 brands have been linked to the Tazreen Fashions factory in Bangladesh, only six brands have ever confirmed their relationship after the catastrophic factory fire in 2013. The lack of transparency at sourcing locations makes it very difficult to verify many of these claims, which is one of the reasons why campaign organizations have demanded the disclosure of audit reports that document inspections prior to the fire.

...on the one hand, the demand for transparency is connected to the aim of holding companies accountable by emphasizing their public agency and their need to publicly justify their actions. But companies can also use techniques of 'making something transparent' to pursue their own governance goals.

Thus, on the one hand, the demand for transparency is connected to the aim of holding companies accountable by emphasizing their public agency and their need to publicly justify their actions. But companies can also use techniques of 'making something transparent' to pursue their own governance goals. This is usually discussed in connection with increased information asymmetries, information manipulation and augmented capacities to surveil and control from a distance.³¹ Companies for that matter are never just passively responding to transparency demands, but actively shape procedures, types of collecting, transforming and using information. This, we claim, is a key element of the pol-

itics of transnational firms – an aspect which is often ignored in the current debate about the political role of companies. Where corporations are the prime agents of knowledge about global production, we can assume that the creation of transparency also brings about a process of marketization and commodification of knowledge (Scheper, 2015; LeBaron and Lister, 2015). It entails a productive power of business practice, which we unpack in the following by differentiating four different levels of transparency politics.

Collecting information

On the level of gathering and collecting information, we primarily find practices such as internal and external social audits, especially in the context of factory production, as well as forms of voluntary disclosure by supplier companies. Social audits in global production networks have specifically been criticized due to their dysfunctionalities in representing human rights conditions (Bartley, 2010; O'Rourke, 2002). But, given the fragmented and complex character of production networks, variants of social audits continue to provide a central (and sometimes the only) source of information for corporate managers, consumers, policy makers and the wider public about distant factory conditions. Audits have thus become a key tool for corporations to govern – not only their relation to suppliers but also their public image and reputational risks. In industries like apparel or electronics production we hardly find any effective practices of conducting human rights risk and impact assessments 'beyond' the limitations of social audits (see Scheper, forthcoming). This corporate function of audits has also led to a widespread commodification of 'auditability' as a supplier asset: not only are many social audits conducted by for-profit agencies, but supplier factories often use their successful passing of brand audits as a source of competitive advantage (LeBaron and Lister, 2015). Even where social audits are conducted by not-for-profit agencies, such as local civil society groups or government inspectors, the image they create about the production network is necessarily selective and limited to particular aspects of social and environmental conditions. Thus, while problems and deficits of social auditing practices are widely known, over the

last decades private transparency politics have paradoxically created a massive auditing market and ever new demands for more and 'better' audits. Ironically the data is often decoupled from the (always in part subjective) interpretation of the human rights situation in production sites – even if they are based on worker interviews (Egels-Zandén and Lindholm, 2015). In practice, workers and trade unions are usually not involved, at least not as equal partners in the knowledge production process.

Translating knowledge into the corporate form

The second field of transparency politics is created when information about dispersed factories are brought into an appropriate form to make the scale and number of data accessible throughout the production network. Sociological and anthropological research on "epistemic practices" illustrates that these processes need to be understood as productive and political in themselves. Practices such as aggregation, quantification, indexing and benchmarking of information constitute "technologies of truth" (Merry and Coutin, 2014). Information about complex social conditions is made simple, accessible, countable and commensurable (Espeland and Stevens, 1998). It is through such practices of translation that information can be made marketable, such as for corporate risk assessment tools, indexes, benchmarks and consumer labels. In the process, highly contestable political and ethical interpretations and judgments over the violation or non-violation of a particular right are 'freed' from their ambiguities and their contested nature. This process, thus, involves an "uncertainty absorption" (Espeland and Stevens, 2008: p. 401) from the 'ground', where someone gathers information, to the headquarters of corporate strategic decisions and public reports. Therefore, what regulators and policy makers actually 'see', are absolute numbers of cases (e.g. of a number of labour rights violations in a certain period), a quantified 'human rights benchmark' or percentages indicating relative changes in company performance over time. While such numbers "firm up" soft laws and guidelines, they also change complex social information into the corporate, managerial form (Merry, 2015). Knowledge presented in

this form then appears as an objective result of public transparency, where in fact subjective decisions and conflicts over ambiguities were taken in a terrain of highly unequal relations of power, information asymmetries and vested capital interests.

This also affects the way knowledge gets translated in labour activist networks. Workers' knowledge is increasingly quantified for reports in order to be comparable and potentially challenge the authority of corporate reports. To link factory conditions to particular lead firms, activists need to draw on available corporate information, which is usually highly restricted by contractual securities throughout the network. Even if activists try to produce alternative knowledge through their transnational "networks of labour activism" (Zajak et al., 2017), the process of translating information through standardization and quantification often looks similar, as activist groups must compete for public legitimacy in the presentation of information with companies. This again can feed back negatively into the activist networks and cause frictions between workers or local trade unions and their allies from abroad – as they no longer feel their grievances and claims represented.

Transferring knowledge into policy decisions

Knowledge about global production networks is constantly transferred to governance decisions and public policy making. On this level, however, the political nature of information collection and translation has mostly vanished in the process. Patchy and fragmented elements of knowledge about conditions in the production network appear as facts and guide wider policies. Corporations also use such factual knowledge for increasing their brand value or generate new sources of profit, such as niche markets for 'fair' or 'organic' trade, and the inclusion into 'sustainability' stock market indexes and investor schemes. Once a label, index or policy standard is granted and widely accepted, the politics of knowledge production, which it presupposes, disappear from public scrutiny. Through this construction of 'certainty', those forms of knowledge and bits of information that have been excluded from the picture in the process become highly difficult to 're-activate' for civil society activists. On the level of policy

making the politics of transparency is subject to a further step of simplification, often even to a dichotomous 'yes' or 'no' decision over benchmarks (which product or firm is fair/not fair; organic/not organic; sustainable/not sustainable; et cetera).

Information as an object of private transnational legitimacy politics

The fourth level of transparency politics draws on the other three levels, but it is the most indirect level and hard to make empirically visible. The notion of legitimacy politics describes the arena on which social actors negotiate and struggle over the very grounds on which legitimacy claims are being made (Black, 2008; Nullmeier et al., 2012; Djelic and Quack, 2018). Social movements and activist groups, at least in Europe and the US, are often engaged in public struggles where movements seek to change corporate politics to produce social change. In global production networks it is often far from clear which normative grounds and criteria of legitimate corporate actions are being assumed. However, where companies can offer 'transparency', this reduces the likelihood that activists can win the conflict over appropriate normative grounds of legitimacy claims. This is why companies consider transparency as an important step of risk reduction, as it shapes the ground for legitimacy, which is difficult to question for 'outsiders'. A provision of aggregated 'counter-knowledge' is hard to come by, because critique often partly depends on the very corporate, managerial form that knowledge about the production network takes. Media analysis have shown how companies use the information to shift blame to others and claim competence for themselves (Zajak und Henrichsen, forthcoming). Paradoxically, critique is sometimes disarmed simply by being confronted with a multitude of information, reports, statistics, and multi-stakeholder involvements, without an actual change in the price-bound transnational competition that leads to the violation of human rights in the first place (Scheper, 2015).

Conclusion

The four levels of transparency politics we suggest here draw a political picture of information and disclo-

sure practices, which can be a useful contribution to current debates on business and human rights. First, in the context of implementing the UNGPs through National Action Plans, the consideration of transparency politics urges governments and regulators to actively engage with norms and practices of how information is being gathered, checked and communicated. The question of agency in global production networks becomes crucial here, as often neither workers nor their representatives, nor public regulators, are actively involved in producing policy-relevant knowledge on human rights impacts and risks. Second, in current debates over a binding international treaty on business and human rights, the possibility of fostering institutional environments, through which both public regulators and rights-holders are enabled to gather, check and communicate about human rights conditions and impacts of corporate activities, should become a key aspect on the agenda of the current UN Working Group on Business and Human Rights. Comparable to the vivid debates about public and private remedy mechanisms, discussions about the ethics, politics and practices of transnational knowledge production in global production networks would be urgently necessary for bringing forward the business and human rights agenda.

To further engage with transparency politics is gaining importance with an increasing digitalization of both supply chain management as well as activist networks and their strategies. Digital tools and algorithmic forms of knowledge generation could further blur political elements of contradiction and ambiguity and turn the role of labour in production and existing capital-labour power imbalances invisible (e.g. Irani and Silverman, 2013). As Moore and Joyce (2017) state: "The turnaround is, apparently, complete. Where digital technology once revealed, it now obscures; workers who previously could not hide, cannot be seen at all". But digital tools might as well offer new pathways of challenging alleged 'truths' about factory conditions. This makes it necessary to further study the dual nature of transparency through the linkages between data, activism, and justice in transnational relations.

References

- Bartley, T. (2010) Transnational Private Regulation in Practice. The Limits of Forest and Labor Standards Certification in Indonesia. In: *Business and Politics* 12 (3), S. 7.
- Black, Julia. (2008) "Constructing and contesting legitimacy and accountability in polycentric regulatory regimes." *Regulation & Governance* 2.2: 137-164.
- Brown, H. S., De Jong, M., & Lessidrenska, T. (2009) The rise of the Global Reporting Initiative: a case of institutional entrepreneurship. *Environmental Politics*, 18(2), 182- 200.
- Djelic, Marie-Laure, and Sigrid Quack. (2018) "Globalization and Business Regulation." *Annual Review of Sociology*.
- Egels-Zandén, Niklas, and Jeroen Merk. (2014) "Private regulation and trade union rights: Why codes of conduct have limited impact on trade union rights." *Journal of Business Ethics* 123.3 461-473.
- Egels-Zandén, Niklas, and Henrik Lindholm. (2015) "Do codes of conduct improve worker rights in supply chains? A study of Fair Wear Foundation." *Journal of Cleaner Production* 107: 31-40.
- Espeland, Wendy Nelson; Stevens, Mitchell L. (1998) Commensuration as a Social Process. In *Annual Review of Sociology* 24 (1), pp. 313–343.
- Espeland, Wendy Nelson; Stevens, Mitchell L. (2008) A Sociology of Quantification. In *European Journal of Sociology* 49 (03), p. 401.
- Irani, L.C. and Silberman, M. (2013) 'Turkopticon: Interrupting worker invisibility in Amazon Mechanical Turk', In *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems*, pp. 611-620).
- LeBaron, Genevieve; Lister, Jane. (2015) Benchmarking global supply chains: the power of the 'ethical audit' regime. In *Review of International Studies* 41, pp. 905–924.
- Merry, Sally Engle. (2015) Firming Up Soft Law. The Impact of Indicators on Transnational Human Rights Legal Orders. In Terence C. Halliday, Gregory Shaffer (Eds.): *Transnational Legal Orders*: Cambridge University Press, pp. 374–400.
- Merry, Sally Engle; Coutin, Susan Bibler. (2014) Technologies of truth in the anthropology of conflict. AES/ APLA Presidential Address, 2013. In *American Ethnologist* 41 (1), pp. 1–16.
- Moore and Joye. (2017) Black Box or Hidden Abode? Control and Resistance in Digitalized Management. Paper presented at the workshop Digitalization and the transformation of labour in the global economy, Lausanne.
- Nullmeier, Frank; Geis, Anna; Daase, Christopher. (2012) Einleitung: Der Aufstieg der Legitimitätspolitik. Rechtfertigung und Kritik politisch-ökonomischer Ordnungen. Sonderband Leviathan 27: Nomos.
- OHCHR. (2011) Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework. Geneva, New York. Available online at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- OHCHR. (2016) Guidance on National Action Plans on Business and Human Rights. Edited by UN Working Group on Business and Human Rights. Geneva. Available online at https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.
- O'Rourke, Dara. (2002) Monitoring the Monitors. A Critique of Corporate Third-Party Labour Monitoring. In Rhys Owen Jenkins, Ruth Pearson, Gill Seyfang (Eds.): *Corporate Responsibility and Labour Rights. Codes of Conduct in the Global Economy*. New York, Florence: Routledge; Taylor & Francis Group [distributor], pp. 196–208.
- Raj-Reichert, Gale. (2013) Safeguarding labour in distant factories. Health and safety governance in an electronics global production network. In *Geoforum* 44, pp. 23–31.
- Scheper, Christian. (2015) 'From naming and shaming to knowing and showing'. human rights and the power of corporate practice. In *The International Journal of Human Rights* 19 (6), pp. 737–756.
- Scheper, Christian. (2019) Assessing human rights impacts in global value chains: Can HRIAs go beyond Social Audits in the Apparel industry? In Nora Götzmann (Ed.): *Elgar Handbook on Human Rights Impact Assessment in the Business Context*. Cheltenham: Edward Elgar.
- Soule, Sarah A. (2012) Targeting organizations: Private and contentious politics. *Research in the Sociology of Organizations* 34:261–285.

Zajak, S, Egels-Zandén N., and Piper, Nicola. (2017) Networks of Labour Activism: Collective Action across Asia and Beyond. An Introduction to the Debate. In *Development and Change* 48(5): 899-921.

Zajak, Sabrina; Scheper, Christian. (2019) The Dual Nature of Transparency: Corporatization and Democratization of Global Production Networks. In Stefan Berger, Dimitrij Owetschkin (Eds.): *Contested Transparencies, Social Movements and the Public Sphere. Multi-Disciplinary Perspectives*: Palgrave Macmillan.

Zajak und Henrichsen (forthcoming) Schuld ohne Sühne? Attributionsnetzwerke und die öffentliche Zuschreibung politischer Verantwortung. *Globale Unternehmen in Bangladesch*.

An Interview with Dr. Neil Howard

Neil Howard is a Fellow at the University of Bath, UK. His research focusses on the governance of exploitative and so-called 'unfree' labour and in particular the various forms of it targeted for eradication by the SDGs. He conducts ethnographic and participatory action research with people defined as victims of trafficking, slavery, child labour and forced labour, and political anthropological research on the institutions that seek to protect them. Neil asks why 'victims' are so often excluded from the policy process and tries to make sense of the way that policy-making institutions think, work and navigate their political limitations.

As a starting point, exploitation is one of those terms that is often utilized around BHR but remains very hard to pin-down. What is your working framework of exploitation? How do you define, understand or frame exploitation?

I totally love this question. The first thing to say on this point is that exploitation has been actively non-defined by the international institutions, and it's really critical to underline this. In all the international legal architecture, there is no definition of what exploitation means, which by itself is somewhat surprising given that it's banded around all of the time and is kind of implicit in all of the work that gets done in this field.

But what I know from interviews with people who work in the ILO and other international institutions is that it's not unintentional that "exploitation" has not been defined. One senior ILO person said to me, "Look, it's a Pandora's Box. If we try to define exploitation, we will basically open up a political shit storm." Why is that? Ultimately because when we start to question what exploitation constitutes, what is legitimate or illegitimate in relation to coercion when it comes to labour, we basically go to the heart of social organization. Is it legitimate for me as a capitalist to employ you in some not-very-great job just because you're poor? Or is it only illegitimate when I apply physical coercion to you? Is physical coercion the only coercion that matters in society? We all live in a web of economic coercion. So, the key starting point here is to know that it is a political choice basically by the forces of the establishment to leave exploitation undefined. Because to define it is very, very threatening to the status quo, which obvi-

ously works for large economic forces. This is point number one.

Point number two: For myself, I don't yet have a working definition of exploitation. I'm actually just starting two quite large research projects working with and for very marginalized workers in South Asia to ask them how they define exploitation. As it stands, there is no international definition, and what that means is that the content of what is exploitative tends to get filled by whoever holds social power. So the modern abolitionist organizations, big philanthros, these sorts of forces of the establishment will say that this or that thing is unacceptable, therefore we label it exploitation, and then we legalize it. But the thing that is super problematic from the perspective of the person living inside this so-called exploitation is that it may be, to them, acceptable, and not exploitative, or at least not exploitative enough given their life circumstances to make banning them from doing it in their best interests. That, in itself, is an abuse of power. So what I'm really interested in exploring in the next while is how people who live at the margins of the economy themselves understand what it means to be exploited. My working hypothesis is that there isn't going to be a universal definition that people share, but to the extent that we are able to draw out a common thread, it will come back to relationality. In other words, the specific task that the person is performing won't constitute exploitation, but the nature of the relationship between them and the person they're working for, the people they're working with, that is where the nugget of the emotional experience of exploitation will lie. But this is an empirical question and I am hoping to answer it over the next few years.

So, in that hypothesis there is a heavy emphasis on the emotional aspect of it?

Right. We are subjective beings. We may exist within objective social relations, but each individual is different, and each individual's experience is different - subjective. What is acceptable to me or what is positive to me isn't necessarily positive or acceptable to someone else. I don't think it's going to be something absolutely irreducible, and it may be that in any given individual context people will choose different things. My hunch is that the nature of the relationship between the givers and the takers of labour will be determining for what people themselves define as exploitative. If that's true, then there will be a whole bunch of implications for international legal criteria and protection interventions in the field. We just don't know. And it's a political choice that we don't yet know.

Jumping a bit to human trafficking. So, we see a huge emphasis on human trafficking and we can observe, even at a cursory glance, that human trafficking is a point of emphasis in the field. And when we look at the uptake of human trafficking efforts compared to human rights more broadly it's obviously disproportionate. What are your thoughts on this? Why is human trafficking such a lynchpin and what are the implications of this?

That's another great question. Very basically, it is more politically and economically convenient for the holders of social and economic power to look at what they define to be the worst of worst, rather than looking at the everyday injustice experienced by many millions or even billions of workers around the world. If we were to take a more structural human rights framework that meant ultimately pushing towards a far greater degree of equality in the world, then their power would be fundamentally undermined.

Human trafficking is useful because it is positioned as the worst of the worst, super abhorrent, and outside the normal state of affairs, right? So, companies and governments can look good, they can accrue some kind of symbolic capital, by appearing to give a shit, by performing, if you like, give-a-shitness vis-a-vis this hyper exploitative act. In doing that, they kind of sweep under the carpet the everyday forms of injustice that

form the bedrock of the global economy. So, I think it's that human trafficking, forced labour, all of these concepts are ultimately useful for maintaining the present hegemony.

Have you seen examples where you see companies, governments, or organizations who are going beyond this narrow focus on the most appalling dynamics? Is anyone actually getting into that structural territory?

Very few organizations make any attempt to get into that structural territory. Very, very few. We can take the example of Unconditional Basic Income. If it is the case that many of the people who end up in what is labeled as un-free work do so because they're poor, then it's an automatic no-brainer that addressing their poverty could prevent them from ending up there. But that's just not part of the plan, is it? There aren't wide-spread calls within the business community for Universal Unconditional Basic Income at the national or local level. Because that would structurally alter the balance of power in the favour of workers, which is not on the agenda, and it's not on the agenda because it's not in the economic interest of the economic powers. So there is some tinkering around the edges, and an attempt to look good. Plenty of times I'm sure there is genuine concern over exploitation, but it's a very selective, sentimental form of concern focusing on high-value symbolic cases of sexual exploitation or the exploitation of children, which sort of prick particular, liberal western sentimentality...this is not a kind of politicized concern with systemic inequality.

So, I wanted to jump a bit to your work on structure and cultural violence. I want to pick your brain a little bit on how you think that those lenses of structure and cultural violence might be useful if people are trying to understand the totality of what's going on in this space. How might people apply these lenses?

Well, if we take a structural lens when looking at exploitation - however we wish to define that - then doing so de-individualizes it. The standard framing is that one worker is having a really shitty time because one bad guy is forcing them to have a shitty time. That is obviously super-apolitical and extracts the individual moment of injustice from the wider political economy. It doesn't take account of systems of violence. Think

of migratory labour regimes which tie people to a place and an employer and therefore make them more vulnerable to exploitation; think of racial hierarchies, which encode certain bodies as more worthy and more protectable for the state than others. To maintain the present very individualistic focus, it depoliticizes the systems in which all people live. But if we take a structural focus, we push back against that. We say, look, this isn't just about any individual instance of something that is problematic. Each of these instances happened because of much wider forces that are the real issue.

To maintain the present very individualistic focus, it depoliticizes the systems in which all people live. But if we take a structural focus, we push back against that. We say, look, this isn't just about any individual instance of something that is problematic. Each of these instances happened because of much wider forces that are the real issue.

As for cultural violence, I think it can permeate political and economic systems in many ways. Take patriarchy... the fact that men are systemically paid more than women, valued more than women, listened to more than women, have access to power more than women, or that white people enjoy more freedoms than non-white people... these are fundamental to understanding the nature of inequality and the nature of exploitation and labour relations more generally. So to meaningfully address existing problems we have to play at a structural level.

The next question is on anti-politics... So you wrote about anti-politics in the modern anti-slavery movement and I am wondering if we brought in that critique to look at the field of business and human rights, how might that apply?

Probably very aptly. I would be wary of speaking too forcefully because this is beyond the domain of my expertise, but in speaking to my experiences that interface and interrelate: political structures de-politicize themselves. In many ways this is their purpose, to hide their own contingency and thus maintain and entrench the status quo. Modern abolition, I think, though not necessarily intentional, ultimately depoliticizes the structures of inequality, including the market. Modern abolitionists pretend that any individual instance of exploitation is just that, an individual instance. They take capitalism out of the story, they take out relations of production, they take out racial and gender inequality, and so on and so on. So, modern abolition is a classic example of depoliticizing, in other words narrating out the story that leads us to wherever we are. And my sense is that this is probably true in relation to business and human rights. Also, there is a great deal of emphasis on protecting particular forms of civil rights, which are ultimately, in theory, guaranteed by a protective state that ensures that people are not arbitrarily detained or the victims of other such violence on the part of another individual. But the push towards the guaranteeing of economic and social rights, for example, is much less robust.

As a bookend question, when you look at this field, what gives you hope? Or is there something that you point to and say, that's what we need to focus?

Oh yeah, I mean there are loads of different things. There are encouraging worker-led initiatives pushing for worker certification and inclusion of workers on Boards; movements for basic income, which I think is really a potentially positive way to decommodify labour; movements for the shared economy; cooperative self-management. Not all is bad... I'm particularly interested in the work of a woman called Miki Kashtan, who has developed something called convergent facilitation for bringing enemies together, and she has a strong piece around the potential of bringing workers and employers together to create more just systems in any workplace. So, yes, there is definitely hope. Being super-critical of what is doesn't blind me to the possibilities of what could be.



Recognizing Pitfalls

Chapter Synopses: Recognizing pitfalls

Vanessa Hongsathavij, Cannelle Gueguen-Teil, and Rajesh Daniel critically engage the politics of “win-win” language as a discursive device. By unpacking “win-win” discourse, the team manages to “highlight the interests and influences behind it, allowing us to better understand how businesses, development agencies, governments, and civil society actors interact with questions of human rights, and ultimately, how we can improve the engagement of corporations and their responsibility to respect human rights.” The win-win language has since become a go-to “paradigm as a way to identify an entry point for conflict management, such as over land-based issues involving the private sector, state, and communities.”

Grounding their analysis in interviews with various stakeholders involved in the drafting of the National Action Plan on Business and Human Rights (NAP) in Thailand, the chapter outlines five key concerns about the causes and effects of “win-win” discourse. These concerns include: a potential watering down of human rights language, the false equating of safeguarding reputation and safeguarding rights, the problem of scale where only the largest corporations and the most headline worthy human rights issues come into focus, the problem with the timing of win-win discourse as interventions “sometimes have occurred after the violations of human rights have already been committed by the companies or state agencies,” and the exclusive focus on immediate wins that can compromise long term thinking and action. In the end, the chapter comes to the conclusion that:

...the mainstreaming of the “win-win” discourse on human rights and business reflects the limitations of the UNGPs as a governing, non-binding international instrument. It further indicates larger trends within the development sector towards the restriction of the discursive and civic space for alternative discourses on policy change and impact, thereby limiting how corporations can effectively address human rights, and become accountable for human rights violations.

Prof. Saul J. Takahashi calls for a concerted international approach, “whereby states are obligated to ensure that their companies operate in accordance with human rights” underpinned by a binding treaty. Examining both the philosophy and practice of voluntary frameworks in Japan, Takahashi explains why such approaches are invariably inadequate. Beyond presenting data-points that illustrate the insufficiency of voluntary scheme, at least as stand-alone measures, Takahashi brings attention to untenable rationale. Voluntary frameworks depend heavily on the goodwill of companies and the strength of a business case for human rights. On the former, Takahashi reminds that *seizen-setsu* (a Confucian idea that human beings gravitate to moral conduct), for example, cannot substitute checks and balances and structures for protection, transparency and accountability. And on the latter, Takahashi argues that the business-case (or bottom-line) argument: “is destined to fail, since advocates simply do not have access to the kind of information that is required to substantiate it (at least not in the eyes of most corporate people).”

Dr. Rajiv Maher examines the threat of rights-washing through the lens of managerialism (efforts to control situations through neutral, technical and pragmatic measures) and human rights impact assessments (HRIA). Managerialism manifests in HRIA in “formulaic often closed-question questionnaires to enable a more efficient ‘controlling!’” The question is whether this “technicized and managerialistic nature of doing development and BHR can be sufficiently sensitive to questions of knowledge, ethics, and power.” The recognition that checklists are insufficient to secure a social license to operate has prompted careful steps to make human rights due diligence (HRDD) more participatory. Drawing upon lessons gained in the field while monitoring two HRIAs around mining operations in Chile – one that was company led, but collaborative and one that was community led – Maher illustrates that even when promoting participation, the desire to control HRIA processes and outcomes can result in misleading and decontextualized assessments and

unintended consequences in local communities. In a word of caution, Maher warns of “the ability to co-opt, silence local resistance and further entrench internal community fissures whilst giving the illusion of democratic structures and processes.” Managerialism is an anti-political trap that can compromise the utility of HRDD and the BHR agenda in general. And the only obvious antidote is vigilance.

Not so “win-win”: Unpacking the discursive politics of business, human rights, and sustainable development

Vanessa Hongsathavij

Institute of Human Rights and Peace Studies, Mahidol University, Nakhon Pathom, Thailand

Cannelle Gueguen-Teil, Stockholm Environment Institute, Bangkok, Thailand

While Cannelle is employed by the Stockholm Environment Institute, the perspectives presented in this chapter are solely her own and should be read as an independent contribution.

Rajesh Daniel, Stockholm Environment Institute, Bangkok, Thailand

While Rajesh is employed by the Stockholm Environment Institute, the perspectives presented in this chapter are solely his own and should be read as an independent contribution.

Introduction

A pervasive term found in the current discussions on business and human rights is “win-win,” frequently seen cropping up in national and international human rights arenas, workshops and publications. It indicates that businesses ventures can, and should, work alongside states and communities by adopting human rights-based approaches (HRBA). This provides the win-win solution: businesses can embark on strategic decisions that consider human rights but not harming their companies’ profit margins, while nation-states offer improved governance and better protection of communities from human rights abuses especially from large corporate activities. In the environment sector in particular, the discourse becomes “win-win-win” as it suggests that rights-based approaches to business can also lead to more economic, social, and environmental sustainability.

Interpreting “win-win”

We argue that the language of “win-win” is a type of discourse that shapes the ways of understanding, interpreting, representing, and speaking on business, human rights, and development.

Discourses define the problem and its scope, creates policy narratives, and influences the type of options that decision-makers eventually adopt (Dryzek 2013). While the language of “win-win” itself is not novel, its wide prevalence and usage reflect its mainstreaming among prominent development actors, including the United Nations agencies, regional intergovernmental bodies, and non-governmental organizations (NGOs). Unpacking this discourse can highlight the interests and influences behind it, allowing us to better understand how businesses, development agencies, governments, and civil society actors interact with questions of human rights, and ultimately, how we can improve the engagement of corporations and their responsibility to respect human rights.

The authors seek to explore the following questions: Why does this “win-win” language persist today? Why does this discourse have a particularly strong presence and resonance among certain development actors in current policy discourses around business, human rights, and the environment? And ultimately, who is driving this discourse and what are the assumptions, interests, and ideas embedded in it?

We address these questions within the context of recent policy discussions on business, human rights, and sustainable development during the drafting of the

National Action Plan on Business and Human Rights (NAP) in Thailand. In 2018, we conducted interviews with various stakeholders drawn from the government, private sector, academia, non-governmental organizations, and civil society groups, who actively work on sustainable development issues in Thailand and in the Southeast Asian region.³² In addition, our analysis employs an ethnographic approach through participant observation in various workshops and platforms on business, human rights, and environment held in Thailand.

First, the introduction shows the historical landscape that brought us to the win-win discourse and lays out the key questions that are explored by the chapter

Second, we identify the key actors and interests driving the “win-win” policy discourse on business and human rights, which reflects a power imbalance particularly within the environment and development sector.

In the third section, we identify the key areas of concern in the “win-win” discourse that is often used to encourage a collaborative and problem-solving approach among various stakeholders to address the pressing issues in business and human rights. We argue that the assumptions embedded in the “win-win” discourse are problematic, in that they focus mainly on the outcomes of developmental agencies and the needs and interests of the private sector, while ignoring or putting at risk those individuals and groups who are most vulnerable to human rights impacts from the actions of corporates.

The final conclusion shows that the mainstreaming of the “win-win” discourse on human rights and business reflects the limitations of the United Nations Guiding Principles on Business and Human Rights (UNGPs) as a governing, non-binding international instrument. It further indicates larger trends within the development sector towards the restriction of the discursive and civic space for alternative discourses on policy change and impact, thereby limiting how corporations can effectively address human rights, and become accountable for human rights violations.

This chapter contends that while it may be a “win” for businesses to show how they have sought compliance

with human rights, burnishing their image while safeguarding their profits, this often comes at the expense of civil society and community actors who question whether, in reality, this approach produces a “win” in terms of genuine human rights outcomes. Even more problematic, this emphasis placed by key stakeholders on the first “win” could be more damaging to human rights in the long-term since the question of who and what represents the second “win” in the “win-win” equation remains ambiguous in these policy discussions so far. But first, how did we get here, and what does all this mean for the protection of human rights?

...the assumptions embedded in the “win-win” discourse are problematic in that they focus mainly on the outcomes of developmental agencies and the needs and interests of the private sector, while ignoring or putting at risk those individuals and groups who are most vulnerable to human rights impacts from the actions of corporates.

How did we get to “win-win”?

Two reference points are embedded within this concept of “win-win”. First, the language frequently refers to policy interventions and outcomes that produce and distribute shared human rights outcomes among governments, the private sector, and communities. This triangular relationship is used to encourage and support multi-stakeholder engagement, dialogue, and participation as necessary conditions for effective and more equitable policymaking processes towards mainstreaming human rights.

Secondly, the win-win language finds resonance in the environmental sector, owing in part to the modern environmental movement around “sustainable development” that emerged after the publication of the

UN-commissioned *Our Common Future* (also known as the Brundtland Report), in 1987 (Brundtland 1987)³³. The concept of sustainable development catalyzed a rethinking of economic growth and proposed that the earth's ecosystems need to be safeguarded to protect the needs of future generations. The international debate about business and human rights, in particular in United Nations fora, has followed a similar blueprint to the sustainable development concept in its increasing focus on the private sector and its responsibilities and roles. This recognition of the responsibility of businesses became intertwined with the notion of sustainability, a notion which corporations have increasingly adopted as standard rhetoric and practice. In 2018, 93 per cent of the world's 250 largest companies now report on the economic, environmental, and social impacts of their corporate activities (United Nations 2018).

Following the endorsement of the UNGPs by the UN Human Rights Council in 2011, the UN Working Group issued a strong recommendation for states to draft, enact, and implement national action plans (NAP) on the UNGPs. The Royal Thai Government accepted a recommendation during its Universal Periodic Review in 2016, becoming the first country in Southeast Asia to introduce the NAP on Business and Human Rights, which is expected to be completed in 2019 (National action Plans on Business and Human Rights 2019). Other countries in the region are expected to follow suit, with multiple multi-stakeholder discussions already underway at the time of writing.

Who is driving the “win-win” discourse?

Amidst an increasingly intense focus placed upon private sector engagement throughout the development sector, multiple actors at different levels are currently driving the “win-win” discourse. As with any constructed discourse, each set of actors has their own interests and political agendas for doing so.

In the environment and development sector, the “win-win” language is often employed in discussions around private sector engagement. For instance, UN Environment promotes business models that use innovative finance mechanisms in order to fulfill three main objectives for sustainable development: protect the

environment through better natural resource management, promote poverty alleviation by providing jobs and livelihood options to local communities, and encourage economic growth, such as providing attractive and viable opportunities for investments that can yield returns (United Nations Environment Programme 2018).

While participating in workshops on business and human rights sponsored by international organizations, we observed the introduction of the “win-win” paradigm as a way to identify an entry point for conflict management, such as over land-based issues involving the private sector, state, and communities. On national platforms, the use of “win-win” was readily found in policy statements with regard to the drafting of National Action Plans on Business and Human Rights. Within ASEAN, we also observed representatives from state governments and international organizations in workshops using the terminology “win-win” in reference to building private-public partnerships to advance the Guiding Principles on Business and Human Rights at the country and regional level.

Non-governmental organizations also articulate a “win-win” discourse in their projects and mandates, including at the local and community level. Organizations in natural resource management increasingly promote activities to engage communities with the private sector as a means to enhance the livelihoods of poor farmers and forest communities by connecting the renewable and sustainable products they produce to markets (RECOFTC 2018, 2014). Environmental organizations focused on conservation and restoration of landscapes project the triple “win-win-win” narrative to encourage more sustainable development and management of natural resources that include measures to strengthen climate adaptation, increase economic productivity, and also improve the livelihoods of those communities who rely on these natural resources. Monitoring and evaluation in these projects demonstrate how these interventions contribute to sustainable development through economic, social, and environmental indicators, which promote a “win-win-win” narrative in alignment with donors’ objectives.

That civil society would articulate a “win-win” in their activities is not so surprising given that win-win is high

on the development aid agendas for key donors of non-governmental organizations in the Asian region. For example, the Swedish International Development Agency (Sida) utilizes “win-win” language in its publications on public-private collaboration towards sustainable development, particularly through poverty alleviation. On public-private partnerships, a Sida publication seeks “... collaboration with partners from the private sector who see the win-win potential in long-term sustainable development” (Swedish International Cooperation Agency 2019). Sida encourages “collaboration with mainly large companies, through joint financing of development projects with a win-win objective; win for development, as well as from a business perspective. Thereby making the engagement sustainable in the long term” (Swedish International Development Cooperation Agency 2019).

Areas of concern within the “win-win” discourse

Driven by multiple actors in the development sector, the “win-win” scenario is based on the assumption that collaboration between businesses, development organizations, and local communities produces shared benefits. In this section, we look in detail at five key concerns underlying this assumption in the environmental field that constrain policy issues and debates in regard to human rights, business, and sustainable development.

The first is the use of a non-conflictual approach based on safeguarding interests in potentially watering down human rights language (and thereby responsibilities and obligations) as well as enabling problematic interpretations of “development” to be carried out by private sectors in “win-win” projects.

The second is a point of contention between CSOs and the private sector: the limited attention given to creating and sustaining trust and incorporating bottom-up perspectives and participation as a basis for partnership.

The third is the reliance on the reputational interests of firms, which limits the scope of the “win-win” approach to larger corporates, as opposed to small and medium

enterprises. This focus further restricts the discussion of risks to only certain types of human rights issues, in effect, those issues perceived as comparatively less controversial or politically less sensitive.

The fourth is the lack of attention to the importance of timing in “win-win” approaches. Interventions sometimes have occurred *after* the violations of human rights have already been committed by the companies or state agencies.

The fifth and last is that the “win-win” approach is a powerful paradigm that may also constitute a potential paradox in development. Our research suggests that the paradigm is pervasive for its practical application to immediate needs, namely to secure the participation and adherence of the private sector to international human rights norms. However, beyond practical needs, we find overall ambivalence on whether this win-win discourse has intrinsic value. Our concern is the discourse is turning out to be far more problematic for the long-term promotion and protection of human rights by non-state actors.

Watering down human rights language

According to our interviews with those who were involved in establishing “win-win” partnerships, they relied on a non-antagonistic approach to business and human rights. One strategy consisted of changing and adapting human rights language into “Sustainable Development Goals (SDG) language,” through which stronger language addressing *rights* was watered down into *common goals or interests*.³⁴ As one employee at a large international organization declared, “There are a lot of people shutting their ears if you use the language of human rights, but, by unpacking the word and using other words early on, then a lot of actors become much less defensive.”³⁵ Indeed throughout the meetings and workshops we attended, we frequently observed stakeholders calling upon broad consensual frameworks, with SDGs being the most salient.

Interviewees from the NGO sector acknowledged the advantage of using this approach, notably to entice the private sector to focus less on contentious reform at least at first. Instead, they leveraged these platforms

as an opportunity for learning and information-sharing at the initial stage before eventually moving at later stages to engaging with business actors on more contentious issues, such as environmental degradation and land rights.³⁶

However, in light of this, we observed that such meetings paradoxically rarely mentioned or referred directly to human rights instruments or frameworks. This omission was flagged by some interviewees who considered that “win-win” programs were diverting attention from existing human rights instruments towards less conflictual and impactful programs. As one interviewee working for a large international development organization on a “win-win approach” declared, the issue with the framing is, “We need to accept that we have all the tools to achieve human rights within business, but we are not using them or using them well enough. For example, in labor inspection, people don’t engage in this. We need to build on the capacity of labor inspectors [to understand human rights approaches].”³⁷ However, when attention is diverted from established instruments, even if for reasons to expedite collaboration, this approach leads to the watering down of the “rights” language.

This effect on human rights is further problematic for a second reason, identified by another interviewer, an activist-scholar working within the field of human rights and business in conservation projects in Southeast Asia.³⁸ The interviewee raised the issue that appealing to businesses based on a broad understanding of common development goals, rather than responsibilities and obligations based on human rights, did not enable businesses to truly question how their potentially problematic view of development itself could lead to human rights violations.

This concern is particularly heightened with regard to the key issue of land tenure and resource rights. One interviewee recalled a case study of a sugar company in Cambodia acquiring land for a plantation, when the head of a private company contended:

“Some people just don’t understand the rule of law, some people think that because their ancestors lived here and they lived there, it’s actually their

land. But other people who are civilized understand that you need to have the law and you need to have the paper documents to say whether or not you are the owner of the land. There has been so much conflict with the local communities and the local communities are just awful, but now, doing corporate responsibility and development projects to them, I think things will be better.”³⁹

This perspective from a private actor draws attention to how land rights have been interpreted within the language and perspective of larger development goals. It illustrates how and the extent to which businesses are able to use through this medium (whether willingly or unwillingly) such development or rights-based programs as a way to push values and discourses associated with development upon communities.

The “watering down” of rights language holds important consequences on the implementation of projects and understanding of businesses. Positing a “win-win” scenario overlooks the disjunction of realities between business actors and people be it laborers, farmers or consumers for whom the human rights language is the key means to respect, protect, and promote their individual rights.

Safeguarding reputations or rights?

The framing of business and human rights within this discourse is an area of concern, as many actors, particularly those from civil society organizations whom we interviewed, do not share this vision of “win-win” as based on business interests. They notably argued that, rather than interests, “win-win” partnerships should be built on (re)gaining the trust of communities by the business actors. The civil society organizations interviewed reported that trust was needed in order to enter into such programs with the business sector and stated that their mistrust of the private sector kept them from entering in partnerships. One issue with the focus on the “win-win” as a means of collaboration is that it recognizes interest as a basis for partnership. In effect, what is sold to the private sector through this language is that their profit margins are safe and can be secured through fulfilling responsibilities to respect human rights.

Trust constitutes a crucial condition that is required for the other actors to be involved in the “win-win” discourse, rather than private sector interests alone. In addition, civil society organizations interviewed not only felt mistrust towards the private sector, they also expressed a degree of skepticism since many do not seem to share the view that businesses engaged in “win-win” with the genuine objective to support and assist communities. In fact, the distrust was so entrenched in some cases that one CSO leader stated explicitly that “Us activists, we do not want the support from businesses.”⁴⁰ Despite this skepticism and reluctance, civil society actors still stressed the issue of inclusion in policy approaches among businesses and states, particularly on issues of labor.

CSOs emphasized the need of rights-based programs to encourage workers, particularly women, to raise their issues and concerns.⁴¹ The issue of inclusiveness, particularly through gender and youth participation, in the approach towards human rights and business has also been raised regarding the UNGPs. While there have been many platforms that engage businesses directly on the issue of human rights (for example, the Responsible Business Forum), interviewees stated that businesses were rarely present in platforms on business and human rights where civil society organizations were invited to, and represented. Indeed, a two-track approach has largely been adopted during the current phase of “multi-stakeholder initiatives,” in which businesses and civil society are engaged with, independently of one another, on the issue of human rights and business through a common broker (such as a non-governmental or international organization). Inclusiveness is not only seen as a human right, but the issue also includes the question of how participation is enabled within such programs; however, the question of what constitutes meaningful inclusion and participation in these multi-stakeholder initiatives are marginalized within the current mainstream “win-win” discourse on human rights and business.

Those international organizations that did engage with businesses directly also recognize the limits in the current discourse on human rights. For instance, despite initial optimism for the project, one interviewee described feeling skepticism once companies quickly

“shut down” when prickly topics were raised in regards to minimum wage or freedom of association.⁴² The interviewee reported working with organizations that purported to adhere to labor standards, but did not allow for the unionization of the workers. Hence, for the interviewee, it was clear that “we need to work out very well at what point do we engage and at what point do we step back.”⁴³ Overall, most interviewees considered that the piecemeal approach of the “win-win” discourse towards human rights was particularly problematic. Instead, they called for a paradigm shift to a more holistic approach, namely one that would require further engagement towards a possible change of philosophy and way of thinking about business, rather than a focus on specific rights that might suit particular interests, whether they be reputational or personal.

By asking interviewees who are involved in “win-win” programs to provide their reasons for what the private sector could gain from HBRA approaches, we found a pattern in justification: the reliance on meeting business interests depends first and foremost on articulating reputational risks that accrue when businesses do not integrate human rights into their operations and activities. Yet, in practice, we found that this narrative around reputational risks places a serious constraint from meaningfully advancing HRBA within these discussions. In these cases, interviewees reported that using the “win-win” framework proved particularly useful. However, when such responsibility was not at stake, the “win-win” discourse was not effective.

Scale is a key constraint

When we asked interviewees from international organizations and civil society organizations about who is, and should be, the target of current development programs on business and human rights, we found a consensus that the focus is overwhelmingly placed on large corporations, with substantially much less interest and discussion currently placed on smaller enterprises. This suggests a potential limitation in scale when determining who, or rather, which type of private actor, benefits from existing multi-stakeholder initiatives on BHR. The UNGPs explicitly state that the responsibility to protect human rights applies to business enterprises of all sizes, even though the capacity

needs of small and medium enterprises (SMEs) should be considered.

When interviewees were asked about the relationship between SMEs and the human rights principles in the UNGPs, the common response was that these SMEs were limited due to their capacity needs, the implicit understanding being that efforts to implement the UNGPs should focus on large corporations due to the extent of their impact on human rights. What a “win-win” would mean for small and medium enterprises is not clear within the mainstream “win-win” discourse that focuses on reputational risks and large corporations as the focus for intervention. Conducting human rights due diligence among smaller enterprises, for instance, may yield a more nuanced understanding of the contextual and mediating factors on the ground that may advance the human rights and business agenda. However, the motivating factors behind these smaller enterprises may rely on better integration into supply chains, rather than reputational costs and risks. Therefore, the current focus on large corporations also reflects a division in the development sector of whether business and human rights should focus of a top-down (the focus at present) or bottom-up approach.

Our interviews revealed that much of the hope, at least within the development sector in Thailand, is that such efforts will “trickle down” to smaller firms, as well as throughout the region. Yet, limited research or evidence is available and often selective, as most claims rely on anecdotal evidence from the region to substantiate that adherence to human rights constitutes a “win” for companies by reducing reputational risks for businesses. Hence the “win-win” discourse remains limited not only in its framing and interpretation, but also in its scope and scale.

Voluntary adherence

A key issue in the intersection of the environment and human rights is that of the controversial issue of land rights especially in cases involving land grabs by companies. On this issue, we noted an important trend in terms of the timing of businesses, especially large businesses’ adoption of human rights-based approaches. Human rights approaches were seen by our inter-

viewees as often problematically adopted only after land and concessions were obtained by companies, for instance, for the establishment of industrial tree plantations. Often, land grabbing, improper use of free and prior consent or using legal loopholes to obtain large pieces of land despite existing legislation, occurred before any commitment to human rights was made. Once the land was obtained, then businesses agreed to enter into human-rights based programs for villages. As one interviewee observed:

“Usually the people will do CSR after the damage is done.... It’s like you just take first and then you ask questions later.... The win-win always comes in later. The community has already lost their livelihood. And so, when the company comes in and clears everything and then proposes a win-win for them to go to school [the company built], then it’s not a win-win as the community has already lost.”⁴⁴

This practice points to the distinct advantage that businesses hold and employ given their resources to decide when and where to invest, often aided by influential private-public partnerships. The “win-win” model depends on the initiative from the private sector, which places a constraint on the types of partnerships and activities that are pursued. Companies with a corporate social responsibility mandate often conduct due diligence and environmental, social, and human rights assessments prior to investment. Companies are then less likely to initiate investment in areas where there have been existing conflicts over land, such as those between communities and the state, due to the high risks involved.⁴⁵ These business practices reveal that the sites where the “win-win” model can be implemented are those where the risks for human rights violations are already low or determined to more manageable by the private sector. However, a “win-win” model is less applicable in sites that are considered more serious in the pre-assessment due to their potential for conflict and human rights-related risks. These standard practices may reflect an unrecognized selection bias among development projects that demonstrate “win-win” outcomes due to the dependence on the businesses’ initiative and discretion over decisions of where and when to invest and engage with human rights in their operational approaches.

Dictating the terms of engagement

That the private sector wields a disproportionate amount of influence in dictating the terms of its engagement with human rights is an issue that is particularly overlooked in both research in this area and programs based on human-rights approaches.

The “win-win” paradigm suggest that this influence can be tempered to an extent if other parties’ needs and interests could be considered in tandem in order to identify solutions that would benefit both the private sector and the communities. However, all interviewees saw this second “win” as impossible to articulate within the discourse of “win-win” due to its focus on the private sector’s interests. This stalemate was often reached when certain types of issues were broached that might harm companies’ profitability. Each time, interviewees reported that “moving discussions beyond companies’ profitability is where the conversation gets stuck.”⁴⁶ This is one of the key limiting aspects of a “win-win” approach to the issue of business and human rights: its inability to reconcile human rights with the bottom line of companies, notably their profits, in a constructive manner.

In the meetings and workshops that we attended, we often witnessed an initial optimistic atmosphere, with many participants from various organizations saying they felt motivated by the potential for public-private partnerships. However, this mood often shifted once the question came up of how much the private sector was willing to compromise and go beyond considerations of profit. The issue is that “win-win” becomes potentially problematic here because it emphasizes finding a point of mutual benefits that will not compromise the for-profit interests of companies. While recognizing the responsibilities of businesses to respect human rights, one interviewee from the private sector emphasized that the return on investment is a fundamental and non-negotiable fact when it considers whether or not to initiate a partnership. In this case the ability of the “win-win” approach to integrate human rights in business beyond the reputational level is to be questioned.

What sort of arrangement can enable the inclusion of human rights first? This question reoccurs when

assessing environmental issues, as the need for human rights to be protected first – as a priority – in many cases at the expense of profit, not as an aside. Most of the interviewees recognized the need to shift focus from “win-win” to “the conversation that has to be had... in order to be a human rights actor you will have to take a few hits in terms of profitability.”⁴⁷ For the most part, the solution has focused on the private sector taking a longer term perspective on their return on investment through increased profitability, and thus sustainability, following adherence to human rights standards and norms. However, under the “win-win” scenario, the decision of how to measure profit, and over how long a timespan, is largely left to the discretion of the private sector to consider and determine.

At a crossroads?

In this chapter, we argued that the notion of a “win-win” is a type of discourse or paradigm that various actors draw upon when articulating the goals, interests, and values underlying business and human rights.

As a discourse, we observed an important paradox that emerged during the course of interviews with these stakeholders: despite the prevalence of the “win-win” discourse, many of those whom we interviewed, particularly those working in development, expressed discomfort or disagreement with the “win-win” mandate. Interestingly, interviewees many times dissociated their position in terms of their work and their personal position on the issue. One interviewee remarked that: “Businesses are ahead of the curve, they have the right speech and right direction. But my personal opinion is that there is a dilemma, which ones are doing it for PR and which ones are doing it to clear up the act.”⁴⁸ Another interviewee declared, “My perspective is that when it comes to businesses in Bangkok, I tend to be quite suspicious in general”⁴⁹; while another admitted, “People are not comfortable with this.”⁵⁰ The personal dilemmas and discomfort on the part of many development actors is worth keeping in mind amidst the current excitement around business and human rights, particularly in Thailand. This paradox raises the question of why the “win-win” discourse continues to be widely used despite these reservations, and what

might this represent for the policy discourses around business and human rights going forward?

We suggest that the answer necessitates addressing the crucial issue of whose interests are represented in, and by, the win-win discourse? In other words, who really wins in the long-term? Our view is that the win is rarely for human rights.

It is also worth noting that the role of the state is noticeably underplayed and largely set aside from these “win-win” formulations. Importantly, this discourse is one that has emerged at a time when many development organizations require, and find themselves embedded in a competitive environment, for private sector funds. The emphasis placed on shared benefits, namely those accrued to the private sector, serves as a precursor to a key issue that will determine the landscape of business and human rights in the development sector, namely how will the costs be distributed among businesses vis-à-vis governments, civil society organizations, international organizations, and others? The private sector is identified as the instrumental actor in cost-sharing, hence the reason why the “win-win” discourse resonates strongly with the desired goals of securing buy-in from the private sector into financing business and human rights programs.

In light of this trend, a key condition identified throughout our chapter, and which warrants further study, is the imbalanced power dynamics within the development sector and in particular, the vested interests in securing a position in light of external organizational pressure for private funds.⁵¹ These embedded interests will likely continue to deeply influence and guide the direction of policy discourses on business and human rights in the development sector going forward. Whether this is a healthy trend for the protection of human rights needs to be addressed.

Conclusion

While private sector engagement is not new, the forms of engagement have significantly increased in size and scope, particularly in financing development. The mainstream “win-win” discourse is embedded within current development politics, and while its proponents justify its usage as a way to identify a starting point

for multi-stakeholder engagement, we flag a potential danger in that the current model caters specifically to the positions, interests, and needs of the private sector. The first “win” is clearly defined as those benefits afforded to businesses which buy into the UN-endorsed mandate of the corporate responsibility to respect human rights. Yet, this discourse reveals a number of constraints that draw into question the second “win” in the model. The non-binding nature of UNGPs is reflected in the discursive politics of “win-win”, in which the focus is on securing the engagement of the private sector to not only adopt but also integrate human rights-based approaches in their operations. If so, the “win-win” model may be substantively more meaningful to those individuals and communities whose human rights are at risk if it were to be based on a legally binding convention on business and human rights. The legal limitations of the UNGPs explain in part why the “win-win” language is used so extensively among professionals in development projects and programs as an instrumental or strategic means to encourage multi-stakeholder engagement with the private sector on the issue of human rights.

However, mainstream discourses in sustainable development are based on narratives of winning and winners, and therefore risk giving the false impression that there is little to lose or that no one really loses. Furthermore, the mainstream “win-win” discourse may result in an opportunity lost: to develop a more nuanced framework to assess the relationship between human rights and business, and possibly develop alternative approaches, for instance, through using language of comprehensive environmental, economic, and social justice. Unwittingly adopting the “win-win” language may restrict the discursive space for criticism and the raising of concerns, particularly from less powerful actors who do not see their perspectives, needs, and rights adequately captured in the “win-win” formula.

The authors would like to recommend five areas for further research to widen the discursive space on business and human rights for the future:

1. Initiatives on business and human rights should focus on trust and the (re)building of genuine and evidence-based trust between companies

and civil society organizations, and the communities with whom they work.

2. Development actors should focus more of their attention to the tension between profit and human rights. Discussions should move beyond that of profitability towards a more holistic change in the philosophy of projects and a more integrated rights-based approach.
3. Discussions on business and human rights among non-governmental and community-based organizations must decide the types of private sector engagement they are willing to partake in, and also identify the points at which they do not engage. They should establish and articulate clearly through their rules and procedures the minimum standards for engagement.
4. Industry-wide approaches are recommended to involve and more meaningfully engage with smaller enterprises, such that the discourse on business and human rights move beyond reputational risks alone as a deciding factor for partnerships on human rights and business. The relationship between scale of enterprise and the types of benefits accrued through public-private partnerships requires further study.
5. More policy research should focus on the variable timing in these “win-win” programs and to better understand at which point in time an intervention should take place to ensure the respect for human rights among businesses.

Our research indicates that even amidst the mainstreaming of a “win-win” discourse, various actors in the development sector are still grappling with the discourse on business and human rights and what it means for sustainable development. At the discursive level, a “new era” on business and human rights ultimately reflects the tensions and frictions that exist in negotiating and reconsidering the relationship between rights-based approaches, private sector engagement, and sustainable development objectives.

References

Dzyzek, John S. (2013). *The Politics of the Earth: Environmental Discourses*. New York: Oxford University Press.

National Action Plans on Business and Human Rights. 2019. "Thailand." www.globalnaps.org. Accessible at: <https://globalnaps.org/country/thailand/> (accessed on January 10, 2019).

RECOFTC – the Center for People and Forests. 2014. "Harvesting bamboo as a renewable energy source and improving livelihoods - a win-win solution for farmers in Lao PDR." www.recoftc.org. Accessible at: <https://www.recoftc.org/stories/harvesting-bamboo-renewable-energy-source-and-improving-livelihoods-%E2%80%93-win-win-solution>" (accessed January 10, 2019).

RECOFTC – the Center for People and Forests. 2018. "FLOURISH hosts national level inception workshop." www.recoftc.org. Accessible at: <https://www.recoftc.org/projects/flourish/news/flourish-hosts-national-level-inception-workshop>" (accessed January 10, 2019).

Swedish International Development Cooperation Agency. 2019. "Public Private Development Partnerships: Sida's collaboration with the private sector." www.sida.se. Accessible at: <https://www.sida.se/contentassets/eafd0d4e0e8142ab8dea74470e29bf8f/15279.pdf> (accessed January 10, 2019).

Swedish International Development Cooperation Agency. 2019. "Collaboration the private sector." www.sida.se. Accessible at: <https://www.sida.se/contentassets/d35192b8fa874920a9627a15649bb81f/82f57b9a-ecf0-414f-8c58-7c731b567242.pdf> (accessed January 10, 2019).

United Nations. (2018). *The Sustainable Development Goals Report 2018*. New York: United Nations.

United Nations Environment Programme (UNEP). 2019. "Doing rubber differently: a win-win solution for people and planet." web.unep.org. Accessible at: <http://web.unep.org/environmentassembly/doing-rubber-differently-win-win-solution-people-and-planet> (Accessed January 10, 2019).

Seizen-setsu and the inadequacy of voluntary frameworks

Prof. Saul J. Takahashi

Saul J. Takahashi was the Japan Representative for the Business & Human Rights Resource Centre from June 2014 through January 2019, and is now Professor of Human Rights and Peace Studies at Osaka Jogakuin University. He has held positions at Amnesty International in Tokyo and in London and at the UN Office on Drugs and Crime, and from March 2009 through May 2014 was Deputy Head of Office of the Office of the UN High Commissioner for Human Rights in Occupied Palestine. Takahashi holds an LL.M. in international human rights law from the University of Essex and is the author of several books, including *Civil and Political Rights in Japan: a Tribute to Sir Nigel Rodley* (Routledge), *Human Rights and Drug Control: the False Dichotomy* (Hart Publishing), *Human Rights, Human Security, and State Security: the Intersection* (Praeger Publishing, ed.), and *Paresuchina-jin ha kurushimi tudokeru: naze kokuren ha kaiketsu dekinai no ka* [The Palestinian People Continue to Suffer: Why the UN Can't Solve the Problem] (Gendai Jinbun-sha).

Introduction

One of the dichotomies in classical Chinese philosophy is that between what in Japanese we call *seizen-setsu*, the Confucian idea that human beings are inherently good, and *seiaku-setsu*, the opposing belief that human beings are inherently bad. According to *seizen-setsu*, people are fundamentally moral beings, and, left to their own devices, will generally engage in moral conduct. In the world of *seiaku-setsu*, on the other hand, human beings are evil, malicious, and immoral, and therefore require constraints and the prospect of punishments to prevent life from being nasty, brutish, and short. The two philosophies are of course far more complex in the originals, but the simplistic way in which they are taught in the rote learning environment of Japanese schools means that is how they are understood by most Japanese.

Generally speaking, most Japanese tend to subscribe to *seizen-setsu* - they like to believe that people are essentially good and moral creatures, and that they will incline towards moral actions. Contrary to this notion, which is understood by many Japanese as a distinctly Japanese (or Asian, depending on the context) frame of mind, *seiaku-setsu* is presented as foreign - more specifically, Western. A world where people can be assumed to be bad requires formal policies and frameworks, clear legal standards, and civil or criminal sanctions in case of a dereliction of duty. *Seizen-setsu*, on the other hand, assumes people are naturally inclined to do the right thing - no formal standards are

required. Most cases of deviant activity are simple misunderstandings, and can be dealt with not through the confrontational naming and shaming that foreign (Western) actors indulge in, but through a little bit of gentle prodding from persons higher in the social hierarchy.

The two terms - and the general philosophies perceived to be behind them - crop up from time to time in the business and human rights discourse in Japan (and elsewhere in other forms), and it will surprise no one that people in the corporate sector are quick to put forward the veracity of *seizen-setsu*, and to stress their good faith. According to this narrative, people should not assume companies are doing wrong - of course companies are responsible citizens, and take human rights extremely seriously. Even if, at times, they are less than transparent in doing so, that is from mere humility - it should not be interpreted as insincerity. And if companies have been shown to have been complicit in rights violations, there were of course no bad intentions, just miscommunications and mix-ups. The public should be more trusting, so the argument goes - after all, we are all inherently good, and that applies equally to companies.

Of course, applying a concept from the fourth century BCE regarding the morality of individuals to modern organisations such as a government or a corporation is somewhat misguided, if not downright disingenuous. Whether human beings are inherently trustworthy is debatable, but the modern state is built on institutions,

and institutional safeguards. In human rights (and in democratic societies in general) we are wary of assuming that people in power are acting benevolently. In the human rights arena, we demand checks and balances, and structures for transparency and accountability, because we believe that without them power will be abused.

Herein lies the fundamental problem with a regime based on voluntary frameworks. By definition, voluntary frameworks rely on the good will of companies - good will that, all too often, is sorely lacking. Some, perhaps even many, individuals within companies may often be well intended, and wish genuinely to improve their company's human rights performance. However, it is surely not controversial to assert that, in the vast majority of companies, the corporate culture and the mindsets of the true decision makers remain at best indifferent to human rights considerations. Put bluntly, most persons in the corporate world simply do not care about human rights, because it has not been part of their socialization, and it is not something they need to be concerned about in their daily lives.

The 'bottom line' argument and why it fails

To change this, many advocates attempt to mount what is commonly known as the 'business case' (or the 'bottom line') argument - that respecting human rights, and showing the public that the company respects human rights, results in more profits and is therefore good for business. The problem with this argument is that it is simply not proven, and in the absence of sufficient concrete evidence, it is difficult to convince companies. There will surely come the day when this will not have to be proven: large number of companies will actively promote themselves as 'good on human rights', like e.g. Apple. In the same way that it is already difficult to find a product that is not advertised as 'environmentally friendly', companies will compete with one another to promote their human rights credentials. However, the reality is that we are simply not there yet, and to most people in the corporate sector, who need to justify their every move in dollars and cents, 'not yet proven' means 'non existent'.

A review of the research on business and human rights shows that concrete and quantified evidence of corporate losses in cases where human rights issues had come to light are few and far between. This is perhaps unsurprising, given that companies are generally opaque regarding their finances - regardless, it makes it practically impossible to show a particular company that they risk damaging their balance sheet unless they do A, B, and C to improve their human rights performance. Most information that is publicly available tends to be regarding large scale development projects - for example, Shell has stated that, through extensive rights-based community engagement during the Malampaya pipeline project in the Philippines, it managed to save from USD 50 to 72 million. (World Resources Institute 2007: 26). Meridian Gold, on the other hand, failed to engage with the community when it attempted to open the Esquel mine, and after some belated, failed attempts, was forced to abandon the project. This led to a loss of over USD 346 million, and a considerable decline in share price compared with the industry average. (World Resources Institute 2007: 30, 31) In addition, "[as well as] these quantifiable balance sheet and stock valuation costs, Meridian endured significant unquantifiable management and reputation costs. ... The Esquel controversy has become the focus of significant attention throughout Argentina and internationally." (World Resources Institute 2007: 32)

As strong and detailed as these examples may be, though, it is the experience of this author that they fall on deaf ears when presented to corporate people from sectors outside of resource extraction, most of whom want to hear about issues more directly affecting their particular area of business (e.g. factories or farms in the supply chain). CSR people with the best of intentions commonly state they need examples from exactly the same sector and exactly the same country, in order to convince skeptical people within their company - in most cases an impossible task. Even companies engaged in resource development who hear the above examples are often able to find countless reasons why their current project is different, allowing them to remain complacent.

The 'business case' argument, in other words, is destined to fail, since advocates simply do not have access

to the kind of information that is required to substantiate it (at least not in the eyes of most corporate people). Advocates like to think that the righteousness of the argument is obvious, and in many ways it is common sense that, for example, operating on the basis of community or worker consent results in less costs. Nevertheless, companies are quick to see that the mechanisms to ensure human rights are respected, including effective processes for consultation with stakeholders, are also not cost free – they take time and staff resources to implement. And insofar as reputational risk is not easily quantified, it can easily be ignored - or at least underestimated.

Some advocates seem to believe that the only way to ensure that companies treat human rights seriously is if they are convinced it is in their best interests. However, the principled argument is precisely the one that we have been using against governments since the beginning of the human rights movement – in general we demand that governments comply with their human rights obligations for the sake of the principle, not for any financial or other benefit they may get from doing so. There is no intrinsic reason that companies should be treated differently.

In the absence of an argument that can convince companies that respecting human rights would be good for their profits, it is submitted that the only way forward for advocates is to return to the principled position, namely that companies should respect human rights because they have an obligation to. In other words, rather than 'you should respect human rights because it will be better for you', the argument should be 'you should respect human rights simply because you should, whether it seems better for you in the short

term or not'. Some advocates seem to believe that the only way to ensure that companies treat human rights seriously is if they are convinced it is in their best interests. However, the principled argument is precisely the one that we have been using against governments since the beginning of the human rights movement – in general we demand that governments comply with their human rights obligations for the sake of the principle, not for any financial or other benefit they may get from doing so. There is no intrinsic reason that companies should be treated differently.

There is of course a legal reason that companies are treated differently from governments – governments have direct obligations under international law, whereas companies do not. This is the main reason that the current legal framework for business and human rights, in particular the UN Guiding Principles on Business and Human rights, talks not about the obligations of companies to protect human rights, but about corporate 'responsibilities' to 'respect' human rights. The responsibilities of companies include, inter alia, the adoption of human rights policies, conducting human rights due diligence so as not to be complicit in human rights violations, and the remedying of any violations that do take place. These responsibilities are accepted (at least in theory) by more and more companies globally, but the Guiding Principles remain a call for voluntary good conduct, not a legal requirement.

On the other hand, states, as direct duty-bearers under international law, can and probably should be saddled with a clear legal obligation to regulate companies, and to require them, under pain of penalty, to respect human rights. States already have obligations to ensure that human rights are respected by private actors (including companies) within their jurisdictions. However, the question remains as to whether the more concrete and specific business-focused provisions of the Guiding Principles should be translated into binding commitments, through a convention specifically on business and human rights. Most powerful states and large businesses scoff at this idea, arguing that the wide range of economic activity that businesses engage in does not lend itself to rigid, 'one size fits all' type regulation. Besides having been advanced in one form or another to oppose nearly every type of regulation since

the beginning of capitalist enterprise, this argument also fails to take into account the international labour standards adopted under the rubric of the International Labour Organization, which go into such minutiae as the length of working hours and the number of paid holidays.

It is important to recall that the Guiding Principles are non-binding not for principled reasons, but political ones – powerful states simply refused to contemplate a binding treaty on business and human rights. This may change, as there is a renewed initiative at the UN Human Rights Council to prepare a binding treaty. Perhaps more importantly, in recent years, several states (including advanced economies where many transnational corporations are headquartered) have adopted business and human rights legislation containing varying degrees of compulsion. This may suggest an emerging recognition that relying purely on the voluntary goodwill of companies is not adequate – binding measures are necessary to ensure companies respect human rights.

The failure of voluntary schemes in Japan

Japan is one case of a country where the failure of the voluntary approach has been manifest. For example, government efforts against the longstanding problem of *karoshi*, or death from overwork, have focused on non-binding goals and voluntary incentive schemes. The first law specifically on this subject, adopted in 2014, contained no binding measures, and even attempted at diffusing responsibility for *karoshi*: the law requires companies only to “endeavor to cooperate with the State and local public entities in promoting measures to prevent *karoshi*”, with the general public also required to “be aware of the importance of preventing *karoshi* ...and endeavor to deepen their interest and understanding”. The only obligation stipulated in the law is for the government to submit an annual report to parliament. A voluntary scheme awarding certification for companies that ostensibly provided for good life-work balance was subject to widespread criticism when it came to light that Dentsu, the employer of a widely publicized *karoshi* case in 2016, had received the certification twice in the preceding years. (Shimbun Akahata 2016) Unsurprisingly, the law

has been ineffective, with the numbers of recognised *karoshi* cases remaining stable since its adoption. In June 2018, the Japanese parliament adopted a law that, for the first time, not only establishes a clear limit to overtime but also provides for criminal penalties for offending supervisors. Though there has been heavy criticism that the overtime limit stipulated in the law is far too high – 100 hours a month, exactly the ‘*karoshi* line’ used as a guideline by the government (see e.g. Tokyo Shimbun 2018) – the fact that punishment has become a possibility is arguably a tacit admission that the current approach has not been effective. The provisions will come into force in April 2019, and only time will tell how strictly they will be enforced.

Regulation of the import of timber also has centred on voluntary schemes, and has been ineffective. Japan is the only country in the G7 not to explicitly outlaw the import of illegal timber, and Global Witness estimates that as much as 12 percent of imported timber may have been illegally felled, raising considerable concerns regarding the environment and the protection of indigenous rights in the Sarawak region of Malaysia, where most of the timber originates. (Global Witness 2016: 5, 6) A new law adopted shortly after international criticism of the lack of government measures remains non-binding. Government guidelines on the provisions of the law are vague, make no mention of human rights, and seemingly allow nearly any document as proof that particular timber is legal. (Rinya-cho 2017)

Women’s rights in the workplace is another major area where voluntary approaches in Japan have proven inadequate. The first law prohibiting discrimination against women in the workplace was adopted in 1985, upon ratification of the Convention on the Elimination of Discrimination against Women. Though the law prohibits certain, narrowly defined categories of discriminatory actions, there are no penalties for non-compliance. Victims can use the law as a basis for filing a civil suit against a company, but this of course depends on the victim having the emotional and financial means to do so.

More than thirty years after the 1985 law, Japan remains near, or at, the bottom of the Organization for Economic Cooperation and Development (OECD) with regard to nearly every relevant indicator. Only 13.0

percent of managerial positions in the private sector in Japan are held by women, with the 43.4 percent held by women in the United States, 36.0 percent in the United Kingdom, and 34.2 percent in Singapore. (Naikaku-fu Danjo Kyodo Sankaku-kyoku 2018). Only 3.4 percent of corporate board seats in Japan are held by women (Naikaku-fu Danjo Kyodo Sankaku-kyoku 2018), as compared to between 10 and 20 percent in most other OECD countries. (International Labour Office 2015: 11) The wage gap between men and women in Japan was 25.7 percent in 2015, nearly double the OECD average. (Organization for Economic Cooperation and Development 2018)

One 2016 government survey showed that “nearly a third of Japanese women have been subjected to sexual harassment at the workplace, including inappropriate touching and unwarranted advances. Nearly two thirds did not make any complaint about the harassment, either formal or informal, and approximately one in ten who did complain were penalized for having done so, including suffering demotion. In addition, over twenty percent of Japanese women reported suffering from pregnancy discrimination.” (Business and Human Rights Resource Centre 2016) Though Japanese women ostensibly have the right to paid maternity leave, they were routinely subject to demotion upon return, a practice not recognized as unlawful until a Supreme Court ruling in 2014. (Business and Human Rights Resource Centre 2015)

A new law adopted in 2015 requires companies with more than 300 employees to submit action plans on improving the position of women at the workplace. The action plans are published by the government, and while there are no penalties for non-compliance, the law states that companies that show particularly effective measures may apply for special certification that would afford a priority status when bidding for public contracts. (Article 9) However, the number of companies that have pursued certification appears to be small, and the action plans of even certified companies rarely go over one side of a page in bulleted text format. (Kosei Roudo-sho 2018)

Conclusion

None of the above is to argue that voluntary schemes can never be effective. Industry specific standards can, and often do, provide specific guidance tailored for the human rights issues prevalent in that industry, and are useful if taken seriously by companies. The UN Guiding Principles have been adopted by a large number of companies worldwide, and have given rise to a large number of initiatives (such as the Reporting Framework and the Corporate Human Rights Benchmark) to help companies improve their record in human rights. Whether all of this has led to true and lasting change “on the ground” is debatable, but the large number of human rights policies and due diligence frameworks adopted by companies can and will be important steps.

It is the contention of this author, however, that voluntary schemes are by themselves not enough. Philosophical debates about human nature aside, it cannot be taken for granted that companies will respect human rights without being compelled by outside actors. Pressure from NGOs and other civil society actors may push companies in the right direction, but this pressure can rarely be either comprehensive (in the sense that not every major company can be targeted) or sustained for a long period of time. The only way to ensure that companies comply with their responsibilities to protect human rights is through a binding legal framework, with clear sanctions for non-compliance. Relying on the good will of companies, or on an expectation that companies will somehow recognise that human rights are ‘good for business’, will never truly be successful – the incentives for companies to ignore human rights are simply too great. Legal obligations and strict enforcement are vital on the national level, and arguably at the international level as well - for without international standards, companies will continue engage in a ‘race to the bottom’, relocating to countries where human rights ‘costs’ are low. A concerted international approach, whereby states are obligated to ensure that their companies operate in accordance with human rights, is called for. It is hoped that the new binding treaty will provide a basis for such an approach.

References

- Business and Human Rights Resource Centre. (2016) 'Japan: Government survey: one third of women suffer sexual harassment'. <https://www.business-humanrights.org/en/japan-government-survey-one-third-of-women-suffer-sexual-harassment> (last viewed on 28 May 2018).
- Business and Human Rights Resource Centre. (2015) 'Japan: Supreme Court rules against demotion of hospital worker on account of pregnancy'. <https://www.business-humanrights.org/en/japan-supreme-court-rules-against-demotion-of-hospital-worker-on-account-of-pregnancy> (last viewed on 28 May 2018).
- Global Witness. (2016) *Willful Ignorance: how Japan's voluntary approach is failing to stop the trade in illegal timber*, 2016, London.
- International Labour Office. (2015) *Women in Business and Management: Gaining Momentum*, International Labour Office, Geneva.
- Kosei Roudou-sho [Health and Labour Ministry]. (2018) Josei no katsuyaku suishin kigyō de-ta-be-su [Database of companies on empowerment of women], <http://positive-ryouritsu.mhlw.go.jp/positivedb/> (last viewed on 31 May 2018)
- Naikaku-fu Danjo Kyodo Sankaku-kyoku [Cabinet Office, Gender Equality Bureau]. (2018) Danjo kyokudo sankaku hakusho heisei 29nendo [White paper on gender equality, 2017]. http://www.gender.go.jp/about_danjo/whitepaper/h29/zentai/index.html#pdf (last viewed on 28 May 2018).
- Organisation for Economic Cooperation and Development: OECD Data, Hours worked. <https://data.oecd.org/emp/hours-worked.htm> (last viewed on 28 May 2018).
- Rinya-cho [Forestry Agency]. (2017) 'Mokuzai kanren jigyou-sha no gouhou bassai mokuzaitou no rayon no kakuho ni kansuru handan no kijun to narubeki jikou wo sadameru shourei [Ministry order for timber companies regarding standards for decision making on legal timber etc.], 23 May 2017.
- Shimbun Akahata. (2016) 'Denstu wo "jitan kigyō" nintei, 07, 13, 15 kourou-shou ihou shiri-tsutsu [Ministry of health and welfare recognized Dentsu as "low overtime" in 07, 13 and 15, knowing illegal practices], 26 October 2016.
- Tokyo Shimbun. (2018) 'Bassoku tsuki zangyou kitei, jitsugen shita ga... karoushi rain younin [Finally an overtime limit with penalties, but... accepting the karoshi line'], 30 June 2018.
- World Resources Institute. (2007) 'Development without Conflict: The Business Case for Community Consent', Washington DC.

Managerialism in Business and Rights: Lessons on the social impacts of a collaborative Human Rights Impact Assessment of a contested mine in Chile

Dr. Rajiv Maher

Rajiv Maher has a PhD in Management from Cranfield University. He is currently a Research Fellow at Trinity College Dublin funded by the European Commission's Marie Curie Individual Fellowship 707485. Rajiv is also external lecturer at Copenhagen Business School and Paris-Dauphine University. Rajiv's research interests are at the intersections of megaprojects, ecology, community autonomy, community resistance, corporate social responsibility and human rights and development standards.

Introduction

In this chapter I aim to critically discuss the burgeoning business and human rights movement from a perspective of managerialism offered by Critical Management Studies (CMS) to illuminate the managerial underpinning of the UN Guiding Principles for Business and Human Rights (UNGPs), and in particular to the core concept of due diligence that falls within Pillar II – the corporate responsibility to respect. Managerialism considers itself as a neutral, technical and pragmatic solution-focused science (Cooke, 2003) essentially concerned about control.

A key tool for conducting business due diligence for human rights respect is that of Human Rights Impact Assessments (HRIAs), which are highly technicalized and decontextualized by their formulaic often closed-question questionnaires to enable a more efficient 'controlling' of human rights impacts. As a response to criticisms of the corporate dominance of HRIAs, some have optimistically suggested the importance of joint or co-ownership (Tamir and Zoen, 2017) or collaborative HRIAs (Columbia Center on Sustainable Investment et al., 2017) between companies and affected rightsholders.

Drawing from two HRIAs conducted in tandem (one collaborative the other community-led) at the Huasco Valley in Chile I discuss their implications with regards to their (in)ability to address the existing struggles of communities in their legitimate right to self-determi-

nation and pre-existing conflicts. I also provide reflections on the impact of HRIAs on community cohesion. Overall, I argue that non-community led HRIA are blind to power asymmetries between business and communities. I round off the chapter by drawing key lessons from knowledge and practice gleaned from the two very different HRIAs conducted simultaneously. In the following section I provide an outline from CMS literature on managerialism within development and participation.

Business and Human Rights from the lens of Managerialism

The UNGPs, understand due diligence as a risk management task indeed "risk management was viewed as the 'foundation' of corporate responsibility and access to effective remedy" (Fasterling, 2017: p.227) throughout the process UNGPs process, led by Jon Ruggie. Essential human rights due diligence within pillar II of the UNGPs consists of a "managerial process" (Fasterling, 2017). The concept of managerialism is underpinned by the unquestioned acceptance of science and management as neutral (Grey, 1996; Dar, 2008). This political neutrality makes management more attractive to an array of fields. More recent management practices such as business ethics or Corporate Social Responsibility (CSR) reflect an incursion of managerialization into the ethical domain (Grey, 1996). Managerialism's self-portrayal as a neutral, technical and pragmatic solution-focused masks power asymmetries and its maintenance of these (Cooke, 2003).

The idea of control sits at the heart of managerialism, which is fueled by the assumption that certified professionals are needed to facilitate social progress (Parker, 2002) and this requires greater control of the natural world and of human beings. Managerialism's prime objective is to achieve total control not only of workers inside managerial regimes, but in society (Klikauer, 2015: p.1114). Managerialism thwarts real social change by "converting every social problem into a technical problem that can be managed" (Klikauer, 2015: p.1111). Managerialism spans its ideology as far as it can, including well within BHR in a way that resembles the Habermasian concept of 'colonization of the lifeworld.' Managerialism has its roots firmly within a western Euro-American capitalist way of thinking and seeing the world, especially the notion of time. In more practical terms, managerialism is reflected by the popular adage used by consultants of "what gets measured gets managed."

CMS scholars have also questioned the managerialization of development that has been occurring since the 1990's. In particular, the "technicization" of development is enacted by the reliance on checklists, forms, and procedures that formalize the top-down process of development interventions (Srinivas, 2009). One significant checklist, key to BHR is the Human Rights Compliance Assessment (HRCA developed by the Danish Institute for Human Rights amongst others).⁵² According to critical development studies thinkers such development tools, including those focused around community participation, though highly praised by mainstream development actors, tend to contribute to the dominance of experts, enhancing their power over 'community participants' (Cooke, 2003; Hickey & Mohan, 2005; Kothari, 2005). Ironically, these participatory methods, despite their claims, appear to be based on the same principles of control as managerialism (Srinivas, 2009). Consequently, modern forms of management "redefine the meanings of emancipation and autonomy through shifting the locus of control from hierarchies to employees, or even beneficiaries and stakeholders. But control, nevertheless, is the guiding principle in constructing notions of manageability and its associated promises of progress". (Dar, 2008: p.106).

The notion of participation has not gone unnoticed by the UNGPs. Terms closely related to participation are mentioned multiple times within the due diligence section of pillar II in the 'Interpretative Guide to the UNGPs', the words 'stakeholder engagement' appear 21 times and 'consultation' 11 times. Stakeholder consultation and engagement by business with rightsholders are seen as key steps in preventing the infringement of human rights by business undertakings. The interpretative guide also recommends that businesses engage and consult with rightsholders via an independent partner, often a Non-Governmental Organization (NGO) or expert consultant.

Nonetheless, as argued from the CMS literature such external actors within international development can actually suppress the role of grassroots-based actors, including social movements (Srinivas, 2009). This sidelining of grassroots-based and social movement organizations can also be depoliticizing, hence imposing administration over politics and service delivery over advocacy in developmental initiatives (Srinivas, 2009). In the work by Maher (2018) it was discovered how Antofagasta Minerals multinational mining corporation reverted a supreme court order to demolish its large tailings dam located 8km from the village of Caimanes, Chile. The corporation achieved this via intense instances of dialogue and engagement together with an NGO. It was a grassroots community movement from Caimanes itself that had fought for years for the removal of the dam due to the devastation it could cause if bursting and due to its impact to local water sources. At the start of the dialogue process in September 2015 the corporation offered around US\$ 42,000 to each family, a multi-million dollar local development fund and an approximate US\$ 4.3m payment to the community movement's lawyers, should they persuade over 70% of the community to vote in favour of the deal and desist from pursuing the enforcement of the supreme court order to demolish the dam (Maher, 2018). Within a year, after failing to achieve 70% of votes at the local referendum the former community lawyers now acting on behalf of the company managed to convince many more residents to sign the agreement, visiting homes one by one.

We should therefore ask whether the technicized and managerialistic nature of doing development and BHR can be sufficiently sensitive to questions of knowledge, ethics, and power. As posed by (Srinivas, 2009) “to what extent can staff trained in tool kits, techniques, and standard procedures facilitate complex social outcomes? Do such tools equip managers to understand better the clients served? Do they sensitize them to how their actions can feed into local politics and patterns of social change?” (p. 622).

Besides critiquing the BHR movement from a lens of managerialism, it is imperative to state the main non-normative driving forces behind. The idea of legitimacy is core to the existence and advocacy of the UNGPs as soft non-binding law. The UNGPs deployed the concept of the Social Licence to Operate (SLO) in order to provide substantial arguments for businesses to respect human rights. Buhmann (2016) provides details of how, throughout the UNGPs process the SLO was utilized to strengthen their appeal. A SLO refers to the local acceptance of a business or its projects, and therefore relates to legitimacy and serves as a fundamental business case especially for extractives actors. Fasterling (2017) presents further details of an array of BHR related initiatives and studies that “contend that human rights due diligence could result in lower costs and higher profits for the corporation” (p.233). In sum, in this section I have discussed the central tenets of managerialism as being around social control via the removal of any viable alternatives to the current dominant neo-liberal model across the world.

Managerialism within the development sector and community participation in particular had led to a further marginalizing of dissent and non-conformist voices, whilst cementing the power of hegemonic private sector actors. BHR and its key due diligence concept that places dialogue and participation with rightsholders at its core has also been shown to be colonized by managerialism and technicization. This includes the use of checklists, compliance audits, and project management that converts and de-contextualizes BHR tasks into ‘man hours’ amongst others. However, this seems less surprising when we learn that the UNGPs and BHR in general have been driven and orchestrated by the instrumental arguments of the SLO or the

business case of doing human rights. Business actors require the local acceptance of their projects and the demonstration of ‘human rights respect’ can facilitate this SLO. Certain actors within BHR have made efforts to address the managerialistic type critique that companies are blind to power asymmetries when doing their due diligence or HRIAs. In recent years the concept of a joint HRIA between company and affected rightsholders has been promoted as the antidote to the limitations of corporate and community-led HRIAs. The following section outlines collaborative and community-led HRIAs and then illustrates them with a real case of each type of HRIA from the same territory in Chile.

BHR and its key due diligence concept that places dialogue and participation with rightsholders at its core has also been shown to be colonized by managerialism and technicization. This includes the use of checklists, compliance audits, and project management that converts and de-contextualizes BHR tasks into ‘man hours’ amongst others. However, this seems less surprising when we learn that the UNGPs and BHR in general have been driven and orchestrated by the instrumental arguments of the SLO or the business case of doing human rights. Business actors require the local acceptance of their projects and the demonstration of ‘human rights respect’ can facilitate this SLO.

HRIAs – Collaborative Vs Community led

Actors within BHR have taken note of criticisms levelled at its managerialistic approach. Publications by authors including the Columbia Center on Sustainable Investment et al, (2017); Tamir and Zoen, (2017)

propel the idea of collaborative HRIAs as the solution to overcoming power disparities between corporations and rightsholders in order to obtain corporate respect for human rights. These publications follow the line of logic that corporate and community-led HRIAs can lead to suspicions around their results. A collaborative HRIA is defined as one that “seeks to bring project-affected people, a company, and other relevant stakeholders together to jointly design and implement an assessment...” (Columbia Center on Sustainable Investment et al, 2017 p.7). The aforementioned study stresses the potential benefits of a collaborative HRIA to gaining a SLO by way of reducing “the risk of social conflicts and associated financial and reputational costs.” (p.11). Furthermore, a collaborative approach to HRIAs can help offset power asymmetries in terms of knowledge since it “creates a mechanism for collaboration and communication between key stakeholders. This can minimize knowledge asymmetries, contribute to a deeper understanding of each stakeholder’s perspective and priorities, help to build trust, and result in more effective action plans to address a project’s human rights impacts” (p.12). The report by the Columbia Center on Sustainable Investment et al., (2017) stresses the importance of an “equitable” governance structure in ensuring “that the process does not replicate or exacerbate existing power imbalances between stakeholders.” (p.75). The report also acknowledges the vital issue of internal community divisions and opposition to projects that are to be assessed under the sub-sections of ‘when will HRIA’s be appropriate’ and ‘characteristics of project-affected people.’ Unfortunately, the wording chosen by the authors of the report remains vague and unclear as to whether a collaborative HRIA should or should not go ahead under conditions of internal community fractions and large opposition to the proposed project. For example the report states the “suitability of a collaborative HRIA depends on various factors, including specifics related to the project or operation being assessed, the characteristics of participating stakeholders and the pre-existing relationships between them, and the political context... Factors concerning project-affected people include the extent to which internal divisions exist, whether project-affected people uncompromisingly oppose the project...” (p.8). Fundamentally the authors of the report provide no specific advice as to whether a collaborative HRIA

should or should not take place under these conditions of internal conflict and opposition to a project, meaning companies may force through such a collaborative HRIA process nonetheless, in pursuit of legitimizing its project (with a HRIA). The report states that to date no collaborative HRIA has taken place, while this may be true with regards to any process having referenced the report, HRIAs have indeed been conducted from a similar collaborative approach. In the following section I provide a brief description of one such process that took place by Barrick Gold in the Huasco Valley, Chile.

The Due Diligence Collaborative Process between Barrick Gold and the Diaguita Community in the Huasco Valley

The following is based on my empirical research in the Huasco Valley in 2012 and 2019, personal communication with valley community members as well as archival research including media reports, articles, videos and social media posts. In June 2013 after intense advocacy from the local community Chilean regulators had suspended Barrick Gold’s Pascua Lama project in the Huasco Valley, Chile due to environmental irregularities. Barrick’s human rights team (that included Jon Ruggie) fought back a year later by proposing what they termed a ‘Memorandum of Understanding (MoU) on the Exchange of information and communication or due diligence’. The proponents of the due diligence process opted for a democratic way of deciding whether to pursue this collaborative type of due diligence. In May 2014, within a context of community conflict 15 of the 22 Diaguita neighbourhoods had approved the collaboration with Barrick for due diligence. The immediate aftermath saw protests by those in the community who perceived the MoU process as a strategy to earn Barrick an SLO whilst continuing to devastate the valley’s glaciers and water supplies. The community group of three who pushed for the collaboration with Barrick became the leading community representatives in the process. This group defended its proactive participation in the due diligence process on national television, stressing that it was not going to be a case of bluwashing.

Barrick pledged US\$2.3m for due diligence-related activities with the community, which included profession-

al fees of selected experts by community members to help understand the environmental and social impacts of the mine and secondly as well as a monthly fee to the community representatives for participating (this latter point affirmed by all local community interviewees). The community leaders in the due diligence MoU also made trips around Chile and abroad to the United States to visit renowned Indigenous Peoples' Rights Professor James Anaya. More specifically, the MoU included 10,000 man hours, 22 site visits, and 44 evaluation workshops with the Diaguita community and took place between May and December 2014, and between May and December 2015 (Barrick Gold Chile, 2018).

Concerned with the process prior to consenting to the collaboration, one group of the community affiliated with national environmental NGO called OLCA teamed up with Mining Watch Canada to conduct their own study on this process. In September 2015 both NGOs published a report titled "A Problematic Process: The Memorandum of Understanding between Barrick Gold and Diaguita Communities of Chile." Here, Wiebe (2015) states that the lack of open transparency and participation was a problem in the process of signing the MoU. Her research shows that community members were manipulated and coerced into signing the agreement. Some of Wiebe's (2015) testimonies claim a Diaguita leader who was seeking signatures from locals was offering around US\$600 per signature and that those who refused to sign had been called "stupid brutes who did not understand" (p.11, 2015). The report details accusations with quotes on the grounds of alleged manipulation, bribes, intimidation and coercion used to get the local population to sign the MoU for the due diligence process, including offers of money, a truck and even free dental treatment (Wiebe 2015). Though it is difficult to verify the veracity of these accusations against the process of conducting the collaborative-type HRIA as being flawed, we can state that this experience further tore apart the social fabric within the valley, also creating more mistrust, as expressed by all local interviewees.

All community members I spoke with referred to the local leaders who participated in the collaborative-HRIA as "sell-outs," with one leader arguing this group was effectively mortgaging their valley to Barrick Gold by

engaging in dialogue. One of the local leaders who led the collaborative-HRIA confirmed this negative community sentiment towards this group and that for them, there was no act of betrayal. For the leader, they were simply interested in identifying the impacts from the mine and needed resources from Barrick in order to undertake such a task. By the end of the 2015 the due diligence process has ended, by the request of Barrick, who never enacted on any of the findings. Just over two years later the Pascua Lama mine was shutdown permanently by Chilean regulators. During the collaborative-type HRIA another community group called the Huascoalinos, supported by a national human rights NGO called Observatorio Ciudadano conducted its own community-led HRIA, which I briefly discuss in the following section.

Diaguita Community-led HRIA at the Huasco Valley

The organization Diaguita Huascoalinos in Chile conducted its own HRIA of Canadian mining corporations Barrick Gold and Goldcorp in tandem with Barrick's collaborative-type HRIA. The Huascoalinos based its methodology on a community based HRIA tool, named 'Getting it Right' developed by Canadian NGO Rights and Democracy. This method consists of six phases (Preparation, Legal Framework, Adapting the Guide, Investigation Process, Analysis and Report and Engagement, Monitoring and Follow-up) and 25 steps in total for the community to follow.⁵³ Central to these initiatives is the idea that affected community rightsholders are in charge of their design, implementation and operation. The assessment was led by the Diaguita Huascoalino community and the findings overall pointed to the fissures within the social fabric allegedly caused by both Canadian mining companies: "this HRIA found that Barrick Gold's corporate practices destabilized the organizations of the Diaguita people and contributed to disintegrating their social cohesion. This destabilization was achieved through negotiations aimed at co-opting organizations, such as those negotiations carried out with Diaguitas communities" (Observatorio Ciudadano, 2016, p.15). More specifically on fracturing the social cohesion, the HRIA states "The installation of the mining projects in the area appears

to have generated serious divisions, rupture of the social fabric, and family and community fragmentation". (p.77, 2016). It is worth mentioning that in January 2018 Chilean environmental regulators, who had received numerous detailed allegations by community members and activists discovered further environmental infractions at Barrick's Pascua Lama minesite and decided to permanently close it down. The case thus reveals that Barrick's collaborative-type HRIA did not help it achieve a SLO.

Lessons from the different HRIAs

What do these two different styles of HRIAs conducted at the same time tell us about BHR and managerialism? I have argued that BHR has been captured by the overwhelmingly dominant ideology of managerialism, where control from companies over their human rights impacts is key. Managerialism within BHR can be evidenced by the proliferation of specific consultancy services, checklists, corporate benchmarks, indicators and reporting initiatives which tend to decontextualize complex local realities. While some may argue that the BHR had been captured by corporations since before the launch of the UNGPs under the leadership of Jon Ruggie between 2008-2011 (see Martens, 2014) the BHR field has over the years become savvy to such critiques and responded with apparent power-sharing initiatives allowing affected rightsholders to be part of the due diligence process for BHR.

In this chapter, by drawing from the experiences in the Huasco Valley, Chile I contend that within contexts of territorial conflict, where there is resistance to a certain 'development' project on the basis of culture and livelihoods companies open up their HRIA to make them more collaborative with the ambition to obtain some sort of stamp of approval to demonstrate it has a legitimate SLO. In the collaborative-HRIA the case reveals how just a small group of community leaders, who had pushed for the process were also the only ones to benefit. Based on empirical fieldwork findings in the Huasco Valley that largely overlap with those from the community-led HRIA, which is also richer in situated contextualized data. I contend that BHR has the ability to co-opt, silence local resistance and further entrench

internal community fissures whilst giving the illusion of democratic structures and processes.

However, it is important to stress that not every local (mining) context, even in Latin America is identical to the one at the Huasco Valley. For example, just 200km north of the Huasco Valley live the indigenous Colla people who also live in the mountains. For the Colla leaders, the ideal solution to their conflicts with other Canadian mining companies who operate within their territory would be a HRIA, ideally a collaborative one as they explained to me in person at their community centre in early 2019. The Colla leaders explained to me that in their case they are not against mega-mining, and would welcome this activity on grounds it were conducted in a responsible and fair manner with them in terms of minimizing harms and maximizing benefits to their human rights. Therefore, context is key. Each case merits a deep and thorough reflection. Companies and their consultants should ask themselves what social consequences will likely arise to community cohesion as a result of their (corporate or collaborative-led) HRIA. If the answer is that such a process will have a damaging effect on the social fabric then continuing with such an exercise will be highly unethical.

In terms of more theoretical lessons arising from this case I would urge scholars to pay attention to the managerialism of BHR and conduct further research on its impacts, mechanisms, how it manifests itself, and explore which actors and processes encourage its further colonizing of BHR. Moreover, we would benefit from learning more about the impacts of managerialism to the rights of affected people, to the corporations themselves and to relevant social movements.

Practitioners and advocates of collaborative HRIAs would be well advised to provide more explicit guidance around under what conditions conducting such intensive processes are inappropriate. As we see from the case study in this chapter the application of the collaborative-HRIA appears to have done more harm than good to the social fabric and self-determination of the community. Unfortunately, the empirical evidence from the Huasco Valley in Chile supports the idea that human rights can cease to be tools of struggle and contestation in the current field of BHR.

References

- Barrick Gold (2018) Memorandum de Entendimiento <https://barrick-latam.com/barrick/presencia/pascua-lama/comunidad/memorandum-de-entendimiento/2014-10-10/092526.html> (accessed 1st December, 2018).
- Buhmann, K. (2016) Public regulators and CSR: the 'social licence to operate' in recent united nations instruments on business and human rights and the juridification of CSR. *Journal of business ethics*, 136(4), 699-714.
- Cooke, B. (2003) "A new continuity with colonial administration: participation in development management", *Third World Quarterly*, Vol. 24 No. 1, pp. 47-61.
- Dar, S. (2008) Re-connecting histories: modernity, managerialism and development. *Journal of health organization and management*, 22(2), 93-110.
- Fasterling, B. (2017) Human Rights Due Diligence as Risk Management: social risk versus human rights risk. *Business and Human Rights Journal*, 2(2), 225-247.
- Ferguson, J. (2003, 1990) *The Anti-politics Machine: 'Development', Depoliticization, and Bureaucratic Power in Lesotho*, Regents of University of Minnesota, Minneapolis, MN.
- Grey, C. (1996) "Towards a critique of managerialism: the contribution of Simone Weil", *Journal of Management Studies*, Vol. 33 No. 5, pp. 591-611.
- Hickey, S., & Mohan, G. (2005) Relocating participation within a radical politics of development. *Development and change*, 36(2), 237-262.
- Klikauer, T. (2015) What is managerialism?. *Critical Sociology*, 41(7-8), 1103-1119.
- Kothari, U. (2005) Authority and expertise: The professionalisation of international development and the ordering of dissent. *Antipode*, 37(3), 425-446.
- Maher, R. (2018) Squeezing Psychological Freedom in Corporate-Community Engagement. *Journal of Business Ethics*, 1-20.
- Martens, J. (2014) Corporate influence on the business and human rights agenda of the United Nations. *Bischöfliches Hilfswerk Misereor e. V* <https://www.globalpolicy.org/home/221-transnational-corporations/52638-new-working-paper-corporate-influence-on-the-business-and-human-rights-agenda-of-the-un.html>
- Observatorio Ciudadano (2016) Canadian mining projects in the territory of the diaguítas huasco altinos agricultural community in Chile https://policy-practice.oxfamamerica.org/static/media/files/Chile_HRIA_English.pdf (accessed 30th November, 2018).
- Parker, M. (2002) *Against management: Organization in the age of managerialism*. Polity Press in association with Blackwell.
- Srinivas, N. (2009) Against NGOs? A critical perspective on nongovernmental action. *Nonprofit and Voluntary Sector Quarterly*, 38(4), 614-626.
- Wiebe, A. (2015) *A Problematic Process: The Memorandum of Understanding between Barrick Gold and Diaguíta Communities of Chile*. MiningWatch Canada and OLCA.



Invigorating State Champions

Chapter Synopses: Invigorating state champions

Dr. Charlie Thame applies a political-economy analysis of mainland Southeast Asia to examine the apparent disconnect between the Westphalian tradition (assertive, capable, and dutiful states) that the UNGPs reflect and the realities of global neo-liberal capitalism. Thame brings attention to two key obstacles with the potential to stifle progress around the BHR agenda: structural challenges (macro and meso) and ideological challenges. He argues negligent and predatory governance does not happen in a vacuum and should be seen in a broader structural context characterised by asymmetries of power between transnational and local forces, and between domestic class fractions, which have in turn been shaped by transnational dynamics resulting from decades of global restructuring in the interests of capital accumulation. Thame suggests that progress may be possible through the UNGPs if leveraged strategically to empower progressive local social forces pushing for democratic state transformation, but cautions that practitioners “should be cognisant of the fact that addressing these dynamics is not in the interest of an emergent transnational capitalist class and should avoid fetishizing legal and technical solutions that do not fundamentally alter underlying power asymmetries.”

Sarah McGrath, Director of International Engagement, Business and Human Rights at the Australian Human Rights Commission, provides first-hand insights into the challenges and opportunities that National Human Rights Institutions (NHRIs) face when working to advance the BHR agenda. McGrath begins by contextualizing the critical role that NHRIs have played in developing the UNGPs and as vehicles to “drive greater uptake and implementation of the UNGPs.” The chapter details the “distinct and valuable terrain” that NHRIs occupy. McGrath highlights the potential of NHRIs, as independent institutions, to play a bridging role across a range of stakeholder groups “including government, civil society, business, trade unions and United Nations agencies,” as well as “the gap between international human rights law and the domestic implementation.” McGrath highlights that NHRIs have been working on

the nexus between business and human rights long before the UNGPs. At present, NHRIs use their mandates to advance BHR in a range of ways: as educators, as independent advisors to governments and companies, investigator and complaint handler. Yet, McGrath reiterates throughout the chapter that NHRIs are only able to successfully undertake these functions if they “maintain their independence, both real and perceived, at all times” and possess the requisite mandate, resources and capacity. NHRIs throughout the world continue to face challenges and constraints in these areas, which impede their ability to drive the BHR agenda.

Despite these obstacles, there remain opportunities for NHRIs to be catalysts for BHR independently and as a collective. McGrath calls for enhanced cross-border collaboration between NHRIs as a way of overcoming “the ‘national’ mandate of NHRIs and the jurisdictional limitations.” The chapter then makes a pointed argument about the unique profile and placement of NHRIs. Speaking about multi-stakeholder engagement, McGrath notes “NHRIs do not have a defined constituency or vested interest, as such they are well placed to bring together a range of actors together and enable the integration of various perspectives on a particular issue or challenge.” NHRIs are also “well placed to share lessons and experiences with other grievance mechanisms under pillar three of the UNGPs (such as state and non-state grievance mechanisms).” The chapter concludes with a blunt but hopeful assessment of the road ahead for NHRIs working to drive BHR:

“The UNGPs outline an evolving and multi-faceted role for NHRIs and created significant expectations about their potential to drive respect for human rights in the context of business activities. The challenge for NHRIs moving forward is to continue to push for strengthened uptake of human rights and accountability, increased engagement and dialogue with their peers and all relevant actors, and to chart new innovative paths.”

Zhong Huang and Professor Wanhong Zhang consider whether socially viable and sustainable outcomes are

possible under the current Chinese overseas investment regime. Deconstructing the policies and laws in place to regulate Chinese overseas investment, Huang and Zhang show that several notable gaps exist. The chapter explains that China has made “strong commitments on international initiatives such as the Sustainable Development Goals (SDGs) and the Paris Agreement in its effort to build up an image of a responsible great power.” Under the rubric of sustainability, “China has issued a growing matrix of laws, regulations, policy statements, and guidelines regarding social and environmental safeguards of its overseas business activities.” Huang and Zhang point out that the problem is not the absence of directives, but rather the low levels of implementation and enforcement due in a large part to inconsistencies between frameworks, lacking awareness and the absent culture of accountability. With regards to BHR, the foremost issue remains the absence of specific guidelines. The Third National Human Rights Action Plan of China (2016-2020), “does not make reference to key international frameworks regarding business and human rights such as the UNGPs, nor sets out concrete plans on important aspects such as requirements on human rights due diligence and other related measures, and human rights impacts of state-owned enterprises (SOEs).” Huang and Zhang’s analysis highlights how multidimensional the barriers to advancing a Chinese BHR agenda at home and abroad. As the chapter argues, the reality of the situation requires responses that are dually multifaceted.

Human Rights, Business, and the Reliance on Elusive State Champions

Dr. Charlie Thame

Dr. Charlie Thame is a lecturer in International Relations at Thammasat University in Bangkok. He is interested in IR theory, critical theory, and political economy. His research explores issues related to labour, migration, and special economic zones in mainland Southeast Asia.

Introduction

The debate about business and human rights would be far less pressing if all governments faithfully executed their own laws and fulfilled their international obligations. (Ruggie 2006: supra 20 at para. 79)

The UN Special Representative has observed that states play a crucial yet often unfulfilled role protecting human rights in business operations. As a relative outsider to the field of business and human rights (BHR) I offer a few reflections spurred by a predicament posed by the editors: how might stakeholders make sense of the disconnect between the Westphalian tradition (assertive, capable, and dutiful states) that the UNGPs reflect and the realities of global neo-liberal capitalism? Is 'progress' in this gridlock possible through or around the UNGPs? The following draws on seven years working on issues related to migration, labour rights, and large-scale infrastructure investments in mainland Southeast Asia with a focus on migrant labour in Thailand and the development and operation of special economic zones across the region (e.g. Robinson et al., 2016; Thame, 2017). It appears to me there are two key obstacles to protecting human rights in this context: structural and ideological. Both empower social forces within the region that undermine protection of rights by states. Progress may be possible through the UNGPs but practitioners should be cognisant of the fact that addressing these dynamics is not in the interest of an emergent transnational capitalist class and should avoid fetishizing legal and technical solutions that do not fundamentally alter underlying power asymmetries. Practitioners may nonetheless leverage UNGPs strategically to empower progressive social forces in

developing states and partner with those pressuring for democratic state transformation.

Macro structural challenges

Beginning with the structural. A complex set of historical dynamics has left most of the planet, people, and states in a highly asymmetrical power relation with transnational capital, which has gone global since the 1970s. Prompted by a global recession, oil crisis, and the collapse of the Bretton Woods system, restrictions on capital mobility were lifted, enabling an emergent transnational class of capital owners and managers to leverage processes of globalisation to fundamentally restructure the world economy by fragmenting and integrating production globally through the development of global value chains (see Robinson, 2005; Baldwin, 2016; Smith, 2016; Bieler and Morton, 2018; Slobodian, 2018). Overlapping this process was one in which political power was consolidated in discrete, bounded, territorial units: i.e., nation-states. The failures of the Russian and German revolutions in the early twentieth century forestalled a proletarian internationalism and prepared the way for global spread of newly independent nation-states during the process of decolonisation (Cunliffe, 2017). This locked in asymmetrical power relations between industrialised and industrialising states that had their origins in the Great Divergence of the nineteenth century (Buzan & Lawson, 2015). The collapse of the Soviet Union and subsequent transition of socialist states to market based economies introduced greater competition among developing states for investment from mobile capital, further undercutting their bargaining power vis à vis an emergent

transnational capitalist class, who argued economic convergence would be faster achieved through rapid industrialisation, economic liberalisation, and foreign investment rather than national development and self-sufficiency.

The dynamic unleashed by the tension between two logics of power: of mobile capital and territorially delimited political administrative power (Harvey, 2003, 2007), has had significant implications for progressive social forces across the globe. Capital flows were directed toward regimes with the cheapest labour, lowest taxes, and laxest regulatory environments, stimulating a 'race to the bottom' as governments compete for investment, contributing to the erosion of state regulatory sovereignty, the growth of corporate power, the dismantling of fiscal states, and growing reliance on debt-driven consumption and growth (Robinson, 2017). Meanwhile, elites in industrialised economies were empowered to deconstruct the re-distributive and post-war 'social' capitalism of the New Deal in the US and social democracy in Western Europe, leading to decreasing levels of unionisation, privatisation of assets, austerity, precarious employment, and the atomisation of social movements, further fragmenting the working class. After the hopes of many in the developing world calling for the creation of the New International Economic Order were dashed (UNGA, 1974), the demand for meaningful regulation and control of multinational corporations operating within their territories was replaced by the promotion of business-friendly reforms to attract foreign investment. This led to institutionalised protection of private property rights for foreign investors, enclosures of land and the dispossession of indigenous people, the extraction of natural resources, expanded labour force participation as women, peasants, and farmers became factory workers, and the development of new systems of labour control to suppress wages, including the criminalisation of independent labour unions and the reliance on new pools of mobile migrant labour structurally dispossessed of citizenship rights (MMN and AMC, 2013). Most economies were restructured toward export-oriented resource extraction during the colonial era then encouraged to liberalise and promote labour-intensive manufacturing as a path to industrialisation and development from the 1970s onwards. Today, trade and investment agreements guarantee

corporate rights without equivalent protections for local communities, while governments are pressured to meet GDP growth and FDI targets, commonly used as key economic performance indicators and thus prioritised over other development metrics. Many economies across Southeast Asia have thus become deeply dependent on export-oriented growth strategies and exploitative and extractivist forms of foreign investment (Thame, 2017).

While governments are obliged to pay lip service to rights to be regarded as legitimate in the eyes of the international community, their commitment is often feigned and easily nullified in practice: whether motivated by personal enrichment, perceived economic benefits for the broader economy, an implicit ideological rejection of fundamental moral equality, or simply shortcomings of domestic legislative systems or capacity of local officials.

This is the broader context in which a range of rights violations blighting mainland Southeast Asia must be understood. This includes forced evictions, restrictions on freedom of assembly and collective bargaining, criminalisation of dissent and harassment of human rights defenders, enforced disappearances, human trafficking, and forced labour. These are endemic in key industries across the region: the garment and textile industry in Cambodia, fisheries and food processing in Thailand, hydroelectric dams in Laos, mining and logging in Myanmar, to cite a few. While the UN Special Representative justifiably laments the fact that governments do not always execute their own laws or fulfil their international obligations, we must not lose sight of the broader structural context and underlying relations of power between local and transnational forces within which struggles for equality and social justice happen. While governments are obliged to pay

lip service to rights to be regarded as legitimate in the eyes of the international community, their commitment is often feigned and easily nullified in practice: whether motivated by personal enrichment, perceived economic benefits for the broader economy, an implicit ideological rejection of fundamental moral equality, or simply shortcomings of domestic legislative systems or capacity of local officials.

Meso structural challenges

Having briefly reviewed the macro structural level, we turn now to the meso: characteristics of states in the region. Several observers have noted one of the most significant challenges across Southeast Asia is widespread impunity for rights violations (e.g. Fuller, 2016). This reflects a deep seated structural problem with power relations between domestic class fractions in societies across the region, which coalesce in various state institutions (on this conception of the state see Poulantzas, 1978). In countries such as the United Kingdom, France, Germany, and the United States, centuries of pressure from below from progressive social forces have counterbalanced reactionary forces so as to permit the consolidation of essentially Weberian states. For the most part, law and order is maintained through an independent legal system of administration, accompanied by checks and balances to prevent abuses of power, with avenues for citizens to pursue accountability and redress for violations. Although constrained in important ways and through increasingly unequal class relations, political power can be contested openly, while oppositional forces generally acquiesce when it changes hands. Across mainland Southeast Asia at least, it makes more sense to see states in instrumentalist, rather than Weberian, terms. Whereas for Weber the state is a tool for maintaining law and order, historical materialists regard the state and its apparatus as essentially an instrument of exploitation: an institution used to protect the interests of particular social forces and allow them to accumulate and preserve wealth.

States could act as a buffer between an emergent transnational capitalist elite and the world's poor majority, an impartial umpire balancing the demands

of different groups with an eye on the broader public interest. Too often, however, state institutions are either complicit or negligent regarding rights abuses and fail to protect the public from the predations of local and transnational capitalists. Four examples in Cambodia, Laos, Thailand, and Myanmar illustrate this claim. State security authorities in Cambodia have publicly stated that one of their core roles is to prevent worker unrest in the country's SEZs, while in Myanmar SEZ management committees have undermined national and international laws governing land and the environment, leading to rights violations and environmental degradation (Thame 2017: 27, 33; ICJ 2017). Of two local government officials responsible for managing the Laos side of a 34km² cross-border special economic zone I interviewed in August 2018, one was drunk, the other could not answer basic technical questions about the mega-project. Yet lack of competence was no barrier to promotion. The second revealed they had been nominated to assume a management position in the SEZ, which I assumed reflected a preference of the SEZ developer for officials who took a 'hands-off' approach to administering the zone. Lastly, a representative of Thailand's National Human Rights Commission made the remarkable admission that state officials were responsible for over 90% of human rights violations in the country (The Nation 2018). Returning to the problem of impunity for rights violations, beyond obvious procedural obstacles to protecting rights, practitioners in the BHR field should ask: Who controls the state? Who has access to its machinery? To its protection?

Whether due to corruption or lack of competence, rather than being staffed by able and expert administrators capable of effective regulation and impartial enforcement of laws with protection equally accessible to all, state institutions are generally more responsive to the interests of capital than to labour or the environment. One reason is that public sector pay is low and cannot compete with the private sector or civil society organisations to attract and retain the most capable staff, or for officials to survive without supplementing their income through informal payments. This is related to the fact that the development of fiscal states has been undermined across the globe in the interests of attracting foreign investment. Another is that the balance of social forces in these societies currently undermines

democratic accountability and is highly skewed in the interests of capital over labour. As colonial powers retreated in the 1950s and 1960s, local elites took control of states, often with the assistance of militaries: one of the few domestic institutions with access to the centralised resources of the state, well-organised, with a clear self-definition, and able to consolidate and expand their institutional position (see Kaviraj, 2001; Chambers and Waitookiat, 2017). As state structures were entrenched during this period: 'single ethnic groups or personal cliques and military cohorts came to establish exclusive control of its revenues, defended fiercely by its coercive apparatus' (Kaviraj, 2001: 316) Cold War geopolitics further entrenched these cliques as coups and anti-communist authoritarian regimes received tacit or explicit support from the US and its allies, security forces were empowered to maintain order, stifle dissent, and rebuff democratic forces with counter-revolutionary zeal. All the while international partners prioritised liberal economic principles over democratisation. Since the end of the Cold War, patronage resources have enabled cliques to further consolidate socio-economic power, compounded by the growth of illicit economies. These regimes of extraction and accumulation have become fundamental to the process of state building in the region, partly due to difficulties collecting tax revenues and developing fiscal states that might otherwise pressure officials to be more democratically accountable to lower and middle classes (see Andreas, 2013; Baker and Milne 2015, Global Witness, 2015; 2016)

Ideological challenges

A final and related point concerns ideology. The political theorist Ronald Dworkin argues that anyone professing to take rights seriously must accept one or both of two important ideas. The first is the 'vague but powerful idea of human dignity'. The second is that of political equality, the notion that 'the weaker members of a political community are entitled to the same concern and respect ... as the more powerful members' (Dworkin 2003: 209). These ideals have roots in the Enlightenment and the Atlantic Revolutions of the 1770s to the 1820s, themselves informed by the basic conviction of natural law that social hierarchies

are against nature and should be abolished. Yet this is a conviction rarely shared by political, bureaucratic, and economic elites in developing states in the region. As an interviewee on an assessment of the Royal Thai Government's anti-trafficking efforts put it to me, the failure of Thai officials to grasp the nature of the problem of forced labour and refusal to address root causes such as an ad hoc and inadequate migration policy and restrictions on freedom of assembly, including the right to organise, despite the risk of trade sanctions, essentially betrays their view that 'there are certain kinds of people put on this earth to work in these jobs' and whether by hook or by crook 'we just need more of them' (Robinson et al., 2016). Equally revealing is how quickly erstwhile human rights activists from Myanmar have rejected the notion that the UDHR also apply to the Rohingya.

Global modernity has placed disruptive pressures on social orders around the world, stimulating a contest between social forces for ideological hegemony to interpret these changes and direct us toward the future. We are also witnessing a global backlash against rights (Roth 2017) that empowers reactionary forces pursuing alternative hegemonic projects to consolidate socio-economic power. These are often militaristic, paternalist, and conservative. Sometimes they draw on local cosmologies that emphasise hierarchy, order, and knowing one's place, strengthening alternative sources of political justification to that of universal equality and democratic consent. That they are able to do so represents a failure of the human rights movement. The UDHR is a document of towering historical significance with the potential to unite victims of power and abuse worldwide and help humanise globalisation, yet its radical and emancipatory potential remains unfulfilled (Booth 2007: 378-383). Advocates need to be more effective at defending fundamental values and linking them to local struggles, and building alliances with progressive forces across the political spectrum. Human rights are too often and too easily dismissed as biased, irrelevant, or essentially foreign concepts. They are promoted inconsistently and seemingly subordinate to Western geopolitical interests, have insufficiently addressed material inequalities and have failed to confront neo-liberalism (Moyn, 2018). Rather than by amplifying local voices and concerns they are overwhelm-

ingly championed worldwide by well-intentioned and relatively affluent Western liberals. When local voices are supported, they are likely to be 'familiar' faces: the bourgeois individual rights champion, the articulate 'change-maker' whose opinions may chime with Western liberals more than those of local audiences. The former are important allies in the struggle for justice and equality, but so too are the workers organising to demand better conditions and the villagers mobilising to defend their land and resources. Practitioners in the BHR field must do more to support these struggles.

Conclusions

Those committed to equality and social justice face a number of challenges in an era of globalising capital, extreme inequalities, looming environmental catastrophe, and return to great power competition. Yet a backlash against globalisation and 'globalism' (Slobodian, 2018) is empowering reactionary forces with a vested interest in maintaining an exploitative status quo and risks undermining the purchase of human rights discourse among those most at risk of having their rights violated. Struggles for equality and social justice must involve halting the macro, meso, and ideological trends outlined above. Doing so requires confronting the interests of an emergent transnational capitalist class and reversing decades of global restructuring in the interests of capital accumulation. This means, inter alia, meaningful regulation of business activities, resisting the ongoing privatisation of public assets and services, greater transparency and accountability, progressive taxation and support for the development of fiscal states, fighting corporate tax evasion worldwide, and better regulation of global supply chains to enable accountability for rights violations. Most importantly, it also requires empowering social forces mobilising and organising to resist the various exploitations of workers, women, and the environment by local and transnational capitalists, and supporting democratising forces including, but beyond, the middle class.

Put differently, what is needed is a fundamental re-balancing of power relations between capital, labour, and the environment. This is a significant challenge in which global civil society plays a role. Yet in the context

of broader global trends related to the commodification of nature, profit maximisation, wage labour, and the private ownership of the means of production, we should not lose sight of the fact that collective emancipation will not be achieved through a myopic legal formalism and technical solutions to social ills mastered only by a cabal of well-paid international consultants and civil servants. While the BHR discourse has been praised for reconciling corporate interests with those of civil society (Aguirre, 2011), if anything more than superficial progress is possible through the UNGPs, practitioners need to do more than serve the interests of an emergent transnational capitalist class by providing ideological cover for the expansion of neo-liberal globalisation, and better support those resisting its predations. Progressive transnational coalitions could be built around the protection and defence of rights to freedom of association and collective bargaining, a zero-tolerance approach could be taken to regimes complicit in the criminalisation and harassment of HRDs and whistle-blowers, and more pressure could be applied to ensure transparency and meaningful public participation in investment decisions, including supporting the right to refuse or demand alternative forms of investment (see, for e.g. DDA et al., 2018). Transnational and cross-sector mobilisation around such issues, backed by meaningful sanctions for states failing in their responsibilities, would be a good start. In the end, the only real rights are the rights of citizens, attached to a national community as such (Rancière, 2004). What the world's poor need are better states (Walzer, 2004). Practitioners in the field of BHR should help build them.

References

- Aguirre, Daniel. (2011) "Corporate Liability for Economic, Social and Cultural Rights Revisited: the Failure of International Cooperation." *California Western International Law Journal* 42: 123–48.
- Andreas, Peter. (2013) "Illicit Globalization: Myths, Misconceptions, and Historical Lessons." *Political Science Quarterly* 126 (3): 403–25. doi:10.1002/j.1538-165X.2011.tb00706.x.
- Baker, Jacqui, and Sarah Milne. 2015. "Dirty Money States: Illicit Economies and the State in Southeast Asia." *Critical Asian Studies* 47 (2): 151–76. doi:10.1080/14672715.2015.1041273.
- Baldwin, Richard. (2016) *The Great Convergence: Information Technology and the New Globalization*. Cambridge MA: Harvard University Press.
- Bieler, Andreas, and Adam David Morton. 2018. *Global Capitalism, Global War, Global Crisis*. Cambridge: Cambridge University Press.
- Booth, Ken. (2007) *Theory of World Security*. Cambridge University Press. Cambridge: Cambridge University Press.
- Buzan, Barry, and George Lawson. (2015) *The Global Transformation History: Modernity and the Making of International Relations*. Cambridge: Cambridge University Press.
- Chambers, Paul, and Napisa Waitookiat, eds. (2017) *Khaki Capital*. Copenhagen: NIAS Press.
- Cunliffe, Philip. (2017) *Lenin Lives! Reimagining the Russian Revolution 1917-2017* Alresford: Zero Books
- Dawei Development Association et al. (2018) *Statement on Government Plans to Resume the Dawei Special Economic Zone (SEZ) Project*. Feb 20. https://progressivevoicemyanmar.org/wp-content/uploads/2018/02/Statement-on-government-plans-to-resume-the-DSEZ_200118_English.pdf
- Dworkin, Ronald. (2003) *Taking Rights Seriously* London: Bloomsbury.
- Ford, Michelle (eds.) (2013) *Social Activism in Southeast Asia: An Introduction*. London: Routledge
- Fuller, Thomas. (2016) "Reporting on Life, Death and Corruption in Southeast Asia - the New York Times." *New York Times*. February 21.
- Global Witness. (2015) "Guns, Cronies, and Crops."
- Global Witness. (2016) "Hostile Takeover."
- Harvey, David. (2003) *The New Imperialism*. Oxford: Oxford University Press
- Harvey, David. (2007) *A Brief History of Neoliberalism*. Oxford: Oxford University Press.
- International Commission of Jurists. (2017) "Special Economic Zones in Myanmar and the State Duty to Protect Human Rights."
- Kaviraj, Sudipta 'In Search of Civil Society' in Kaviraj, Sudipta and Sunil Khilnani (eds.) (2001) *Civil Society: History and Possibilities*. Cambridge: Cambridge University Press.
- Moyn, Samuel (2018) *Not Enough: Human Rights in an Unequal World* Cambridge MA: Harvard University Press.
- Poulantzas, Nicos. (1978) *State, Power, Socialism*. London: Verso
- Rancière, Jacques. (2004) "Who Is the Subject of the Rights of Man?" *The South Atlantic Quarterly*, no. 103: 297–310.
- Robinson, Courtland, Charlie Thame, and Casey Branchini. (2016) "Anti-Human Trafficking in Thailand: a Stakeholder Analysis of Thai Government Efforts, the U.S. TIP Report and Rankings, and Recommendations for Action." June. Baltimore: Johns Hopkins Bloomberg School of Public Health / Ministry of Foreign Affairs, Royal Thai Government.
- Robinson, William I. (2005) "Gramsci and Globalisation: From Nation-State to Transnational Hegemony." *Critical Review of International Social and Political Philosophy* 8 (4): 559–74. doi:10.1080/13698230500205243.
- Robinson, William I. (2017) "Global Capitalism: Reflections on a Brave New World." Great Transition Initiative, July.
- Roth, Kenneth. (2017) "We Are on the Verge of Darkness." *Foreign Policy*. January 12. <https://foreignpolicy.com/2017/01/12/we-are-on-the-verge-of-darkness-populism-human-rights-democracy/>.
- Ruggie, John. (2006) *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*. Interim Report

Slobodian, Quinn. (2018) *Globalists*. Cambridge MA: Harvard University Press.

Smith, John. (2016) *Imperialism in the Twenty-First Century*. New York: Monthly Review Press.

Thame, Charlie. (2017) "SEZs and Value Extraction From the Mekong: A Case Study on the Control and Exploitation of Land and Labour in Cambodia and Myanmar's Special Economic Zones." Bangkok: Focus on the Global South.

The Nation, (2018) 'State officials behind 90% of rights violations' December 12. www.nationmultimedia.com/detail/national/30360204

United Nations General Assembly, (1974) Declaration on the Establishment of a New International Economic Order (1 May) [Online] A/RES/S-6/320 Available from: <http://www.un-documents.net/s6r3201.htm>

Walzer, Michael. (2004) *Politics and Passion: Toward a More Egalitarian Liberalism*. New Haven: Yale University Press.

National Human Rights Institutions and Business and Human Rights: Challenges, Opportunities and Next Steps

Sarah McGrath, Director

International Engagement, Business and Human Rights, Australian Human Rights Commission

The role of national human rights institutions (NHRIs) has been fundamental in advancing the business and human rights agenda. NHRIs were actively involved in the development of the UN Guiding Principles on Business and Human Rights (UNGPs) and obtained an evolving role within all pillars of the framework and in its implementation (Brodie, 2012; Haász, 2013). Around the world, NHRIs have taken various actions to drive greater uptake and implementation of the UNGPs. NHRIs have played a key role by conducting research, organising multi-stakeholder dialogues, shaping laws and policies, advising and training companies on human rights and conducting awareness raising and capacity building efforts. Collectively, NHRIs have embraced their role and potential and have actively looked for ways to increase their impact through strengthened collaboration (Danish Institute for Human Rights; International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (now GANHRI), 2010). As a result of the efforts of NHRIs both individually and collectively, the role of NHRIs in advancing implementation of the UNGPs and other business and human rights frameworks is increasingly recognised.

This article seeks to briefly highlight the various ways in which NHRIs have been working to advance human rights in the context of business activities. It will first outline the role, mandate and function of NHRIs. Through a number of illustrative examples, it will seek to explore the various ways in which these core functions can be used to prevent, address and remedy business-related human rights harms. Finally, it will consider avenues for NHRIs to further enhance their role and collaboration with other actors.

The Role, Mandate and Function of NHRIs

NHRIs occupy a distinct and valuable terrain. As independent institutions, NHRIs can play a bridging role between different stakeholders including government, civil society, business, trade unions and United Nations agencies. They also play an important role in bridging the gap between international human rights law and the domestic implementation, as such they are uniquely placed to advance human rights domestically.

The UN Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights (1991) (Paris Principles) outline the minimum international standards for the status and functioning of NHRIs. To be compliant with the Paris Principles, NHRIs must be independent and be established by law, for example, through stand-alone legislation or a Constitution. The Paris Principles require NHRIs have a broad mandate, based on universal human rights norms and standards and have adequate resources and powers of investigation. While the mandate and functions of NHRIs varies across jurisdictions, the Paris Principles outline a number of functions of an NHRI. In general, these include being an advisor to government on the promotion and protection of human rights, investigating and resolving complaints, educating the public on their human rights and responsibilities, and engaging with the international human rights system to bridge the gap between international law and its domestic implementation.

NHRIs as a Vehicle to Advance Business and Human Rights

The role and functions of NHRIs are wide ranging and multifaceted. As such, there are many entry points

for NHRIs to advance the promotion and protection of human rights in the context of business activities (Götzmann & Methven O'Brien, 2013; International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (now GANHRI), 2010). While there is growing attention on the role of NHRIs within the business and human rights landscape, NHRIs have been tackling the intersection of business and human rights long before the adoption of the UNGPs (Götzmann & Methven O'Brien, 2013; Haász, 2013).

The following section will outline how NHRIs are using their mandate to advance human rights in the context of business and consider some of the challenges to the application of these functions.

Educator

Human rights education is core to the prevention and promotion of human rights. Such education can ensure duty bearers are aware of their obligations and responsibilities and empower rights holders to claim their right and seek accountability for human rights abuses. Given the importance of transmitting knowledge of human rights norms and principles, human rights education is a core component of an NHRI's mandate (Asia Pacific Forum of National Human Rights Institutions, 2013).

This focus on education and awareness raising is equally important in the context of business and human rights. Many NHRIs have offices or focal points in regional or remote areas which gives them direct access to community groups (Niebank & Utlu, 2017). As such, NHRIs are well placed to work with local communities to raise awareness about their rights and provide information about avenues for redress when such rights are violated, ultimately empowering them to advocate and have their rights realised.

NHRIs also have a role to play educating business and industry on challenging human rights issues or concerns. Around the world, many NHRIs have experience translating human rights principles and standards into language that business can understand and then practically implement. For example, recognising the need

for board directors to have a better understanding of human rights, the United Kingdom Equality and Human Rights Commission developed a five-step guide to familiarise boards with the UNGPs and assist them to integrate them into business operations and decision making processes (Equality and Human Rights Commission, 2016). NHRIs can also play a role in driving positive industry practice and also generating rights respecting cultural change within the private sector. In Australia, the Australian Human Rights Commission was instrumental in bringing together some of Australia's most influential and diverse male CEOs and Chairpersons to champion gender equality through the Male Champions of Change group, an initiative that has since been replicated in other jurisdictions and within specific industries or sectors. (Male Champions of Change, 2018).

Independent Advisor to Government

The UNGPs specifically acknowledge that NHRIs "have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors." (UN Human Rights Council, 2008) Paris Principle compliant NHRIs play a key role in assisting governments to meet their international obligations, including through providing technical advice and assistance on how to turn human rights purely from legal instruments into effective policies and practices.

One area where NHRIs have been playing an increasingly important role is in relation to the development and implementation of National Action Plans on Business and Human Rights (NAPs) (Danish Institute for Human Rights and the International Corporate Accountability Roundtable, 2017). NHRIs have an important role to play in informing the standard of both the process and the NAP content, advocating for the application of a human rights-based approach, and ensuring that the development of the NAP is conducted in a transparent and consultative manner. Given their knowledge of the human rights landscape, NHRIs are also well equipped to identify gaps in relation to the implementation of business and human rights

frameworks and make recommendations for reform. In Germany, the Foreign Ministry assigned the responsibility for researching and drafting a National Baseline Assessment to Germany's NHRI, the German Institute for Human Rights (DIMR) German Institute for Human Rights, (2015) and used the information from the baseline assessment to inform the NAP content (Danish Institute for Human Rights and the International Corporate Accountability Roundtable 2017).

It is essential that implementation of a NAP be closely monitored and there is a process for stakeholders to provide ongoing input and feedback. Recognising the importance of having an independent body monitor NAP implementation, the French NAP provides that the follow-up and evaluation of the NAP will be conducted by the NHRI (Danish Institute for Human Rights and the International Corporate Accountability Roundtable, 2017 p. 40). The German NHRI also chairs the Working Group on Business and Human Rights of the German Government's CSR Forum which is responsible for advising the government on the NAP implementation (German Institute for Human Rights, 2019).

Independent Advisor to Companies

There is increasing scrutiny by governments, civil society, consumers and investors on businesses to proactively manage human right risks and positively engage with communities in which they operate. As institutions with in-depth human rights expertise, companies are increasingly looking to NHRIs for advice and feedback on their human rights policies, processes and practices. For example, the Danish Institute for Human Rights works with a number of multi-national companies assisting them with human rights impact assessments and due diligence frameworks and processes (Danish Institute for Human Rights). In addition, the Malaysian NHRI, SUHAKAM, entered into an memorandum of understanding with Malaysian based agribusiness company, Felda Global Ventures Holdings Berhad (FGV) in 2017 to provide guidance on the implementation of the UNGPs (Human Rights Commission of Malaysia (SUHAKAM), 2017). This was a strategic partnership following the outcomes of SUHAKAM's National Inquiry into the Land Rights of Indigenous Peoples which was finalised in 2012 (Human Rights Commission of

Malaysia (SUHAKAM), 2013).

Engaging and working with business can raise a number of challenges for NHRIs. Brodie notes that given business can be both a human rights violator and human rights champion, trying to find the right balance when engaging with business can be a difficult exercise (Brodie, 2012 p. 249). This balancing act is not a new phenomenon and something that NHRIs have had to grapple with in the past, particularly in relation to their engagement with government and civil society. Key to successful engagement and collaboration with the private sector is ensuring that the NHRI's maintain their independence, both real and perceived, at all times.

Investigator and Complaints-handling

While not a mandated function, the Paris Principles also allow for NHRIs to receive and consider complaints. Given that this is not a mandated function, not all NHRIs have a complaint handling function, however it is through these complaint handling functions that NHRIs can provide remediation for human rights violations that take place in the context of business activities. In his report to the Human Rights Council, John Ruggie stated that on the issue of access to remedy the "actual and potential importance of these institutions cannot be overstated." (UN Human Rights Council, 2008) The report notes the importance of NHRIs providing individual remedy, but also their ability to operate as "lynchpins within the wider system of grievance mechanisms, linking local, national and international levels across countries and regions." This is reiterated by McGregor et al. who note that all NHRIs, even those that don't have complaint handling function, will be approached by individuals seeking advice or information on where to go regarding a complaint (McGregor, Shipman, & Murray, 2017a). It is therefore important that all NHRIs have an understanding of the complaints handling landscape so that they can refer individuals to the correct institution or body. Acknowledging the broader contribution NHRIs can make to the issue of access to remedy, the Human Rights Council has asked the UN Working Group on Business and Human Rights to analyse the role of NHRIs in facilitating access to remedy and report back to the Council (UN

Human Rights Council, 2018).

Despite the potential for NHRIs to deliver remedy to individuals for business-related harms through complaint handling mechanisms, a number of challenges and barriers exist. One key limitation is the limited grounds in which NHRIs can receive complaints and the fact that this will vary from institution to institution (Brodie, 2012). For many NHRIs, especially equality bodies, their mandate may be limited to handling complaints related to specific forms of discrimination as opposed to broader human rights issues (McGregor et al., 2017a). In addition, many NHRIs are limited by the jurisdictional reach of their complaint handling powers and are unable to receive complaints that occur outside of their territory or jurisdiction.

Notably, some NHRIs, particularly in South East Asia, are beginning to apply their mandate extraterritorially. For example, the National Human Rights Commission of Thailand (NHRCT) has investigated complaints into a small number of transboundary cases. Cases have involved investigations into the large scale land evictions following the grant of a land concessions in Cambodia (Pred, 2013), the impacts of the Xayaburi dam in Myanmar and the Hongsa lignite power plant in Laos (Middleton, 2012). While the ability to enforce recommendations from these investigations is limited, the complaints process has provided an important avenue for civil society and impacted communities to raise concerns and has led to increased public and government attention of the cases (Middleton, 2018).

NHRIs not only investigate individual complaints but can conduct national inquiries to address systematic human rights issues. Rather than addressing individual complaints, the national inquiry process examines systemic human rights violations and provides recommendations for systemic responses and remedial action at a broader level (Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2017; Brodie, 2015). The national inquiry process is a consultative one and provides a platform for those that have experienced human rights harms to share their story, views and insight into what is needed to remedy the situation. The potential for national inquiries to drive change has

meant that NHRIs globally are conducting these processes and increasingly in relation to business-related human rights harms and issues (The German Institute for Human Rights and the Danish Institute for Human Rights, 2019).

Utilising the national inquiry process, the National Commission of Human Rights in the Philippines (CHR) has also taken a proactive and innovative approach to how it applies its functions and mandate. Following a complaint made to the NHRI of the Philippines by Greenpeace and other civil society groups in 2015 (Philippines, 2016), the CHR launched the National Inquiry on Climate Change (Commission on Human Rights Republic of the Philippines, 2018). The national inquiry is investigating the role of 47 fossil fuel companies in contributing to climate change and related human rights impacts.

The CHR's mandate to accept the case was challenged by the fossil fuel companies. In accepting the case, Commissioner Roberto Eugenio Cadiz acknowledged that this was new terrain for the NHRI and that there was no legal precedent in which to follow (Commission on Human Rights Republic of the Philippines, 2018). The CHR confirmed that while it did not have the power to compel the companies to give evidence or impose any damages, it did have a responsibility to investigate the matter (Commission on Human Rights Republic of the Philippines, 2018). Not only did the CHR apply an innovative application of its mandate, it also took a unique approach to the national inquiry methodology. Recognising that the companies in question are based in developed industrialised countries, the Commission conducted public hearings in both the United States and the Europe allowing a broader group of stakeholders to give evidence (Commission on Human Rights Republic of the Philippines, 2018). This approach has led to widespread global interest and attention in the case (see for example, Howard, 2016).

While the Pilipino national inquiry provides an example of an innovative and flexible application of an NHRIs mandate, for many NHRIs, the types of issues they can address through their investigations and/or complaints handling process and the jurisdictions in which they can operate is hampered by their founding legislation.

As the business and human rights agenda continues to evolve and the global community increases its scrutiny of the role in business in human rights harms, these limitations will likely need to be revisited. For Brodie, unless government equip NHRIs with the necessary powers and functions to effectively operate as a non-judicial grievance mechanism, NHRIs will never live up to the expectations created by the UNGPs (Brodie, 2012 p. 247).

Leveraging the Role of NHRIs

NHRIs have been playing an increasingly important role in the area of business of human rights, however there is scope for their role to be leveraged further to realise the expectations set out in the UNGPs. Many of the challenges briefly explored above need to be addressed through amendments to the founding legislation or through increased resources and capacity. For most NHRIs, this takes time and requires significant political support and buy-in. As such, the following section will highlight some of the ways NHRIs can work within their current mandates to enhance their role.

Enhance Cross-Border Collaboration with other NHRIs

A key strength of NHRIs is their ability to drive respect for human rights at home, yet what happens when a company domiciled or headquartered within their jurisdiction is involved in a human rights violation abroad? What role can NHRIs play in these situations? Given the 'national' mandate of NHRIs and the jurisdictional limitations NHRIs face, the cross-border nature of business activity can be a significant challenge. Yet, there is scope to tackle cross border cases through increased coordination and collaboration amongst NHRIs, either bilaterally or through existing regional networks.

Current cooperation amongst NHRIs take place in three keys ways, through the Global Alliance of NHRIs (GANHRI), regional networks, and bilateral or multi-lateral cooperation, but the latter often takes places in an ad-hoc manner (Schuller & Utlu, 2014). Despite the various avenues for cooperation, collaboration can be challenging due to the diversity amongst NHRIs including in relation to their mandates, functions and

also capacity (Chatham House - The Royal Institute of International Affairs, 2018). Despite these challenges, the Office of the High Commissioner for Human Rights has noted that there is an increasing willingness of NHRIs "to enter into ad hoc cooperative arrangements with counterparts in other States to investigate and identify ways of addressing the adverse effects of business-related activities on human rights that cross national boundaries." (UN High Commissioner for Human Rights, 2018) For example, given the reliance of Germany on Colombia for coal, the German Institute for Human Rights and the Colombian Defensoría del Pueblo have been cooperating in efforts to address human rights risks in the extractive industry in Colombia (Kaya, Niebank, & Utlu, 2017). This cooperation has led to an increase in engagement between governments, companies and impacted communities (Chatham House - The Royal Institute of International Affairs, 2018; Utlu & Niebank, 2017). The collaboration has also provided a vehicle for German companies to get a better understanding of the Colombian context and the specific human rights risks within the extractive sector (Chatham House - The Royal Institute of International Affairs, 2018). The success of this collaboration suggests that NHRIs can play a role in connecting key stakeholders at both ends of the value chain, and ultimately assist in closing governance gaps.

In addition to a value-chain approach, for many NHRIs it is strategic to engage through regional networks. For example, the South East Asia National Human Rights Institutions Forum (SEANF) collaborates on a range of business and human rights issues including trafficking, indigenous people and migrant workers (for example, see Robertson, 2010).

Facilitate Multi-Stakeholder Engagement

One of the most important strengths of an NHRI is the ability to bring all relevant actors to the table (Faracik, 2012; Haász, 2013; Utlu & Niebank, 2017). While the convening role and power of NHRIs was not acknowledged in the UNGPs (Brodie, 2012), the ability and potential to convene a range of groups and stakeholders should not be underestimated. As an independent institution, NHRIs do not have a defined constituency or vested interest, as such they are well placed to bring

together a range of actors together and enable the integration of various perspectives on a particular issue or challenge. Given they are often trusted institutions who have connections with the community, they can also create safe spaces for companies and communities to engage and can facilitate partnerships, where appropriate, under goal 17 of the Sustainable Development Goals.

This convening role goes beyond national actors, but also extends to international and regional players and organisations (Haász, 2013). As NHRIs have experience engaging with the UN both at an international and regional level (Linos & Pegram, 2016), NHRIs are uniquely placed to help create strategic alliances between national actors and players in the area of business and human rights and connect them with the international human rights system.

Build Bridges and Share Insights with other Grievance Mechanisms

NHRIs, particularly with complaint handling functions, are well placed to share lessons and experiences with other grievance mechanisms under pillar three of the UNGPs (such as state and non-state grievance mechanisms). Many NHRIs have decades of experience in handling human rights related cases (McGregor, Shipman, & Murray, 2017b) and as such, have a wealth of knowledge and experience that could be shared with other grievance mechanisms. Given that a key barrier to achieving a sustainable and meaningful outcome is the inherent power imbalances that exist between parties (Marshall, 2016), NHRIs are well placed to share their insights into how to deal with the power imbalances that commonly arise in these cases. As two state-based non-judicial grievance mechanisms, NHRIs and National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises should look for further opportunities to exchange advice and information. A framework for collaboration between NHRIs and NCPs is provided by an MOU between the OECD network of NCPs and the Global Alliance of NHRIs (GANHRI) (Organisation for Economic Co-operation and Development and the International Coordinating Committee of National Human Rights Institutions, 2012).

Engagement with NHRIs can also assist both state-based and non state-based grievance mechanisms to build awareness and visibility of these mechanisms. As independent institutions with strong connections with local communities, creating linkages with NHRIs may lead to increased trust in these mechanisms. NHRIs can also assist in promoting awareness of such grievance mechanisms in their existing community outreach and engagement.

NHRIs are uniquely placed to help create strategic alliances between national actors and players in the area of business and human rights and connect them with the international human rights system.

Conclusion

NHRIs are central to ensuring respect for international human rights standards at the national level. They provide a vital role in bridging the gap between the international human rights law and obligations, and their national implementation. NHRIs are playing an increasingly important role in advancing and influencing the business and human rights landscape, including through shaping legislative and policy responses and facilitating access to remedy for business-related human rights harms. As impartial and independent institutions with in-depth human expertise, private sector actors are also increasingly seeing the value of NHRIs in providing human rights advice and guidance.

This paper has outlined the various ways in which NHRIs are contributing to the implementation of the UNGPs. While NHRIs globally face a number of challenges including inadequate resourcing and jurisdictional limitations, there are also opportunities for NHRIs to strengthen their role and engagement on business and human rights issues. In particular, NHRI peer coordination and collaboration around specific cases or challenges seems to be one area of great potential.

The UNGPs outline an evolving and multi-faceted role for NHRIs and created significant expectations about their potential to drive respect for human rights in the context of business activities. The challenge for NHRIs moving forward is to continue to push for strengthened uptake of human rights and greater accountability, increased engagement and dialogue with their peers and all relevant actors, and to chart new innovative paths.

References

- Asia Pacific Forum of National Human Rights Institutions. (2013) Human Rights Education: A Manual for National Human Rights Institutions. Retrieved from https://www.asiapacificforum.net/media/resource_file/Human_Rights_Education_Manual_for_NHRIs_ejmumah.pdf
- Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law. (2017) Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation. Retrieved from Sydney: https://www.asiapacificforum.net/media/resource_file/Conducting_National_Inquiries_Manual_cNSg0ju.pdf
- Brodie, M. (2012) Pushing the Boundaries: The Role of National Human Rights Institutions in Operationalising the 'Protect, Respect and Remedy' Framework. In *The UN Guiding Principles on Business and Human Rights* (pp. 245-272): Brill Nijhoff.
- Brodie, M. (2015) Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions to Inquire. *University of New South Wales Law Journal*, 38, 1215.
- Chatham House - The Royal Institute of International Affairs. (2018) Access to Remedy in Business and Human Rights: the Role of National Human Rights Institutions. Retrieved from London: <https://chathamhouse.soutron.net/Portal/Default/en-GB/RecordView/Index/179194>
- Commission on Human Rights Republic of the Philippines. (2018) CHR Concluded Landmark Inquiry on the Effects of Climate Change to Human Rights; Expects to Set the Precedent in Seeking Climate Justice [Press release]. Retrieved from <http://chr.gov.ph/chr-concluded-landmark-inquiry-on-the-effects-of-climate-change-to-human-rights-expects-to-set-the-precedent-in-seeking-climate-justice/>
- Danish Institute for Human Rights. The GANHRI Working Group on Business and Human Rights. Retrieved from <https://www.humanrights.dk/projects/ganhri-working-group-business-human-rights>
- Danish Institute for Human Rights. Our Corporate Engagement: Working with Companies. Retrieved from https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/ce_flyer_2017.pdf
- Danish Institute for Human Rights and the International Corporate Accountability Roundtable. (2017) National Action Plans on Business And Human Rights: A Toolkit For The Development, Implementation, And Review Of State Commitments To Business And Human Rights Frameworks - 2017 Edition. Retrieved from https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrd_2017/dihr_icar_nap_toolkit_2017_edition.pdf
- Equality and Human Rights Commission. (2016) Business and human rights: A five-step guide for company boards. Retrieved from London: https://www.equalityhumanrights.com/sites/default/files/business_and_human_rights_web.pdf
- Faracik, B. (2012) The Role of Non-EU National Human Rights Institutions in the Implementation of the UN Guiding Principles on Business and Human Rights, with a Focus on Eastern Partnership Countries. Retrieved from Brussels: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457112/EXPO-DROI_ET\(2012\)457112_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457112/EXPO-DROI_ET(2012)457112_EN.pdf)
- German Institute for Human Rights. (2015) National Baseline Assessment: Implementation of the UN Guiding Principles on Business and Human Rights (in German). Retrieved from Berlin: <https://www.institut-fuer-menschenrechte.de/publikationen/show/national-baseline-assessment-umsetzung-der-un-leitprinzipien-fuer-wirtschaft-und-menschenrechte/>
- German Institute for Human Rights. (2019) National Action Plan on Business and Human Rights. Retrieved from <https://www.institut-fuer-menschenrechte.de/en/topics/business/national-action-plan/>
- Götzmann, N., & Methven O'Brien, C. (2013) Business and Human Rights: A Guidebook for National Human Rights Institutions. Retrieved from https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/bhr_guidebook_for_nhris_2013_eng.pdf
- Haász, V. (2013) The role of national human rights institutions in the implementation of the UN guiding principles. *Human Rights Review*, 14(3), 165-187.
- Howard, E. (2016, 7 May) Philippines investigates Shell and Exxon over climate change. *The Guardian*. Retrieved from <https://www.theguardian.com/sustainable-business/2016/may/07/climate-change-shell-exxon-philippines-fossil-fuel-companies-liability-extreme-weather>

- Human Rights Commission of Malaysia (SUHAKAM). (2013) National Inquiry into the Land Rights of Indigenous Peoples. Retrieved from Kuala Lumpur: <https://drive.google.com/file/d/0B-6FQ7SONa3PRbUInUGcxzdEWU0/preview>
- Human Rights Commission of Malaysia (SUHAKAM). (2017) Press Statement No.12 of 2017 (MoU SUHAKAM, FGV and Felda) [Press release]. Retrieved from <https://www.suhakam.org.my/press-statement-no-12-of-2017/>
- International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (now GANHRI). (2010) The Edinburgh Declaration. In.
- Kaya, G., Niebank, J.-C., & Utlu, D. (2017) Closing Protection Gaps in the Human Rights and Business Context: What Transnational Cooperation between the National Human Rights Institutions of Germany and Colombia has Achieved. Retrieved from Berlin: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Information/Information_14_Promising_Practice_Closing_protection_gaps_in_the_human_rights_Business_context.pdf
- Linos, K., & Pegram, T. (2016) Architects of their own making: national human rights institutions and the United Nations. *Human Rights Quarterly*, 38, 1109.
- Male Champions of Change. (2018) Impact Report 2018. Retrieved from <https://malechampionsofchange.com/wp-content/uploads/2018/12/MCC-Impact-Report-2018-1.pdf>
- Marshall, S. (2016) OECD National Contact Points: Better Navigating Conflict to Provide Remedy to Vulnerable Communities. Retrieved from Melbourne: https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/580d7b7bb3db-2b51a441a6e8/1477278601503/NJM16_OECD.pdf
- McGregor, L., Shipman, S., & Murray, R. (2017a) First Contact with Complainants: A Human Rights Based Approach to Triage and Referrals by NHRIs: University of Essex.
- McGregor, L., Shipman, S., & Murray, R. (2017b) National Human Rights Institutions in Europe and Dispute Resolution: A Mapping. Retrieved from https://www1.essex.ac.uk/hrc/documents/50647_NHRI_Mapping_Report_web.pdf
- Middleton, C. (2012) Transborder environmental justice in regional energy trade in mainland South-East Asia. *ASEAS-Österreichische Zeitschrift für Südostasienwissenschaften*, 5(2), 292-315.
- Middleton, C. (2018) National Human Rights Institutions, Extraterritorial Obligations and Hydropower in Southeast Asia: Implications of the Region's Authoritarian Turn. *Austrian Journal of South-East Asian Studies*, 11(1), 81-97.
- Niebank, J.-C., & Utlu, D. (2017) Closing gaps in protection. Transnational cooperation on human rights: The case of the extractive sector in Colombia. Retrieved from https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analysis_Closing_gaps_in_protection_Transnational_cooperation_on_human_rights_The_case_of_the_extractive_sector_in_Colombia.pdf
- Organisation for Economic Co-operation and Development and the International Coordinating Committee of National Human Rights Institutions. (2012) Memorandum of Understanding Between the Organisation for Economic Co-operation and Development and the International Coordinating Committee of National Human Rights Institutions (now GANHRI). Retrieved from <http://www.oecd.org/investment/mne/oecdandnationalhumanrightsinstitutionsjoinforces.htm>
- Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change, No. Case No.: CHR-NI-2016-0001 (2016).
- Pred, D. (2013) Bittersweet Harvest: A Human Rights Impact Assessment of the European Union's Everything but Arms Initiative in Cambodia. Retrieved from Phnom Penh: https://www.tni.org/files/download/bittersweet_harvest_web_version.pdf
- Robertson, P. S. (2010) Paper on Migrant Workers. Retrieved from Kuala Lumpur: <http://apmigration.ilo.org/resources/resource-content/south-east-asia-national-human-rights-institution-forum-seanf-paper-on-migrant-workers>
- Schuller, C., & Utlu, D. (2014) Transnational Cooperation in Business and Human Rights: A model for analysing and managing NHRI networks. Retrieved from Berlin: https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Transnational_Cooperation_in_Business_and_Human_Rights_A_model_for_analysing_and_managing_NHRI_networks.pdf
- The German Institute for Human Rights and the Danish Institute for Human Rights. (2019) Case Studies and Workshop Report. Remedy in Business and Human Rights Cases: The Role of National Human Rights Institutions. Retrieved from Berlin: https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrb_2019/nhri_conference_report_and_case_studies_2019.pdf

UN High Commissioner for Human Rights. (2018) Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse through State-based Non-judicial Mechanisms (A/HRC/38/20). In.

UN Human Rights Council. (2008) Protect, respect and remedy: A framework for business and human rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. April 2008, A/HRC/8/5. In.

UN Human Rights Council. (2018) Business and human rights: improving accountability and access to remedy (A/HRC/38/L.18). In.

Utlu, D., & Niebank, J.-C. (2017) Business and Human Rights: Trans-national NHRI Cooperation between Colombia and Germany. Retrieved from Berlin: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Sonstiges/Trans-national_NHRI_cooperation_between_Colombia_and_Germany_Poster_DINA4.pdf

Business and Human Rights in China: An Overview of Policies and Laws on Chinese Overseas Investment

Zhong Huang

HUANG Zhong, a Chinese national, serves as China Researcher & Representative at Business and Human Rights Resource Centre. Based in Beijing, she is responsible for research and outreach in Mainland China and highlighting the social and environmental impacts of Chinese overseas investment. She previously worked as a Consultant at the Saferworld China Programme in the project on Chinese business engagement in conflict-affected areas, and Research Fellow at Wuhan University Public Interest and Development Law Institute (PIDLI), responsible for research on human rights impacts of Chinese investment in Africa, community legal empowerment for rural women, etc. Zhong was educated at the University of York (MA in Applied in Human Rights), University of Newcastle (LLM in International Commercial Law), and Wuhan University (LLB).

Professor Wanhong Zhang

Zhang Wanhong earned his Ph.D. in Law from Wuhan University School of Law, Wuhan, China, where he now holds the position of Professor of Jurisprudence. He studies and teaches in the legal areas related to human rights, public interest and civil society. He has also authored some of the first Chinese articles on Business and Human Rights. Professor Zhang is one of the drafters of China's first National Human Rights Action Plan. Professor Zhang is one of the drafters of China's first National Human Rights Action Plan. As Executive Director of Wuhan University Institute for Human Rights Studies (China's National Human Rights Education and Training Base) and the Director of Wuhan University Public Interest and Development Law Institute. Professor Zhang and his colleagues are actively working in the field of protection and promotion of human rights in China. He also serves as advisor to several international and domestic organizations.

Since China announced the “One Belt, One Road” strategy in 2013, an ambitious initiative in its political and economic goals that connects Asia, Europe, the Middle East and Africa with a vast logistic and transport network which involves 65 countries (Huang, 2017), its overseas investment activities have been on a steady rise and made the country the world's second largest source of foreign direct investment (FDI). Meanwhile, the government has shown its interest and desire on various occasions, both internationally and domestically, to play a leadership role in the new era of globalization. However, concerns over the adverse economic and political impacts of China on the host countries are arising. Notably, compared with its western counterparts, there is a growing dispute as to whether China is providing an alternative approach to FDI and infrastructure abroad for the world to achieve sustainable development goals together (Nassiry and Nakhoda, 2016: 15) or is merely exporting abroad its old model of growth – overly emphasizing economic development and leaving massive environmental and social problems behind (Webster, 2012 and Gathii & Chair, 2013).

This chapter tries to sort out the policies and laws regarding Chinese overseas investment in the context of UN Guiding Principles on Business and Human Rights (UNGPs), and to examine how and to what extent China turns its policy commitment to sustainable development into reality in its overseas investment. By showing the incoherence between the political/legal framework and the practice at different institutions and levels, it suggests that there is still a long way to go to incorporate business and human rights into the political agenda and multifaceted efforts from different actors are needed to bridge the gaps.

National Policies

While China has made strong commitments on international initiatives such as the Sustainable Development Goals (SDGs) and the Paris Agreement in its effort to build up an image of a responsible great power, it has simultaneously been slow in taking actions on promoting business and human rights – both domestically and internationally – since the UNGPs were endorsed

unanimously by all member states, including China, in the UN Human Rights Council in 2011. The Chinese government seemingly has yet to put a specific and holistic business and human rights national action plan (NAP) on its agenda. This is despite the UN Working Group on Business and Human Rights' directives for all states to develop, enact and update relevant national policies. In contrast to Chinese lethargy, over 50 countries in the world have produced NAPs or are in the process of taking actions in this regard (OHCHR 2018).

On the SDGs and the Paris Agreement, China released its national plan for implementing the 2030 Agenda (2016), which highlights the overarching approach of "innovative, coordinated, green, open and shared development" and integrates the 17 goals and 169 targets of the SDGs into China's 13th Five-Year Plan. A series of policy documents on "Belt and Road Initiative" including the Guidance on Promoting Green Belt and Road (2017), the Guiding Principles on Financing the Development (2017), and the Vision and Actions on Energy Cooperation (2017) that map out China's overseas investment strategy strengthened its promises to SDGs and Paris Agreement.

With regards to business & human rights, the third National Human Rights Action Plan of China (2016-2020) (2016) urges "overseas enterprises to abide by the laws of the host countries and fulfill their social responsibilities in the process of conducting foreign economic and trade cooperation, providing assistance and making investment." This was deemed significant progress that reaffirms that human rights principles and issues are embedded in social responsibilities in the policy theory of the Chinese government. Nevertheless, the document does not make reference to key international frameworks regarding business and human rights such as the UNGPs, nor sets out concrete plans on important aspects such as requirements on human rights due diligence and other related measures, and human rights impacts of state-owned enterprises (SOEs). Hence it falls short on mapping out a systematic and holistic plan to implement measures to protect human rights in relation to business activities (Liang, 2016).

It has been recognized in the 2030 Agenda that the realization of SDGs will rely on the universal respect for

human rights. Nonetheless, neither the 13th Five-Year Plan nor the National Human Rights Action Plan of China explicitly addresses the link between the SDGs and human rights, and the respective roles the public and private sector should play. Without such a hint from the top-level policy design, civic space for further discussions on these aspects in the country remains very limited.

Laws & Regulations focusing on Chinese overseas investment

In recent years, China has issued a growing matrix of laws, regulations, policy statements, and guidelines regarding social and environmental safeguards of its overseas business activities. These instruments cover diverse aspects of China's economic activities abroad, from regulating utilization and cultivation of forests, to stressing the need to reinforce the integrity, environmental awareness, security, vitality and accountability of central enterprises.

Among the over 30 regulations and guidelines for the overseas sustainable development of Chinese enterprises that are currently in effect (table 1), only the Green Credit Guidelines for the financial sector in 2012 cover environment and community development issues in a comprehensive manner. In addition, the Administrative Rules for Overseas Contracting promulgated by the State Council in 2008 provides specific provisions on legal accountability regarding the violation of the Rules and other relevant laws. Other than that, most of the normative documents were issued by specific administrative departments and titled as "notice", "opinions", "measures", which implies a lower degree of enforceability of these documents, and there are lack of solid mechanisms and specific bodies to implement them. Moreover, compared with relevant international standards and guidelines that take human rights as one of the key components, the domestic documents rarely refer explicitly to human rights issues.

In his country visit report (A/HRC/31/60/Add.1) after visiting China, Juan Pablo Bohoslavsky, UN Independent Expert on the effects of foreign debt on human rights, commended the Chinese government's efforts

on building regulatory frameworks on social & environmental impacts of outbound investments, but expressed concerns on the implementation of such frameworks.

Inconsistencies in the implementation of laws and regulations relating to responsible overseas investment

Despite the Chinese government often citing the published guidance documents to showcase Beijing's efforts to make its overseas investments more socially and environmentally responsible, the practices by the Chinese business communities in this area – and the forces that regulate them – remain elusive. Few steps have been taken to further strengthen or operationalize such norms and guidelines, or to review corporate adherence to these documents.

For instance, while examining the implementation of the Green Credit guidelines in which a new article updated in 2012 (Article 21) obligates banks to comply with international norms for overseas investments, some observed (Innovation Seed, n.d.) that, in the sector as a whole, lending to polluting, energy-hungry and resource-extracting industries is still high. Even though the guidelines are mandatory, their implementation in some cases still resembles a voluntary environmental scheme. Another case study (Friends of the Earth 2014) by several environmental organizations found that Chinese banks are far less than satisfactorily in meeting expectations to ensure that borrowers comply with relevant environmental and social regulations and uphold good international practices. It suggested there is lack of transparency and insufficient engagements with affected community by various projects.

Another report on Chinese enterprises in Africa (IIED 2016) revealed that Chinese businesses generally show a lower level of awareness on social and environmental safeguards, comparing to other requirements directly concerning the business operations, such as the regulations on licenses and approvals of construction contracting companies, and overseas safety guidelines etc. The study also suggested that the state-owned enterprises (SOEs) have a higher degree

of familiarity with regulations relating to overseas business due to the close ties with their headquarters and the government departments, when compared to private companies. However, it is difficult to measure if the SOEs have better performance than the private companies due to the lack of information disclosure in general.

Within the context of a lack of concrete plans to implement these measures, there have been numerous media coverage and reports raised by NGOs as well as local communities bringing up social, environmental and human rights concerns about Chinese foreign investments in various host countries. It is roughly calculated that there were nearly a hundred items during the year of 2017-2018 collected by the Business and Human Rights Resource Centre concerning the misconduct of Chinese companies overseas. Yet, most of the companies were reticent on the allegations raised by the public and civil society. For instance, only two enterprises responded to Resource Centre's inquiries despite over a dozen approaches the organization made regarding the allegations against Chinese businesses overseas in 2018. Both the companies denied the occurrence of the alleged human rights abuse. From the author's experience, Chinese companies, particularly the SOEs are often less reachable, with limited direct contact channels available. While a company's response rate to social and environmental concerns may not be able to adequately reflect the extent of the responsible business conduct, it is still an important indicator that shows the openness of the company to engage with human rights challenges and be transparent and accountable. In this regard, Chinese companies bear reputational risk partly due to the lower accessibility.

Responsible Business Guidelines and Action Plans for Industries in China

Some business sectors in China have developed guidelines for responsible business conduct that are in line with international standards and have started to form good practices in this aspect. The cooperation between OECD and China, particularly with the China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters (CCCMC) (OECD 2014) and

the China National Textile and Apparel Council (CNTAC) (OECD 2018) has not only helped the industries strengthen the guidelines as well as implementation tools (especially) for Chinese companies operating overseas and the due diligence of the supply chain, but also created opportunities and expanded space for broader international cooperation with multi-stakeholders, which involve great efforts from civil society organizations such as Global Witness (2017 & 2015).

While there is somewhat greater space for domestic organizations to become involved in issues relating to Chinese investment overseas, challenges such as language barriers, lack of local knowledge and trust from the host communities, shortage of resources, fragmentary and disintegrated efforts hinder actors from effectively bridging the gaps.

Nonetheless, the challenges on implementation of those guidelines are, again, huge. The awareness towards these standards among Chinese companies remains low. Very few businesses understand the value of human rights due diligence. The industry-initiated codes of conduct are voluntary, which means the incentives to implement are weak. There is a lack of leverage from civil society to keep business accountable to laws and respectful of human rights. These desiderata are due to the underdeveloped consumer movement and shrinking civic space in China.

The crackdown on domestic labor and human rights lawyers' groups (Franceschini and Lin 2018 & South China Morning Post 2018), as well as the continually stringent media control in the past years, has tremendously limited civil society's voice against abuses and adverse social impacts of business inside China. It inevitably results in the absence of human rights lens in discussions around corporate social responsibility due to the lack of engagement of broader external stake-

holders. While there is somewhat greater space for domestic organizations to become involved in issues relating to Chinese investment overseas, challenges such as language barriers, lack of local knowledge and trust from the host communities, shortage of resources, fragmentary and disintegrated efforts hinder actors from effectively bridging the gaps.

Conclusion

Admittedly, the Chinese government's firm commitments on sustainable development through 'mutually beneficial cooperation' embody its self-expectation and designs for future actions. It nevertheless remains a high risk that they are only beautiful buzzwords if the authorities cannot openly confront the inconsistencies from policy making to the implementation at different levels, and take appropriate legislative and administrative measures to ensure the accountability and legal liability of Chinese companies and their subsidiaries abroad for human rights abuses.

Based on the analysis above, it might be fair to suggest that the Government of China must take the first step to develop a national action plan on business and human rights OR at least include a specific chapter on business and human rights that clearly references the UNGPs and places related human rights due diligence requirements on companies operating both domestically and overseas in the next national human rights action plan. An additional boon would be to make sure that the process of the policy-making involves broad public consultation. It is also crucial to set up programmes targeted to relevant government department (such as MOFCOM, MFA, Ministry of Industry and Information Technology) and financial institutions on awareness raising and capacity building on BHR issues and applicable national and international standards in the field of human rights, labour, social security, health and environment in both China and host countries.

Besides acting as a watchdog over the irresponsible business conduct, international civil society could play a key role in promoting business and human rights agenda in China and among Chinese investment overseas through proactively engaging in emerging

responsible business initiatives and sharing good practice in social and environmental governance. It could also help to build constructive dialogues among multi-stakeholders at different levels by raising and empowering the voices of the affected groups.

References

- Business and Human Rights Resource Centre. (2018) Company Response Rates. <https://www.business-humanrights.org/en/company-response-rates>
- Franceschini, Ivan and Kevin Lin. (2018) "Chinese labour NGOs reconsidering their role under pressure from government crackdown." Hong Kong Free Press. September 29, 2018. <https://www.hongkongfp.com/2018/09/29/chinese-labour-ngos-reconsidering-role-pressure-government-crackdown/>
- Friends of the Earth. (2014) "Going out, but going green?" <https://foe.org/2014-11-going-out-but-going-green/>
- Gathii, James Thuo. (2013) "Beyond China's Human Rights Exceptionalism in Africa: Leveraging Science, Technology and Engineering for Long-Term Growth." *Columbia Journal of Transnational Law*, 51(3): 664-695.
- Global Witness. (2017) "Chinese industry takes bold step to tackle land grabs with launch of new rubber guidelines." <https://www.globalwitness.org/en/press-releases/chinese-industry-takes-bold-step-tackle-land-grabs-launch-new-rubber-guidelines/>
- Global Witness. (2015) "Global Witness welcomes progressive new Chinese mineral supply chain guidelines." <https://www.globalwitness.org/en/press-releases/global-witness-welcomes-progressive-new-chinese-mineral-supply-chain-guidelines/>
- Huang, Zheping. (2017) "ONE BELT, ONE ROAD: Your guide to understanding OBOR, China's new Silk Road plan." *Quartz*. May 15, 2017. <https://qz.com/983460/obor-an-extremely-simple-guide-to-understanding-chinas-one-belt-one-road-forum-for-its-new-silk-road/>
- IIED, (2016) *Feizhou Zhongzi Qiye: Ruhe Kaidai Qiye Shehui Zeren he Zhongguo Zhengfu Zhengce de Zuoyong* [Chinese enterprises in Africa: How to treat of the role of CSR and Chinese government's policies], edited by Weng Xiaoxue, and Lila Buckley. <http://pubs.iied.org/pdfs/17581CIIED.pdf>
- Innovation Seed. "Green Credit Guidelines in China." <http://www.innovationseeds.eu/Policy-Library/Core-Articles/Green-Credit-Guidelines-In-China.kl>
- Liang, Xiaohui. (2016) "Does China Now Have Its National Action Plan on Business and Human Rights?" Business & Human Rights Resource Centre. October 24, 2016. <https://www.business-humanrights.org/zh-hans/node/145559>
- Nassiry, Darius and Smita Nakhoda. (2016) "The AIIB and investment in climate change, Overseas Development Institute." Overseas Development Institute, April 2016. https://www.odi.org/sites/odi.org.uk/files/resource-documents/the_aiib_and_investment_in_action_final_20160413.pdf
- OECD. (2014) "China and OECD to co-operate on promoting the responsible sourcing of minerals." <http://www.oecd.org/corporate/mne/china-oecd-cooperation-responsible-sourcing-of-minerals.htm>
- OECD. (2018) "China and the OECD partner to promote responsible business in global textile and apparel supply chains." <http://www.oecd.org/corporate/cntac-oecd-partner-to-strengthen-cooperation-textile-apparel-supply-chains.htm>
- Webster, Timothy. (2013) "China's Human Rights Footprint in Africa." *Columbia Journal of Transnational Law*, 51(3): 626-663. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=212558
- South China Morning Post. 2013. EU urges China to free activists three years on from 709 crackdown. July 11, 2018. <https://www.scmp.com/news/china/policies-politics/article/2154761/eu-urges-china-free-activists-anniversary-709-crackdown>
- The People's Republic of China. Ministry of Foreign Affairs. China's National Plan on Implementation of the 2030 Agenda for Sustainable Development. (2016) https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/W020161014332600482185.pdf
- The People's Republic of China. Ministry of Environmental Protection, Ministry of Foreign Affairs, National Development & Reform Commission, Ministry of Commerce. *The Guiding Principles on Financing the Development*. (2017) <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13757.htm>
- The People's Republic of China. Ministry of Finance. *The Guiding Principles on Financing the Development*. (2017) <https://eng.yidaiyilu.gov.cn/zchj/qwfb/13757.htm>

The People's Republic of China. National Development & Reform Commission, National Energy Administration. Vision and Actions on Energy Cooperation in Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road. (2017)

<https://eng.yidaiyilu.gov.cn/zchj/qwfb/13754.htm>

The People's Republic of China. The State Council Information Office. National Human Rights Action Plan of China (2016-2020). (2016)
http://english.gov.cn/archive/publications/2016/09/29/content_281475454482622.htm

U.N. Human Rights Council, Thirty-first session. Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to China. March 1, 2016 (A/HRC/31/60/Add.1). <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/040/18/PDF/G1604018.pdf?OpenElement>



The Art of Respecting Human Rights: Guiding Business Enterprises

Chapter Synopses: The art of respecting human rights: Guiding business enterprises

“[H]uman rights advocates and practitioners that do not favor abolishment, whether for philosophical or practical reasons, need to develop more robust and powerful frameworks for effective mitigation and remediation.” This is the conclusion that Joana Cassinerio reaches in a critical review of a human rights discourse that promotes abolishment as the only option for Big Tobacco. After questioning the feasibility of focusing on abolishment as the only way forward, the chapter explores several alternatives. Citing different scenarios and lawsuits, Cassinerio offers: “emphasising the responsibility of a business to reform itself and provide remedies seems an appropriate and important pivot away from advocating for outright abolishment.” The chapter argues that such an emphasis on reform and remediation should not be read as an abandonment of the letter or spirit of the UNGPs. Rather, Cassinerio argues “plain abolishment underestimates and disregards other solutions described in the UNGPs, especially in Pillar 3.” The chapter concludes by considering abolishment and its alternatives through the lens of Big Tobacco in the Global South. Cassinerio’s examination of British American Tobacco Cambodia highlights the obstacles to both abolishment and its alternatives, as all of these options require reliable legislation and enforcement. This leads Cassinerio to conclude on a practical, strategic way forward:

Cambodia’s leniency with BATC’s policies revealed the pitfalls of allowing a business to fully self-regulate. However, this case study does not disregard a plethora of solutions to increase business accountability. For example, governments are advised to take on a stricter role in protecting their citizens by implementing smoke-free areas, increasing taxation on cigarettes, and conducting awareness campaigns around the country to educate young people about the dangers of tobacco consumption.

Mairead Keigher and Michelle Langlois ask what can be done to ensure that human rights reporting is meaningful. Indeed, business enterprises have begun to change the way they “think, strategize and

act” relative to human rights, but it is unclear whether current reporting practices provide an honest picture of transformations and lack thereof. As Keigher and Langlois convey, disclosure and reporting may not be an end in itself, but it can have a catalyzing effect, seen through the kinds of meaningful questions that take place within an organization as a result of asking the right kinds of questions: “The theory of change being that, Over time, enhanced disclosure of human rights issues will enable the market to reward and incentivise better behaviour by companies, leading to a ‘race to the top’ by CEOs eager to take leadership positions in this area.” Disclosure is becoming an area of greater emphasis, but recent research reveals significant gaps relative to both ‘knowing’ potential human rights risks and ‘showing’ appropriate responses. Keigher and Langlois note that, “At the heart of this reporting trend is a basic misunderstanding of what respect for human rights means for companies and how to communicate their alignment with the expectations of the UN Guiding Principles.” Fortunately, mounting expectations around disclosure, the drive to understand how companies can , and guidance provided by, for example, the UNGP Reporting Framework are compelling better reporting. But, as the chapter argues, in order to make reporting meaningful efforts must go beyond simply ticking boxes. Meaningful reporting requires a principled approach, such as the blueprint Keigher and Langlois provide, which begins with “a rights-based approach to identifying their salient human rights risks, in other words, those human rights at risk of the most severe negative impact throughout their business operations and value chain.”

An interview with Luke Wilde, Hannah Temple and Carolin Seeger of twentyfifty limited provides the kind of insights and perspectives that only a consulting firm with fifteen years of experience could offer. The twentyfifty team spoke of promoting a management practices approach to BHR long before the establishment of the UNGPs. The influx of companies seeking consultation on the UNGPs only seems to have occurred in the last two to three years. The timing is proof positive that

action from government, specifically national action plans, are critical in stimulating specific action from the business community. Beyond national action plans, the twentyfifty team felt that the UNGPs have been catalytic because they provide “language” and “urgency... to the people within companies who are working on corporate responsibility and on business and human rights, who have had the topic on their agenda for a long time but have never really had the external justification to say: ‘This is important. This is why we need to look at this!’”

When asked about hurdles, the twentyfifty team spoke to a number of issues: absent legal requirements – they pertinently point out that many of their (company) clients are proponents of effective regulation as they are “hungry...for a level playing field”; lack of buy-in from the top; fragmented supply chains; the isolation of human rights within a specific department:

“the main barrier at the moment is the fact that still, even though other functions like procurement, HR, compliance are getting involved, this topic is being driven out of sustainability departments largely, which often don’t have very much power within the organization. They are often seen as a cost center, not really part of core business, and so it really requires those departments to build relationships with other functions to get the budget, to get the leadership, to get the recognition of this as an important topic that the company needs to be looking at.”

Overlaying many of these challenges is a perceived absence of connection to a broader corporate purpose beyond profit. However, the twentyfifty team suggested that progress was possible with a change in mindset from a “compliance-orientated” to a “leadership-orientated” approach to human rights. To this end, the twentyfifty team highlighted the importance of “translating the language of human rights into something that the businesses understand or particular functions within the business understand.” The interview concludes with a question about twentyfifty’s work in the technology sector. Much of the human rights efforts in this sector seems to currently focus on the implementation of technical due diligence. Although there are some efforts to for example understand the human

rights impacts associated with raw materials used in new technologies, so far the really meaty topics for this sector around the human rights impacts of the future of work, AI and the impacts of products and services on broader rights like rights to privacy, freedom of expression have been much less explored. twentyfifty looks forward to working with bold, purpose-driven technology companies on these topics in the near future.

Making Human Rights Reporting Meaningful

Mairead Keigher

Mairead Keigher has a 19 year ICT sector background, most recently spending 8 years as Citizenship and Corporate Affairs Manager at Microsoft. As the Human Rights Reporting Manager at Shift, Mairead's work involves outreach and training to multiple audiences on the application of the UN Guiding Principles Reporting Framework, outlining how it catalyzes improved corporate human rights performance and disclosure.

Michelle Langlois

Michelle Langlois is a lawyer specializing in international human rights law and clinical legal education, with a focus on business and human rights. Prior to joining Shift, Michelle worked at a major Canadian corporate law firm, and with non-profit human rights organizations in Cambodia, Thailand and Canada. At Shift, Michelle conducts in-depth analysis of companies' human rights reporting and develops the UN Guiding Principles Reporting Database as a unique public resource.

Eight years after the UNGPs were endorsed, their promise to push corporate practice forward in order for companies to understand, mitigate and remedy their human rights risks has been, at least, partially met. The UNGPs have successfully become the authoritative standard, and are influencing the way businesses think, strategize and act, when it comes to impacts on people's rights. But, can we say the same about the transparency with which they report on the impacts that do happen, as well as the steps they are taking towards meaningful change?

The unanimous endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council in 2011⁵⁴ brought great optimism that companies would become more transparent about how they dealt with impacts on people's lives and dignity. The UN Guiding Principles call on companies to 'know and show' that they are aware of the potential human rights related risks to which they may be connected, and that they are taking appropriate steps to manage and remedy those that occur. They encourage corporate transparency to the benefit of a broad set of stakeholders, including those whose enjoyment of their human rights has been negatively impacted, and require companies to improve the way they manage their human rights risks. Over time, enhanced disclosure of human rights issues, as a result of asking the right questions internally, will enable the market to reward and incentivize better behaviour by companies, leading to a 'race to the top' by CEOs eager

to take leadership positions in this area. Eight years on from the UN endorsement, we can see the indelible influence of the UNGPs across the business community (participation at human rights workshops and conferences, proliferation of reporting), institutional investors (becoming more informed, engaging with companies), civil society (through benchmarks, research and outreach), as well as in regional and national legislation, regulations and government expectations⁵⁵.

Yet, the call to companies to publicly communicate on their human rights impacts has met with mixed results to-date. Recent research by Shift identified that 56% of the Top (mostly) FT500 listed companies do not explain what human rights issues are most relevant to their operations and value chains, and therefore of greatest relevance to their reporting⁵⁶. In other words, more than half of these top companies do not appear to know what their most severe human rights risks are, let alone include them in enterprise risk management systems, or actively manage them.

While this statistic highlights a concerning trend in corporate disclosure, there are many reasons to be optimistic for the future, given the backdrop of more frequent legislative and regulatory requirements across the globe, both at national and regional levels. Institutional investors and NGOs are paying closer attention to this field of disclosure, while new benchmarks and indices rank companies on what impact they are having with regards to respecting human rights⁵⁷. The

UN Sustainable Development Goals agenda⁵⁸ also puts additional pressure on companies to get their people-related disclosure right.

What progress are we seeing?

Global reporting on human rights is evolving but still leaves room for improvement. Too few of the largest companies show that they are aware of the most severe human rights risks resulting from their business activities (across their own operations and value chain). Only 39% of companies reviewed by Shift identify who is responsible for managing human rights issues, while 16% provide no information whatsoever about governance of human rights, nor of broader issues such as “sustainability” or “corporate social responsibility”. Ninety percent of the companies lack a coherent narrative about how risk or impact assessments inform mitigation actions taken, how decisions are made or if senior management is ever involved. Forty-five percent share little to no data about whether or not the measures they have taken to manage human rights risks are working, except health and safety incidents or workplace demographics, leaving readers in the dark about whether any of their efforts translate into positive outcomes for people.⁵⁹ Knowing that this is what human rights reporting amongst the larger corporations looks like – supported by CSR / sustainability teams and often human rights leads – the outlook for smaller companies with fewer resources, but still with supply chain and community footprints, should be even more concerning. Fortunately, though, some small-and-medium enterprises are showing that it is possible to report well on human rights, even with less resources.⁶⁰

At the heart of this reporting trend is a basic misunderstanding of what respect for human rights means for companies and how to communicate their alignment with the expectations of the UN Guiding Principles. When it comes to people-related topics, Shift has observed that most of the largest companies approach disclosure from the perspective of traditional “Corporate Social Responsibility”; in other words, focusing on the philanthropic and volunteering efforts of the organisation. The UNGPs make it clear, however, that where human rights are concerned, philanthropic efforts do

not count. Negative impacts on people (as a result of the business model or activities) cannot be offset by “doing good”. Instead, companies must first identify, and seek to prevent or remedy, all of the ways in which their business activities, and business model (including in their own operations as well as across their value chain), may negatively impact on the human rights of people, and then they must prioritise these risks for action.

Changing the focus of a risk identification process from ‘risk to business’ to ‘risk to people’ can help companies remove the blind spots usually associated with using a business risk lens, thereby improving their ability to more accurately identify and manage human rights issues.

Most readers of annual reports (financial, sustainability or CSR) will be familiar with the materiality heatmaps used to examine the range of non-financial issues being managed by the company. While the word “materiality” conveys prioritisation based on importance, it fails to specify importance to whom, and as a result gets used in different ways. In general, companies tend to use the term to denote importance to the company and a range of its stakeholders, often shareholders. This definition, then, focuses on the external risks (technological, social, political, economic, environmental, etc.) that (may) impact on business, resulting in ‘risks to business’. This is in contrast with the expectations of the UNGPs, which require companies to identify the human rights impacts that may occur as a result of their business activity, whether within their own operations or across their value chain, in other words the ‘risks to people’. Changing the focus of a risk identification process from ‘risk to business’ to ‘risk to people’ can help companies remove the blind spots usually associated with using a business risk lens, thereby improving their ability to more accurately identify and manage human rights issues.

The result of both of these factors is hundreds of sustainability and CSR reports of the top global listed companies that do not identify the most severe human rights risks that their companies are connected to, potentially placing their business and stakeholders in a vulnerable position.

Achieving a breakthrough

How can businesses address this issue? Companies can start by taking a rights-based approach to identifying their salient human rights risks, in other words, those human rights at risk of the most severe negative impact through their business operations and value chain⁶¹. This requires them to map all of the potential negative impacts on different groups of people, and then prioritise them for action by determining the severity of the impact and the likelihood of it occurring. Once this list of priorities has been developed, companies should put in place – or strengthen – a due diligence process that will enable them manage the risks and impacts. These salient human rights issues should become the centre point of their people-related disclosure, whether in the form of an annual integrated report, a sustainability report, a CSR report, or indeed a standalone human rights report. Prioritisation of issues does not imply that companies can ignore issues that may not appear to be severe. Rather, it helps companies focus on where they should begin to take action. Once companies are clear about their most severe human rights risks, they can then explain how they are managing these risks (or actual impacts).

In addition to providing clarity about a company's salient human rights issues, the key to strong disclosure lies in a number of elements: explaining how the company's governance structures support the management of human rights risks; going beyond high-level statements of policy and commitment and discussing specific processes for implementing respect for human rights; referring to specific impacts that occurred within the reporting period and are associated with its operations or value chain; providing relevant examples of how the company's policies and processes have influenced practice and outcomes within the reporting period, that reflect not only achievements but also

challenges or areas for improvement; explaining how the company gains, and takes on board, the perspective of stakeholders who could be negatively impacted; discussing complex or systemic human rights challenges and how the company grapples with them; including specific data, key performance indicators or other metrics that offer clear and relevant evidence to support the narrative; including information about the company's plans for advancing its efforts to respect human rights; clarifying how strategic company initiatives or projects help advance the company's own management of human rights risks; finally, providing evidence that the quality of its disclosure, and related human rights performance, improves year over year.

While many of the largest companies have strengthened efforts to develop disclosure that meets the requirements of national or regional legislation or regulations, human rights disclosure is largely not yet at the level where institutional investors and others can make informed decisions about their performance against the expectations of the UNGPs. Apart from failing to identify the most severe human rights issues, the average report tends to be couched in very positive language, and containing few indicators that show whether progress is being achieved or not.

To tackle this very issue Shift, together with Mazars, developed the UN Guiding Principles Reporting Framework⁶², following a two-year multi-stakeholder consultation period across six continents. The specific aim of the Reporting Framework is to help companies write better disclosure that is aligned with the Guiding Principles. It consists of eight key open-ended questions that help companies explain how they manage human rights risks. The guidance is centred around the salient human rights issues that should be prioritised by the company for immediate action. Developing good human rights disclosure using the Reporting Framework is an iterative process; companies are unlikely to be able to provide complete information on all questions to begin with, but over time, and as they build out their relevant policies, processes and systems, they should be able to strengthen the management of their salient human rights, and thus the related disclosure. In sum, what is particularly important is the quality of process: whereby asking the right kinds of question internally

will help the company self-diagnose and then test its assumptions with stakeholders, leading to better insight and informed decisions about how to approach human rights challenges.

Stakeholders, in addition to companies, have a role to play in supporting this breakthrough. Institutional investors should increase their understanding of what good human rights disclosure looks like and infuse their investment decisions with this new knowledge. They should also be sure to engage companies in detailed conversations on their disclosure, and press for improvements that are aligned with the UNGPs. Stock Exchanges around the world should build on the solid foundation of the Sustainable Stock Exchange Initiative⁶³ and World Federation of Exchanges⁶⁴ call for meaningful disclosure on human rights, by focusing more attention on the quality of disclosure by their listed companies. Finally, the role of civil society organisations in emphasising the importance of meaningful company disclosure on human rights will continue to be crucial.

Advancing global priorities

In addition to existing legislation and calls for future mandatory due diligence requirements, businesses are heavily focused on working out their respective contributions to the UN Sustainable Development Goals and how to articulate them. Comprising of 17 goals related to both 'people' and 'planet', the SDGs are a clarion call for businesses all over the world to close the widening gulf in equality and economic development resulting from decades of globalisation. To this end, recent thinking has shown that respecting human rights is the linchpin in the attainment of many of the SDGs⁶⁵. Long term sustainable development cannot take place if people's basic human rights and dignity are trammelled. Companies, therefore, need to place human rights at the center of their SDG strategies and activities.

While the SDGs are a useful framework for companies, they can lead to confusion about how to assess and prioritise the most relevant goals, articulate their connection to them, and explain impact over time.

In particular, companies tend to struggle more with making that connection to the social or people-related goals than to the environment, or planet-related goals. When it comes to reporting on SDG-related impact, recent guidance from Shift, the World Business Council on Sustainable Development and partners helps companies do just that⁶⁶. It advises companies to determine the salient risks to people (and planet) within their operations and value chains, and map those priorities to the most relevant SDG goals and targets. In other words, taking a rights-based approach to identifying salient human rights will also benefit a company's ability to understand their contribution to achieving the SDGs, and ultimately report about it. We are seeing a number of the largest global companies begin to describe their alignment in this way in recent human rights, sustainability, CSR or annual reports.

Conclusion

Expectations of human rights disclosure is becoming more specific and rigorous, and the pressure on companies to disclose their actions is mounting. Not only must companies develop a meaningful narrative about their efforts to respect human rights, this narrative must also reflect their commitment to understanding and managing their human rights risks over time. In other words, companies must be able to show that this is a forward-looking commitment that is being embedded across the company, leading to a culture of respect for human rights throughout the organisation. Disclosure needs to also convey the implementation of a due diligence process that centres around their salient human rights risks, that tracks effective performance indicators and that provides remedy to people negatively impacted by the business activities. Through all of this, companies will be able to satisfy the UNGP requirement to 'know and show' how they are managing human rights risks.

We're not there yet, but there are reasons to be optimistic that future human rights disclosure will be more meaningful for all stakeholders.

The Spirit of Human Rights and the UNGPs

Dr. Matthew Mullen

Dr. Matthew Mullen recently concluded his tenure at the Institute of Human Rights and Peace Studies, Mahidol University and is the founder of Article 30.

Beyond the letter of the UN Guiding Principles on Business and Human Rights (UNGPs) lies a spirit with roots stretching back to the Universal Declaration of Human Rights. While the letter of a law (literal legis) denotes its “literal meaning,” the spirit of a law refers to its “perceived intention” (Garcia et al., 2014: 479-480). The spirit is about the deeper purpose of a legal framework, the underlying why. Why does the law exist? What is the BHR agenda trying to accomplish? Clarity of purpose is all important in this new era of business and human rights (BHR). Popular works such as Page’s (2017) *The Alchemy of “Business & Human Rights”* (Part I): *The BHR Boom Years* and Hobbes’ (2017) *Saving the World One Meaningless Buzzword at a Time* take aim at legal formalism, rules-lawyering (manipulating the letter of the law), ceremony and other dynamics that compromise the BHR agenda. A narrow focus on the letter of the UNGPs and accompanying global norms leads to disorientation, stagnation, smoke-screening, deflection, and what Page (ibid) coins as a “public relations” approach to BHR issues. Checking boxes and going through the motions may furnish the appearance of compliance. But that compliance is only window dressing in the absence of fidelity to the spirit of human rights. Fortunately, BHR is much more than a legal game.

The spirit of human rights can be felt and leveraged, even when it cannot be adjudicated. McBarnet and Whelan (1991) note that when legal formalism goes awry, the spirit provides another way forward:

The letter of the rule may not accord with the spirit in which the law was framed; a literal application of the rules may not produce the desired end, it may be counter-productive; there may be gaps, omissions or loopholes in the rules which undermine their effectiveness...There may be a dynamic adaptation to escape rules...The anti-formalist approach is ‘more flexible,

open-textured and policy-oriented,’ as there is an emphasis on the substance of transactions and relationships, on the purposes and ‘spirit’ of regulation and on the need for dynamic responses (850-851).

The spirit of human rights provides an anchor and compass to hear through the noise, expose shortcuts, locate substance and keep sight of what ultimately matters in this rapidly evolving BHR field. In this brief chapter, I characterize the spirit of human rights and provide guidance on how stakeholders may safeguard and kindle that spirit. Stakeholders need not guess as to whether certain BHR efforts are being true to the spirit of human rights. The purpose of the human rights based approach is to ensure that efforts are ‘intrinsically’ and ‘instrumentally’ in alignment with human rights (OHCHR, 2006). In other words, are duty bearers doing the right things, the right way for the right reasons. If one has questions about whether BHR efforts (whether inputs, outputs, outcomes, and impact) align with the spirit of human rights, the HRBA provides an apt diagnostic. In an effort to provide some practical guidance, I conclude this chapter with a breakdown of PANELS (participation, accountability, non-discrimination and equality, empowerment of rights holders, legality, and sustainability), an acronym that stakeholders can deploy when trying to safeguard the spirit of human rights in the BHR field.

The Spirit of Human Rights

The search for the spirit of human rights begins and ends with the UDHR. The UDHR remains the unabating foundation of human rights. As Steiner and Alston (1996) conclude, “It is the parent document, the initial burst of enthusiasm and idealism, terser, more general and grander than the treaties, in some sense the constitution of the entire movement – the single most invoked human rights instrument” (120). What may be

hard to fully grasp seven-decades on is the notion that, while radical, aspirational and emancipatory in orientation (Booth, 2007), the UDHR is not an utopian document. Born out of the untold death, destruction and suffering of WWII, the UDHR was an attempt to prevent continuous slips into mass atrocities and inhumanity. It was an attempt to end perpetual waves of self-destruction. Indeed, the spirit of human rights runs deep, and this deeper purpose can be found in the preamble:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Studying this excerpt from the preamble, one can see that virtues such as dignity, freedoms and rule of law are not sacred and worthy of protection only because they are virtuous. Human rights are about protecting and advancing the species. The spirit of human rights is to protect and advance the species, to safeguard and ensure the sustainability of humanity. In this sense, and against the backdrop of WWII, human rights manifest a social evolution. This evolution is still underway as human rights are less a perfect finished formula and more a living framework that adapts along with the human experience. The constant is that human rights, when properly put in motion, set conditions to stifle the kind of dynamics that have led to tyranny and suffering time and again.

Reviewing the preamble of the UDHR, one can observe that the why and how of the spirit of human rights are interwoven. Human rights protect that which makes all of us human. Sovereignty over mind and body is a starting point. But, human rights are about protecting the species; protecting individuals and collectives from

predatory propensities by constraining and confronting predatory or harmful conduct and ensuring that people can take action on their own behalf. The way to reliably protect and advance humanity is to ensure that each individual human being enjoys an essential level of safety, freedom, dignity, equality, accountability and opportunity. This functionality that underpinning the spirit of human rights is aptly described in Human Rights Education in the Northeast Asian School System, made available by HURIGHTS OSAKA:

The principles of human rights were drawn up by human beings as a way of ensuring that the dignity of everyone is properly and equally respected, that is, to ensure that a human being will be able to fully develop and use human qualities such as intelligence, talent and conscience and satisfy his or her spiritual and other needs... Human rights enable us to respect each other and live with each other. In other words, they are not only rights to be requested or demanded but rights to be respected and be responsible for. The rights that apply to you also apply to others. The denial of human rights and fundamental freedoms not only is an individual and personal tragedy, but also creates conditions of social and political unrest, sowing the seeds of violence and conflict within and between societies and nations (15).

Reviewing the preamble of the UDHR, one can observe that the why and how of the spirit of human rights are interwoven. Human rights protect that which makes all of us human. Sovereignty over mind and body is a starting point. But, human rights are about protecting the species; protecting individuals and collectives from predatory propensities by constraining and confronting predatory or harmful conduct and ensuring that people can take action on their own behalf.

Eleanor Roosevelt (cited in Peters, 2015) captured this sentiment in a candid summation of what the UDHR set out to accomplish:

Basically we could not have peace, or an atmosphere in which peace could grow, unless we recognized the rights of individual human beings ... their importance, their dignity ... and agreed that was the basic thing that had to be accepted throughout the world.

The UDHR lays out a simple but elegant two-part formula to protect and advance humanity 1. constrain and confront predatory or otherwise harmful activities and abuses of power (for the purpose of BHR this would include things like corruption and tax evasion which compromise the commons that all human beings rely on and are to benefit from), and 2. put people in a position to protect and advance themselves and their interests. These two imperatives are mutually reinforcing and create what is known in security studies as defense in depth. This is why I and many others in the field argue that human rights are an optimal, objective measure of sustainability. This is also why I argue that companies ought to see human rights as risk management, rather than another component of the CSR efforts. Human rights apply constraints and turn on a feedback loop that allows for auto-regulation within and around social organisms (business enterprises in the case of BHR) that can engage in or be party to harmful activity. Human rights, when properly put in motion, set conditions that stifle predatory or otherwise adverse conduct and enable people to become agents of their own protection and interests. Setting such conditions is, or should be, the intent of the BHR agenda.

The HRBA and Fidelity to the Spirit of Human Rights

The HRBA is a conceptual framework that emerged in the 1990's as an alternative to the welfare model of development programming, which proved untenable given the absence of accountability and the production of dependency relationships. Formalized in the 2003 UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding), the HRBA's original function was to bind UN

development agencies, states and other "subjects of international law" taking part in development activities (OHCHR, 2006). The reach of the HRBA has since evolved and now acts as a conceptual and practical framework. Whether looking at process, policy, practice, or performance, the HRBA offers a diagnostic to determine whether efforts in any domain are "normatively based on international human rights standards and operationally directed to promoting and protecting human rights" (ibid). In other words, are human rights being deployed correctly? This is a question that reckons with the what, why and how of human rights. Because the HRBA accounts for both form and function it acts as the perfect diagnostic for a field that is as vast, dynamic, and complex as BHR. It is one thing to promote fidelity to the spirit of human rights in the BHR field. It is far more desirable to be able to assess fidelity to that spirit. And that is what the HRBA enables stakeholders to do."

While the HRBA is more nuanced than can be adequately unpacked in this concise chapter, practitioners have developed a digestible acronym that captures the key elements of the HRBA: PANELS (participation, accountability, non-discrimination and equality, empowerment of rights holders, legality, and sustainability). What follows is an attempt to explain how stakeholders can use PANELS as a diagnostic tool.

The Scottish Human Rights Commission offers a useful list to establish working definitions of the PANELS principles:

Participation

People should be involved in decisions that affect their rights.

Accountability

There should be monitoring of how people's rights are being affected, as well as remedies when things go wrong.

Non-Discrimination and Equality

All forms of discrimination must be prohibited, prevented and eliminated. People who face the biggest barriers to realising their rights should be prioritised.

Empowerment

Everyone should understand their rights, and be fully supported to take part in developing policy and practices which affect their lives.

Legality

Approaches should be grounded in the legal rights that are set out in domestic and international laws.

***Sustainability: The Scottish Human Rights Commission did not include the (S) in their introduction to the HRBA. Some human rights organizations apply the S and others do not. I would argue that sustainability has obvious applicability for the BHR field. Sustainability simply asks whether efforts are built to be sustainable. Are efforts forward looking? Have duty bearers given adequate thought to unintended consequences?*

In some situations, deploying the HRBA is quite straightforward. In others, it is more complex and there is a need for deep knowledge and experience. While far from exhaustive, I would like to conclude this chapter by teasing the art of getting the HRBA right in the BHR field.

Participation

Beyond participation as a blanket prescription, the HRBA calls for the prioritization of the most impacted and vulnerable stakeholders. It is on duty-bearers to cater and facilitate such participation. And it is not enough to treat a population as uniform. Efforts to facilitate participation must account for layers of asymmetries within groups. Getting this right can be difficult, but is critical to establishing a reliable feedback loop.

In the BHR field, there are two domains of participation to account for. There is the participation that should preclude the design and development of a plan, policy, or practice. When looking at a National Action Plan or a company's human rights policy, ask whether the most impacted and vulnerable stakeholders meaningfully participated in the drafting process. Then, there is the participation that plans, policies, and protocols should facilitate. For instance, are stakeholders enabled to meaningfully participate in human rights due diligence?

Accountability

Speaking to the III Pillars of the UNGPs, (A/HRC/17/31) states the following:

Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

Accountability is not a passive exercise. Accountability is about proactively embedding measures and mechanisms that enable stakeholders to seek effective remedy and effectively establish a culture of accountability. Ask whether duty-bearers clearly direct stakeholders to channels of accountability. Further, consider whether systems of accountability could withstand stress-testing from a range of angles. Could the system ensure accountability in the event of a major atrocity? What about everyday abuses of power?

Non-discrimination and equality

Like accountability, non-discrimination and equality does not happen passively or reactively. Blanket commitments are not enough. Non-discrimination and equality requires reckoning with realities. What is being done to drive change and provide support for those populations and people who face obstacles and marginalizations? What could be done better? This principle lends to reflection on how to deal with social norms, cultural differences, power asymmetries, or even physical barriers. What could be done to increase inclusion, accessibility, and buy-in? Non-discrimination and equality not only requires fluency in concepts like universal design and frameworks like the Yogyakarta Principles, it entails deep reflection on local systems and customs across entire value chains. Per the spirit of human rights, non-discrimination and equality feeds into prevention and mitigation. There is no way of side-stepping the structural and cultural underpinnings that create risks, threats and vulnerabilities.

Empowerment of rights holders

Empowerment is all about agency. This principle should not be misunderstood as a fluffy ideal. Efforts that give lip service to empowerment are woefully out of alignment with the spirit of human rights. The best measure of agency is whether stakeholders are able to action on their own behalf. Are they empowered or enabled with awareness, support and the capability to act? Can stakeholders protect themselves and their interests (as individuals and collectives)? I would argue that such agency, that is opportunities where people are able to advance their interests individually and collectively, as well as the interests of others (Alkire, 2008), is the most readily overlooked aspect of the BHR agenda. Agency is simple, but not easy. In arenas of democracy deficit and lackluster protection of freedom of association and collective bargaining, it is on business enterprises to create platforms that enable stakeholders to participate within and around the business enterprises. And such efforts are worth it as embedding agency along allows for a sort of auto-regulation wherein stakeholders can assist business enterprises in correcting course.

Legality

Legality is very straightforward and plagued by one major trapping in the BHR field. When domestic legislation does not align with international human rights norms, both governments and business enterprises are in a compromised position. National Action Plans provide a process and vehicle for governments to correct areas of non-alignment. For business enterprises, the dynamic is more complicated. Business enterprises face the challenging task of ensuring compliance with all applicable laws, regulations, or other requirements, which can mean complying with the UNGPs and domestic legislation that is in conflict with international norm. Unfortunately, this leads some companies to retract or qualify their commitment to international human rights norms by being vague or giving pre-eminence to domestic law, which is the wrong way of navigating this tough situation.

Sustainability

Sustainability, in the BHR field, requires thoughtful forecasting. It requires thinking about knowns and unknowns, changes that are underway and changes that have yet to develop. Sustainability (which is a security studies term that can roughly be understood in terms of resilience to foreseeable and unforeseeable risks/threats) is about simultaneously thinking about now, tomorrow, and thirty years from now. This requires deep content expertise and much reflection on indirect and unintended consequences, particularly in contexts that are unfamiliar or in flux. A good example of this depth of consideration can be found in BSR's October 2018 Human Rights Impact Assessment: Facebook in Myanmar. The key is to establish this type of awareness proactively with foresight rather than reactivity and grounding sustainability strategies in meaningful consultation with stakeholders, particularly those who are most impacted or vulnerable.

References

- Alkire, S. (2008). Concepts and measures of agency.
- Booth, Ken. 2007. *Theory of World Security*. Cambridge University Press. Cambridge: Cambridge University Press.
- BSR. 2013. *Conducting an Effective Human Rights Impact Assessment Guidelines, Steps, and Examples*. https://www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf
- BSR, 2018. "Human Rights Impact Assessment: Facebook in Myanmar." https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria_final.pdf
- Garcia, S. M., Chen, P., & Gordon, M. T. (2014). The letter versus the spirit of the law: A lay perspective on culpability. *Judgment & Decision Making*, 9(5).
- HURIGHTS OSAKA. (Open). "Human Rights: Principles and Rights." Human Rights Education in the Northeast Asian School System. https://www.hurights.or.jp/archives/other_publications/section1/pdf/Principles%2C%20Rights%2C%20Duty%20and%20Pedagogy.pdf
- McBarnet, D., & Whelan, C. (1991). The elusive spirit of the law: Formalism and the struggle for legal control. *The Modern Law Review*, 54(6), 848-873.
- Office of the High Commissioner for Human Rights [OHCHR] (2006) *Frequently Asked Questions on a Human Rights Based Approach to Development Cooperation*. United Nations: New York and Geneva.
- _ (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. United Nations: New York and Geneva.
- Page, A.M. 2017. The Alchemy of "Business & Human Rights" (Part I): The BHR Boom Years. https://www.huffingtonpost.com/aaron-marr-page/recalibrating-the-business_b_9540850.html
- Peters L. (2015) *The Development of the Universal Declaration of Human Rights*. In: *The United Nations*. Palgrave Macmillan, New York.
- Ramsden, N. (2015) 'Migrant workers body concerned at exclusion from Thai labor task force.' *Undercurrent News*. <https://www.undercurrentnews.com/2015/05/25/migrant-workers-body-concerned-at-exclusion-from-thai-labor-task-force/>
- Scottish Human Rights Commission. (Open) *A Human Rights Based Approach: An Introduction*. http://www.scottishhumanrights.com/media/1409/shrc_hrba_leaflet.pdf
- Steiner, H. and Alston, P. (1996). *International Human Rights in Context*.

The Abolishment Paradox and Big Tobacco

Joana Cassinerio

Joana Cassinerio is a PhD Candidate at the Institute of Human Rights and Peace Studies, Mahidol University, Thailand. Based in Cambodia and Thailand, she has researched a variety of human rights issues within ASEAN and beyond. Focusing on the Cambodian garment sector, her upcoming dissertation assesses interpretations around the concept of 'worker's rights' through the lens of existing laws, garment workers, and employers, and the resulting challenges to fully realising labour rights in the country.

"If we had any thought or knowledge that in any way we were selling a product harmful to consumers, we would stop business tomorrow."

George Weissman, Vice President of Philip Morris, 1954

Introduction

In recent years, the human rights discourse has begun to solidify expectations and culpability in cases where business activities harm humans and the environment. The introduction of emission stickers for vehicles, colour-coded labels on food and drinks in supermarkets, "Drink responsibly" ads and "Don't drink & drive" campaigns are some of the many milestones achieved through a heightened pressure on companies to acknowledge both responsibility and accountability. This development is further advanced through the UN Guiding Principles (UNGPs), created under UN Special Representative John Ruggie in 2011. The UNGPs map out accountability in incidence of harm. HR/PUB/11/04, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" provides a straightforward directive:

13.(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

13.(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their opera-

tions, products or services by their business relationships, even if they have not contributed to those impacts.

The question becomes, what does this benchmark mean for industries and enterprises where their services or products have a known, inevitable adverse impact on some aspect of human rights, such as the tobacco industry's detrimental effect on health? It depends on how one applies the UNGPs. Strictly applying the UNGPs as the Danish Institute for Human Rights (DIHR) did in their human rights assessment of the tobacco company Philip Morris International (PMI) in 2016/17, may lend to the conclusion that abolishment is the only feasible human rights option. However, the debate about abolishment is very much alive and while big tobacco is the focus of this paper, there are fault lines that have broader implications for the field.

Human rights advocates and practitioners that do not favor abolishment, whether for philosophical or practical reasons, need to develop more robust and powerful frameworks for effective mitigation and remediation.

In this chapter, I would like to work through three perspectives, all of which reflect different ways of applying human rights and the UNGPs in particular. First, I show that there is a sound human rights case for abolish-

ment. Citing some notable works, namely Proctor (2013), the chapter outlines the numerous ways in which the tobacco industry may be inherently detrimental to human rights. Second, I consider the counter-arguments to abolishment. There are both practical and conceptual justifications to explore alternatives to abolishment that are not an abandonment of human rights. Lastly, I explore the feasibility of abolishment and its alternatives in a developing world context vis-à-vis the case of British American Tobacco Cambodia (BATC). The chapter concludes that those human rights advocates and practitioners that do not favor abolishment, whether for philosophical or practical reasons, need to develop more robust and powerful frameworks for effective mitigation and remediation.

Part 1: Tobacco Versus Human Rights - A Sound Case For Abolishment?

In 2017, the World Health Organization (WHO) estimated that more than seven million people died from smoke-related cancer including second-degree smoke, most of which happened in low and middle-income countries (WHO, 2018; WHO, 2014). Showcasing the abusive nature of the tobacco industry, the WHO stated in a 2008-report:

"Tobacco use is growing fastest in low-income countries, due to steady population growth coupled with tobacco industry targeting, ensuring that millions of people become fatally addicted each year. More than 80% of the world's tobacco-related deaths will be in low and middle-income countries by 2030" (WHO, 2008b).

The adverse impacts of the business model of tobacco companies are reason of health issues for consumers as well as non-consumers. After its assessment of PMI, a leading tobacco company, by the DIHR from late 2016 to mid-2017, the DIHR concluded that the only appropriate way forward for PMI was abolishment:

"Tobacco is deeply harmful to human health, and there can be no doubt that the production and marketing of tobacco is irreconcilable with the human right to health. For the tobacco industry, the UNGPs therefore require the cessation of the production and marketing of tobacco" (DIHR, 2017).

Seeing the DIHR calling on PMI to cease operations was a courageous statement in the name of human rights, however, there are certain issues that need more attention: For example, the DIHR's argument mostly concerns itself with PMI's business model being inherently harmful. While there is no doubt about the adverse impact of smoking, the DIHR fails to acknowledge the UNGPs' multiple perspectives on state obligations and duties, business responsibility, and effective access to remedy instead of calling for cessation.

In a research article *Why ban the sale of cigarettes?* The case for abolition, Robert N. Proctor (2013) listed reasons in favour of abolishing tobacco products, among others due to the fact that cigarettes were not only deadly, unreasonably dangerous, and harmful to the natural environment but also violated smokers' rights to self-determination. The last point is critical, as Proctor writes:

"The most important reason for abolition is the fact that smokers themselves do not like their habit. This is a key point: smoking is not a recreational drug; most smokers do not like the fact they smoke and wish they could quit" (Proctor, 2013, p. 2).

Proctor's mentioning of the right to self-determination brings up an interesting viewpoint in the dilemma between abolition and apathy of industries causing inevitable harm: The right to self-determination is a human right in itself, and taking autonomy away from people would violate their right as much as tobacco violates their health. While the viewpoints of the DIHR and Proctor help contextualise arguments in favour of abolishment, complete abolition is considerably unrealistic.

Part 2: The Counterargument To Abolishment - How Effective Remedies Evoke Business Responsibility

While this chapter focuses on the tobacco industry, it might be helpful to bring in another industry with adverse impact: the drug industry. Recent years have seen various U.S. states as well as Uruguay and Canada legalising marijuana in an effort to protect human

rights, rather than damaging them. In the case of Uruguay, where marijuana was fully legalised in 2013, Jordan explains that

“the government wanted the policy to make obtaining marijuana legally a more attractive option than purchasing it on the black market. For this to be possible, legally obtained marijuana would need to beat black market prices and offer higher quality” (Jordan, 2018).

While still in the early stages of legalising the acquisition, possession, use, and cultivation of cannabis, Canada faced a lot of criticism from more conservative countries, which mostly revolved around Canada’s apparent violation of three UN drug control treaties the country is signatory party to: the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. However, Walsh, Blickman, Jelsma & Bewley-Taylor provided options other than simply withdrawing from the three treaties, including

“the possibility of withdrawing from and then re-joining the treaties with reservations (a procedure that Bolivia used with regard to coca) or of modifying certain treaty provisions by means of a special agreement among a group of like-minded countries” (Walsh, Blickman, Jelsma & Bewley-Taylor, 2018).

While tobacco is not an illegal product compared to drugs, these cases nonetheless make a case in point: Industries that are perceived harmful as well as countries ‘hosting’ such industries can find meaningful, responsible ways to commit themselves to the overall cause of human rights without abolishment.

This can be further strengthened through the application of the UNGPs third pillar. This pillar - often nicknamed the “Forgotten Pillar” due to it often being overlooked - provides an important platform for people to claim remedy whenever they were violated.

“These remedies not only ensure that victims will receive some type of reparation for the harm they suffered but most importantly, that governments and businesses will be held accountable for their

role in causing or contributing to that harm” (Drimmer & Laplante, 2015, p. 347).

Remedies for human rights abuses can be argumentative because they depend on the admission of wrongdoing, and the willingness to do proactive work to correct human rights violations. However, the challenge is also to decide the level of responsibility of the state itself as well as non-state actors, such as companies. The complexity in determining responsibility is not only but especially evident through the fact that, so far, only states can sign international human rights documents and be held accountable if they violate commitments made.

Recent years have seen an increase in civil society calling upon business responsibility and the provision of remedy. For example, in 2014 a woman from Florida won a billion-dollar lawsuit against a tobacco company for failing to educate her husband, who died of lung cancer 40 years prior. In another case, a non-smoker working in a British casino sued his employer for having developed asthma in his 12 years of working in a hazardous environment (Capeluoto & DiGiacomo, 2014; Sifferlin, 2014; Carr-Brown, 2003). These civil cases illustrate that businesses can and will be held accountable. Simultaneously, they prove there are more realistic solutions to harmful industries other than abolition. In fact, emphasising the responsibility of a business to reform itself and provide remedies seems an appropriate and important pivot away from advocating for outright abolishment. Such a move preserves the concerns of persons who emphasise individual rights while allowing states to be more even-handed regulators. Due to the reality that harmful industries cannot be erased, future discourses may want to reflect on how to encourage those industries to be less harmful. The thought of rewarding an industry that has adverse impact on people may initially seem outrageous; however, there are good opportunities in offering incentives to businesses to cause less adverse impact.

Part 3: The Feasibility Of Abolishment - Tobacco In The Global South

The UNGPs’ first pillar concerns the role of states in preventing and policing human rights abuses, in-

cluding those tentative harmful industries. Therefore, states are encouraged to address and mitigate harmful products in their territories. However, these state-wide restrictions face two challenges: Firstly, tobacco companies are using such limitations as states' willfulness to damage their products, and hence profits. For example, in 2013, PMI sued Uruguay after the country "adopted a number of anti-tobacco regulations with a view to implementing the 2003 World Health Organization's Framework Convention on Tobacco Control, aimed at tackling the health dangers posed by tobacco" (de Zayas, 2015). Eventually, the court ruled against PMI in 2016, and ordered the company to pay Uruguay \$7 million and cover all fees and expenses related to the case (Castaldi & Esposito, 2016). However, this incidence showcases the leverage and power of non-state actors.

In the second pillar, the UNGPs state the obligation of enterprises to respect human rights by avoiding to infringe on the rights of others, and address "adverse human rights impacts with which they are involved" (UN Guiding Principles on Business and Human Rights, 2011, p. 13). However, tobacco companies freely advertise and sell their products in fact when they should be acknowledging their responsibility for human rights abuses, conducting due diligence, creating human rights scorecards and company policies, and more.

British American Tobacco Cambodia is one case in point. Having grown significantly since its entry into post-Khmer Rouge Cambodia in the late 1990s, previously confidential company documents revealed BATC's exploitation of a war-torn country desperate in need of foreign direct investment (MacKenzie et al, 2004; Davies, 2016). Due to BATC's successful marketing strategies, near-monopolistic powers, and connections to the ruling political elite, the company was able to create sufficient leverage to oppose national health plans and education to prevent tobacco consumption. As a result, the prevalence of smoking has continuously increased in Cambodia. Recently, the WHO estimated that 10,000 Cambodians die annually from tobacco-related illnesses, and the Southeast Asia Tobacco Control Alliance (2016) stated that there were currently more than two million tobacco users in Cambodia, with "a significant increase in the number

of smokers among adult males aged 15 and above from 1.34 million in 2011 to 1.55 million in 2014." The prevalence of smoking is especially disturbing as the national healthcare system and health-related education remain insufficient. When there is neither proactive nor reactive protection of smokers and potential smokers, the awareness of risks connected to smoking remain secret, misunderstood or completely neglected. The WHO summed this up:

"The global tobacco industry now exploits the developing world by using the same marketing and lobbying tactics perfected – and often outlawed – in the developed world" (WHO, 2008a).

While the future of BATC is cemented in the country's economic landscape, the company's responsibility towards realising and respecting human rights is not forgotten. The UNGPs can play a critical role in providing guidelines to the company's code of conduct, but this will be challenged by BATC's close ties with a government known for abusing human rights.

Conclusion

This chapter discussed the adverse impact of harmful businesses on human rights. Focusing on the tobacco industry, three main arguments were illustrated: abolishment, alternatives to abolishment, and the feasibility of abolishment. Strictly applying the UNGPs would result in a call for cessation of such businesses, as suggested by the DIHR in its assessment of the tobacco company PMI. However, this was criticised due to two reasons: Firstly, given the leverage, power and influence of the tobacco industry, it is impossible to prohibit tobacco production and consumption. Secondly, plain abolishment underestimates and disregards other solutions described in the UNGPs, especially in Pillar 3. These solutions were thus presented as alternatives to abolishment. Cases of Canada and Uruguay, which both legalised marijuana in the past years to tackle human rights abuse, showed that there are ways to work with harmful industries rather than against them. In this, Pillar 3 offers access to remedy, which has increasingly been used by members of civil societies to claim justice over abuses they faced.

The third argument of this chapter - the feasibility of abolishment and its alternatives - was portrayed in a case study of British American Tobacco Cambodia, and highlighted the challenges of access to remedy and protection in countries with a lack of trustworthy legislations surrounding the protection of humans. Cambodia's leniency with BATC's policies revealed the pitfalls of allowing a business to fully self-regulate. However, this case study does not disregard a plethora of solutions to increase business accountability. For example, governments are advised to take on a stricter role in protecting their citizens by implementing smoke-free areas, increasing taxation on cigarettes, and conducting awareness campaigns around the country to educate young people about the dangers of tobacco consumption. Thus, instead of solely focusing on business cessation, the human rights realm must come up with more realistic, feasible solutions for effective mitigation and remediation. The UNGPs provide guidelines and answers for this discourse.

References

- Capeluoto, S. and DiGiacomo, J. (2014) Florida jury awards \$23.6 billion to widow in smoking lawsuit. CNN World, [online] 20 July 2014. Available at: <<https://edition.cnn.com/2014/07/19/us/florida-tobacco-verdict/index.html>> [Accessed 2 September 2018].
- Carr-Brown, J. (2003) Casino payout over passive smoking claim. The Sunday Times, [online] 10 August 2003. Available at: <<https://www.thetimes.co.uk/edition/news/casino-payout-over-passive-smoking-claim-r0jzssfzdrq>> [Accessed 2 September 2018].
- Castaldi, M. and Esposito, A. (2016) Phillip Morris loses tough-on-tobacco lawsuit in Uruguay. Reuters.com, [online] 9 July. Available at: <<https://www.reuters.com/article/us-pmi-uruguay-lawsuit-idUSKCN0ZO2LZ>> [Accessed 7 April 2019].
- Danish Institute for Human Rights. (2017) Human rights assessment in Philip Morris International. [news], 11 May 2017. Available at: <<https://www.humanrights.dk/news/human-rights-assessment-philip-morris-international>> [Accessed 3 September 2018].
- Davies, J. (2016) Tobacco company's tactics scrutinised. The Phnom Penh Post, [online] 21 April 2016. Available at: <<https://www.phnompenhpost.com/national/tobacco-companys-tactics-scrutinised>> [Accessed 4 September 2018].
- de Zayas, A. (2015) How can Philip Morris sue Uruguay over its tobacco laws? Theguardian.com, [online] 16 November. Available at: <<https://www.theguardian.com/commentisfree/2015/nov/16/philip-morris-uruguay-tobacco-isds-human-rights>> [Accessed 7 April 2019].
- Drimmer, J. and Laplante, L. (2015) The third pillar: Remedies, reparations and the Ruggie Principles [pdf]. Available at: <<https://ssrn.com/abstract=2988574>> [Accessed 30 October 2018].
- Jordan, E. (2018) Marijuana legislation in Uruguay. Centre for Public Impact, [online] 23 November. Available at: <<https://www.centreforpublicimpact.org/case-study/marijuana-legalisation-in-uruguay/>> [Accessed 8 April 2019].
- Mackenzie, R., Collin, J., Sopharo, C., Sopheap Y. (2004) "Almost a role model of what we would like to do everywhere": British American Tobacco in Cambodia. Tobacco Control, 13(2), pp.112–117. Available at: <<https://www.ncbi.nlm.nih.gov/pubmed/15564213>> [Accessed 2 September 2018].
- Proctor, R. N., (2013) Why ban the sale of cigarettes? Tobacco Control, 22(1), i27-i30. Available at: <[10.1136/tobaccocontrol-2012-050811](https://doi.org/10.1136/tobaccocontrol-2012-050811)> [Accessed 8 March 2019].
- Roberts, M. (2014) Smoker numbers edge close to one billion. BBC.com, [online] 8 January 2014. Available at: <<https://www.bbc.com/news/health-25635121>> [Accessed 8 March 2019].
- Sifferlin, A. (2014) \$23.6 billion lawsuit winner to big tobacco: "Are you awake now?" Time.com, [online] 22 July 2014. Available from: <<http://time.com/3016961/23-6-billion-lawsuit-winner-to-big-tobacco-are-you-awake-now/>> [Accessed 2 September 2018].
- Southeast Asia Tobacco Control Alliance. (2016) Dissemination workshop on the National Adult Tobacco Survey of Cambodia 2014. Phnom Penh, Kingdom of Cambodia, 28 October 2016. Phnom Penh: SATCA. Available at: <<https://seatca.org/?p=6640>> [Accessed 3 September 2018].
- UN Guiding Principles on Business and Human Rights (2011) Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework. [pdf]
- United Nations. Available at: <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> [Accessed 23 February 2018].
- van der Eijk, Y. and Porter, G. (2015) Human rights and ethical considerations for a tobacco-free generation. Tobacco Control, 24(1), pp.238–242. Available at: <<http://dx.doi.org/10.1136/tobaccocontrol-2013-051125>> [Accessed 30 October 2018].
- Walsh, J., Blickman, T., Jelsma, M. and Bewley-Taylor, D. (2018) Yes, legalizing marijuana breaks treaties. We can deal with that. Transnational Institute, [online] 10 January. Available at: <<https://www.tni.org/en/article/yes-legalizing-marijuana-breaks-treaties-we-can-deal-with-that>> [Accessed 8 April 2019].
- WHO. (2008) The global tobacco crisis - World Health Organization. [pdf] WHO. Available at: <http://www.who.int/tobacco/mpower/mpower_report_tobacco_crisis_2008.pdf> [Accessed 3 September 2018].
- WHO. (2008) The World Health Organization on the global tobacco epidemic. Population and Development Review, 34(1), pp.188–

194. Available at: <https://www.jstor.org/stable/25434675> [Accessed 4 September 2018].

WHO. (2014) Global status report on alcohol and health 2014. [online] Available at: <http://www.who.int/substance_abuse/publications/global_alcohol_report/en/>[Accessed 3 September 2018].

WHO. (2018) Key facts. [online] Available at: <<http://www.who.int/news-room/fact-sheets/detail/tobacco>>[Accessed 3 September 2018].

An interview with twentyfifty limited

Luke Wilde

Luke Wilde is the founder of twentyfifty Ltd. Based in Frome, England Luke has worked in leadership and organisational development for over two decades, with a specific focus on corporate responsibility, human rights and sustainability. He is recognised as a leader in the field of business and human rights, in particular in developing practical approaches to integrating the corporate responsibility to respect with major businesses. In the late nineties, Luke was a senior management adviser to the UN High Commissioner for Human Rights, Mary Robinson, and helped establish the Business Leaders Initiative on Human Rights.

Hannah Temple

Hannah Temple is Director of Consulting for twentyfifty in the UK. Based in London Hannah leads twentyfifty's UK-based team and work. Hannah has over eight years' experience working in industry and consulting roles. She is a specialist in on-the-ground engagement with global supply chains, stakeholder engagement and human rights impact assessment. Hannah previously led key labour rights projects for Impactt in India and the Gulf.

Carolin Seeger

Carolin Seeger is Managing Consultant for twentyfifty Germany. Based in Berlin, Carolin is a corporate responsibility and business and human rights specialist with more than 12 years' experience in industry and consulting roles. Carolin previously led the human rights practice at Telstra, Australia's largest telecommunications company and worked at Maplecroft, leading the development of the Maplecroft Human Rights Risk Atlas.

Given that twentyfifty limited was established in 2004, how have the UNGP's transformed the nature of your work and the field has a whole, from your perspective? How do you interpret the role of the Guiding Principles in terms of changing how you approach your work?

What's interesting is that we were already somewhat pioneering in taking a management process approach to human rights. So, in those days, those early days, we had the UN norms and they very much focused on a set of particular rights. We would then map - as we continue to do - those rights or topic areas, for example, one of the obvious ones is equality in the workplace, diversity and inclusion, we would map the management process to manage that particular topic area. I think two of the key aspects of change that the Guiding Principles brought were firstly the reinforcement of a kind of management practices approach to business and human rights, and secondly the conceptualisation of human rights due diligence as a preventative process. The overall process of human rights due diligence, which is about identifying and addressing human

rights impacts, leads to businesses constantly asking themselves: Have we identified our rights impacts? Are we addressing them on an ongoing basis? The Guiding Principles also highlight the importance of acting in areas of conflict, and addressing complicity in issues of human rights abuses as a matter of compliance, and I think the third area where they are instrumental is bringing the focus on all the remedy and grievance mechanisms ... And really, that idea of operational-level grievance mechanisms, I don't think was so well developed prior to the guiding principles. I would say those have been the key shifts in terms of content.

In terms of its impact on the volume and dynamics of the consulting businesses, it was pretty thin pickings in 2005, 2006, 2007 where we found the most opportunity was in facilitating collaborative learning processes within human rights teams. Bringing companies together, informing business leaders on human rights, or gathering people together to explore the topic of human rights and what it meant for them was our main activity. In the period after the financial crises, 2008, 2009, 2010 quite a bit of our work was framed around

“sustainable agriculture” rather than human rights although our work in Germany was picking up and we were continuing our business and human rights training courses, training people to become change agents in their businesses around the management of human rights issues.

Since the Guiding Principles, although the reaction was a bit delayed, I would actually say our work has primarily been influenced through changes in government policy. As governments have picked up the Guiding Principles and made them into policies like the National Action Plans, or laws like the UK Modern Slavery Act, or potential forthcoming laws in Switzerland, that’s what really seems to have added a different consulting focus. We have seen very rapid growth in the last two or three years, and I think that comes from awareness reaching a critical level. Today, it is quite common that companies will come and ask us to do a gap assessment against the Guiding Principles or the German National Action Plan for example, ask us to help them do risk assessments where they suspect their human rights risks are, or help them understand the impact they are having in this particular location or product via a formal human rights impact assessment. I think those range of services which are quite tightly aligned to the Guiding Principles are much more common at least for companies which are internationally exposed and headquartered in a European country.

...

I would also add a particular impact of the Guiding Principles specifically around grievance mechanisms. Although expectations around remedy and grievance have always been on the scene in one form or another, we have certainly seen a growth of interest in these areas over the past few years. Increasingly clients are coming to us and asking for support in these areas. They also have a greater level of awareness about what these terms mean and increasingly come to us with dedicated budgets and commitments around them.

...

I was actually working in a corporate when the UNGPs came out and for the first couple of years after that.

From that perspective I think that what they have done is given language and urgency to the people within companies who are working on corporate responsibility and on business and human rights, who have had the topic on their agenda for a long time but have never really had the external justification to say: “This is important. This is why we need to look at this”. After the Guiding Principles they could point to something. They could say: “Look, this is an internationally agreed set of principles”. It did take a couple of years to really take off but we’ve really seen the uptake grow massively over the last couple of years. I think the internal piece was happening within companies quite soon after the adoption of the Guiding Principles.

...

What we are also now just starting to see in probably the last twelve months really is different functions beginning to get in touch. In addition to Corporate Responsibility teams and Human Rights leads we are working more and more with procurement teams, compliance teams, business teams to help them understand the implications of the Guiding Principles for them, and how to put them into practice in the business.

Having a budget and coming to the table with that readiness, seems critical. You spoke about all that catalyzed this shift to more demand and serious action in this space. Do you see things that are holding back progress? What kind of challenges or hurdles do you find in the current space?

It’s a kind of the flip side to the increasing regulation coming out, or all the compliance requirements coming out of the UNGPs driving a lot of interest. The fact that, in a lot of instances, there aren’t legal requirements has meant there is not that compliance driver for companies - although that’s now increasingly changing over the last couple of years. But I think the main barrier at the moment is the fact that still, even though other functions like procurement, HR, compliance are getting involved, this topic is being driven out of sustainability departments largely, which don’t have very much power within the organization. They are often seen as a cost center, not really part of core business,

and so it really requires those departments to build relationships with other functions to get the budget, to get the leadership, to get the recognition of this as an important topic that the company needs to be looking at. So yes, I think management's attention in that respect and budgets as well, because those are the sorts of departments whose budgets are very easily cut if the business environment gets a bit tougher. I think also the ability - and this is something we are working on very strongly - to help these departments, the ones that are leading the human rights work, with the ability to engage internally to build capability, to build buy-in. This whole organizational change, engagement and dialogue piece is really a skill in itself. By helping our clients to build that internally, they can have more of an impact -we build that into all of our projects but they do need to buy that idea too.

...

In terms of the lack of regulation, I think that's one thing that actually surprised me when I first came into this industry, and I think that surprises a lot of people when we talk about it, is it that often, governments are talking about being frightened of or very reluctant to put any regulations in place that could affect corporates or the ways in which businesses operate. But actually, often what we hear from our clients is that actually they are hungry for some regulation. Otherwise it's a very difficult job to convince internal decision-makers to put their weight behind particular actions when it's not clear that they are not going to lose out by doing that. There is no guarantee that their competitors are going to do the same thing. So what they are really hungry for is a level playing field. I think that regulation itself is a really important driver of action and its lack is one of the reasons why we do see obstacles.

Regarding the internal dynamics within organizations, it can definitely be challenging when the function who is heading up the topic of human rights is not seen as powerful or important within the business. If they are not listened to or seen as critical that often severely impacts their ability to take action, either because they don't get the resource to do it or because they cannot use their knowledge and understanding to influence others. Another thing that can happen which can

severely limit impact is where organisations are not just siloed, but where one part of the business operates with completely different aims and objectives to another, to an extent counter-acting each other. We have seen some clients of ours where human rights is embedded within the core business of the company, for example by having one person who simultaneously heads up procurement and sustainability. In these instances where you have understanding from the very top that commercial and human rights concerns cannot be separated, that's where we see the really strong success.

...often what we hear from our clients is that actually they are hungry for some regulation. Otherwise it's a very difficult job to convince internal decision-makers to put their weight behind particular actions when it's not clear that they are not going to lose out by doing that. There is no guarantee that their competitors are going to do the same thing. So what they are really hungry for is a level playing field.

There are also challenges related to the nature of how supply chains are currently being developed and managed from our experiences. The fragmentation the supply chains is just completely mind-boggling. For some of our clients, especially the larger and more complicated ones, they have tens or even hundreds of thousands of suppliers, and that's just their direct suppliers. What that means is that, even when you're a really big player, you may not have very much leverage with individual suppliers. It can mean that no one out there has the power or leverage to make a decisive difference within a value chain on their own because they've split their spend so minutely. That means companies need to work together to increase their impact.

...

One challenge I am encountering is that the big companies who we work with are leaner than they have ever been before and, at times, they become so lean that there it seems there isn't really much room left for what you might call 'innovation'. The mindset in these circumstances is focused on compliance rather than leadership. Ultimately, until we have more companies which are recognizing that they have a purpose, a social purpose beyond profit, realizing that that purpose can be served by the human rights approach, getting beyond what's often a very technical understanding of human rights and welcoming a shift in the fundamental ways and behaviors of people and of the company, we will still have some of that drag going on.

In terms of trying to promote that kind of leadership and advancing a more, perhaps progressive or expansive understanding and approach to human rights within management and leadership: What do you think could be done better on the human rights side of things, whether that be consultancy services, or civil society or the field in general? What do you think the human rights community could do to help facilitate this?

I think language is a really important point in that because often we know that the language of human rights in itself is very confronting to people. It can inspire complete defensiveness right from the start in the sense of: 'Ah, we don't have child labor here so we don't have a human rights issue'. It can also be that people feel like they don't know enough to really engage with the topic. So, I think that one of the things that we do quite well is to be quite pragmatic in terms of translating the language of human rights into something that the businesses understand or particular functions within the business understand and highlighting the benefits. When we are talking to a procurement person, we use different examples and are talking very differently from when we are talking to a compliance person or an HR person. I think that also does distinguish us from some other consultancies who consider themselves very much technical human rights expert consultancies whereas we pride ourselves very much on the pragmatic and business-centered approach that we have. We prefer this to the strictly academic approach because we just feel like it

can turn people off. It's a lot more effective in creating change to use language, business benefits and business language that people understand.

...

Yes, we need to stop using technical and exclusionary language, and start seeing businesses where they are at and helping them to see how they are already working with human rights issues and topics in many aspects, and already also having positive impacts. It becomes something which is about including and driving success for the business rather than meeting external needs and expectations. We have to be good at getting on their side.

...

I think that's completely right, but also I think we need to enable leaders to talk about human rights in that language as well. So yes, we need to make it understandable for them, we need to be pragmatic about what will work internally but I think a big part of also the requirements of the UNGPs is around transparency, it is about external leadership and so we need to, at the same time, think about how we enable the corporate leaders to talk about external requirements too.

To go straight to your question, I think that one of the things that consultants or this industry can do is to recognize that what you are dealing with is individuals and the only way to enact change in an organization is through its individuals. So, building up their capacity, their power, their resources - that's as big a part of any successful consulting initiative as providing the right tools and the right guidance. Those soft skills are critical we find, to helping an organization to have a real impact.

I noticed that one of the sectors that you work with is technology. I'm interested in what that particular experience is like: is it distinct from other industries? I'm interested to know what kind of activities and efforts you have underway as far as engaging the technology sector?

I think the real challenge in the technology sector is the due diligence for their products and services. I think

that needs to come from a high level of awareness of human rights concerns across the company. A lot of our work that we're currently being asked to do by the technology sector doesn't tackle that head-on but is more of a UNGP gap assessment, or is a kind of on the ground impact assessment in a particular locality rather than looking at the more holistic issues.

...

I agree. The opportunities we're seeing working with this sector are most commonly around implementation and due diligence. We have a few projects where we have worked with clients to understand the impacts of products and services on broader rights like rights to privacy and freedom of expression. We have also worked with clients around new technology, for example the batteries that are increasingly being used in different types of new technology, and the different human rights issues associated with the raw materials and supply chains associated with them. Some of the really challenging debates, for example, about the future of work, AI, and the ethical use of all of those things has stayed a little bit at arm's length and on the fringes of a more product- or service-based conversation. We would like to see more tech companies looking into the future of what human rights might mean for their business model or what their responsibilities might be for those agendas.

...

I think with products and services, that is quite a notoriously difficult area to get into, with companies because it's so central to their business and how they make money. I think specifically with technology companies the supply chain work that we've been doing has been growing quite a bit over the last couple of years so, with a lot of technology companies where raw materials like minerals and metals are of concern, like the impact of, say, cobalt from the Congo, and the human rights impact associated with that. Yes, the growth of electric mobility is generally considered a good thing, but what about all the minerals and metals that go into a battery and the impacts of that. So we're seeing a lot more interest in that space from technology companies. Again, it's not an easy conversation or an easy process

because the supply chains are very, very fragmented, and even just getting transparency of what a company is buying and where it's coming from can take quite a lot of time. But I think that's definitely an issue that's not going away, with scarcity being a big issue and the human rights impact of raw materials. But yes the Holy Grail with technologies is definitely products and services space. I think there will need to be more scandals and more NGO exposés around the impacts of technology products and services for there to be real interest and the willingness to pay for consultancy in that field.



Refined Approaches to Cross-Cutting Issues

Chapter Synopses: Refined Approaches to Cross-Cutting Issues

In *Our River, Our Rights*, Maureen Harris explores the human rights challenges resulting from mega-dam projects in the Mekong River basin and the pursuit of Extraterritorial accountability through the Xayaburi dam lawsuit in Thailand. In August 2012, 37 Thai villagers filed a lawsuit in the Administrative Court of Thailand concerning the trans-boundary impacts of a project located in neighboring Laos. The villagers' human rights concerns included "depletion of migratory fish and loss of fish species biodiversity, decreased sediment and nutrient passage, altered hydrology and degradation of water quality and ecosystem health." While the Xayaburi dam lawsuit remains unresolved, it reflects a surge in attention and action towards extraterritorial accountability and the realization of environmental rights particularly around large-scale infrastructure projects involving transnational investments. Harris explains that in lieu of reliable legal redress, communities and civil societies have turned to other channels such as National Human Rights Institutions and National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises. Whether through everyday resistance, protest, coalition building or formal complaints and lawsuits, the communities of the Mekong River basin continue to seek redress through all available extraterritorial channels. At present, the slow development of extraterritorial accountability "stands in stark contrast to the rapid construction of mega-dams in the Mekong basin" and the threats to human rights that result. To this point, Harris concludes that while incremental progress towards extraterritorial accountability is underway, there is a pressing need to dismantling existing barriers by "adjusting the human rights lens" in a way that "expands the expectations placed on states and business enterprises with respect to extraterritorial accountability."

Giorgio Algeri argues for a revisit of the passive role that business enterprises have traditionally played with regards to ensuring the well-being of vulnerable migrants and refugees. As powerful catalysts and beneficiaries of migration, "[b]usiness enterprises are now in a position where they must provide migrants

and refugees with services, social protections and adequate trainings to align their responsibilities under international human rights norms." Algeri specifies that business enterprises need new strategies, collaborations and a general readiness to confront vulnerabilities resulting from pervasive social, cultural and protection barriers, including those arising from anti-immigration sentiments.

Dr. Mark Capaldi considers why child rights remain a low priority area for businesses despite the UNGPs and the Children's Rights and Business Principles (CRBP) and preceding international frameworks dealing with the children, business and human rights nexus. Beyond a monitoring and enforcement deficit, Capaldi points to the overly narrow understanding of what child rights are and what role businesses should take. Too often, child rights are seen through the lens of charity/philanthropy or the most headline-catching issues like child labour, child trafficking and sexual exploitation, which overlooks their role as consumers and stakeholders that experience varying impact. Capaldi posits: "...whilst the predominant concern of business obligations to child rights is generally seen through the lens of eliminating child labour (negative publicity hits profits), conditions for young workers and their families, business infrastructure, marketing and advertising can also lead to other forms of harm. "

Dr. Ryuhei Sano explains the importance of adopting a comprehensive frame of disability-inclusive business in this new era of BHR. The first step towards this end is to part with outdated paradigms that position persons with disabilities as "objects of charity" or simply "targets of CSR." Through the lens of BHR, disability-inclusive business positions persons with disabilities as "employees, suppliers, employers, entrepreneurs, customers and consumers," and works towards full inclusion and incorporation, the extension of services and opportunities, and the destruction of existing barriers. Sano discusses both progress, such as examples where companies use universal design and reasonable accommodations to ensure equal opportunities to

influence and advance, and pervasive challenges, such as barriers to financial support, information, trainings and networking opportunities for entrepreneurs with disabilities. The ever-present nature of the barriers that Sano highlights is a reminder of the importance of concerted planning and co-design efforts with persons with disabilities during the development of catalyzing frameworks like the human right policies of business enterprises and National Action Plans.

Chloé Bailey and Amol Mehra examine how the UNGPs have enabled action against modern slavery. Bailey and Mehra explain how business models that drive towards lower costs and greater efficiencies enable “slavery practices to flourish”. The chapter dispels attempts to deal with forced labor and human trafficking without mobilizing human rights and enabling workers to become agents of their own protection: “Current action remains stuck in first gear, focused too heavily on corporate self-regulation and disclosure initiatives focused on policy and process that have little to no impact for the workers at the bottom of the supply chain that continue to experience systematic violations of their fundamental rights on a daily basis.” Bailey and Mehra recognize the advancement of modern slavery legislation and business-led initiatives, but note that such efforts are insufficient to accomplish “transformational change that percolates through to the roots of the supply chain”. This kind of transformation change requires a mix of national and international, mandatory and voluntary measures that enable workers to enforce their rights by “rebalancing the power asymmetries inherent in the globalised supply chain system”.

Marlese von Broembsen & Laura Alfes investigate the plight of homeworkers as a means of revealing pervasive protection challenges in informal economies. The chapter considers the utility of OECD Due Diligence For Responsible Supply Chains in the Garment and Footwear Sector as a means of safeguarding the human rights of homeworkers. Von Broembsen and Alfes show how business enterprises and stakeholders can use the Guidelines and Guidance of the OECD not as an end in itself but as a means locating and mobilizing meaningful solutions. To this end, the chapter offers an optimistic conclusion on how the UNGPs can crystallize into ever more clear and specific direction:

“There is significant scope for instruments arising out of the UN Guiding Principles – such as the OECD Guidelines for Multinational Businesses – to provide a set of tools to promote better working conditions for homeworkers. In particular, the fact that the Guidelines establish the legitimacy of homeworkers as workers is crucial. This is a central – and often primary – struggle for all informal workers whose work is not recognized as real work.”

Marjoleine Motz of Fair and Sustainable Consulting offers an interview highlighting pertinent issues that consultants working across sectors, fields and cultures are sure to encounter. Speaking to Fair and Sustainable’s work in Africa, Motz emphasizes the importance of finding the language and examples that resonate in a particular circumstance. Whether working with smallholder farmers or management teams within a particular business, it is critical to drive “a different kind of conversation” by bringing “very practical examples, very close to their daily reality.” Motz also spoke to the challenges that can arise when trying to implement the UNGPs in situations of instability or transition. These settings can present grey areas and can require a change of thinking with regards to responsibility, even when changes are the result of decisions and shifts occurring outside the control of traditional trade relationships. In such circumstances, consultants can plan an important role in determining “how far responsibility stretches or what must be done to remediate particular things.” Motz conveyed hope relative to the possibility of a business and human rights treaty increasing awareness and uptake of the BHR agenda and also noted that it is very possible for human rights to become part of “normal business processes” in the same way that food safety protocols went from unfamiliar to customary over the stretch of a decade. Motz reminds that, regardless of how this field evolves, the onus is on each stakeholder to define what they stand for and to remain true to their particular purpose and priorities.

Our River, Our Rights: Extraterritorial accountability in the Mekong

Maureen Harris

Maureen Harris is an expert in human and environmental rights. She is currently the Southeast Asia Program Director at US-based NGO International Rivers. Ms. Harris holds a Bachelor of Arts/Law from the University of Sydney and a Masters in Law from the University of New South Wales in Australia. She has previously worked with a number of government and non-governmental organizations including EarthRights International and the Australian Human Rights Commission. She has experience working in Southeast Asia and Australia.

In the lower Mekong region, environmental degradation and land loss driven by transnational investment is creating serious challenges for human rights. This chapter explores these challenges through the construction of a series of mega-dams to generate hydroelectricity in the Mekong River basin. The dams threaten the integrity of riverine ecosystems and biodiversity, as well as the food security, livelihoods and cultural practices of river-dependent communities. The chapter explores the Xayaburi dam lawsuit in Thailand, which helped pave the way for later extraterritorial claims, and the implications of planned dams on the river system and local communities. Secondly, the issue of extraterritorial accountability is located within the evolving international framework for human rights and the environment and its interaction with the UN Guiding Principles on Business and Human Rights (UNGPs). The final section traces actions taken by local communities to prevent and seek remedies for environmental harm, revealing ongoing barriers to extraterritorial accountability on the part of the business enterprises, investors, governments and other actors pushing forward new projects.

“The Mekong River is Not for Sale”

“[The] social and environmental trans-boundary impacts as a result of the dam have not been made public. No one can tell us how many fish species will be blocked from migrating upstream to spawn. All the designs for fish passage and fish lifts are just an experiment. No one can tell us how many riverine communities, fishers, gardeners, gold panners and ordinary villagers will be affected.” – Niwat Roykaew,

plaintiff, addressing Thailand’s Administrative Court (International Rivers 2015).

In August 2012, 37 Thai villagers filed a lawsuit in the Administrative Court of Thailand regarding the proposed Xayaburi hydropower dam on the Mekong River (International Rivers 2012). The lawsuit broke new ground: while filed in a Thai court, it concerned the trans-boundary impacts of a project located in neighboring Laos, and the extraterritorial obligations of Thai state agencies with respect to these impacts on local communities in Thailand (BHRRC 2014).

The 1285MW dam in Laos’ Xayaburi province is largely a Thai project; driven by investments by Thai private and state-owned enterprises. The project developer consists of a consortium led by a Thai company, Ch. Karnchang, and including several other Thai companies as shareholders. The dam project received financing from six Thai banks and 95% of the power generated is intended for sale to the Electricity Generating Authority of Thailand (EGAT). The lawsuit was filed by villagers from eight provinces along the Mekong against five Thai state agencies, including the National Energy Policy Council, the Thai Cabinet, and EGAT, regarding their role in approving the project’s Power Purchase Agreement (PPA).

The Thai villagers’ concerns, elaborated in court filings, are the dam’s expected impacts on the river system and associated livelihoods, living conditions and community wellbeing. They include depletion of migratory fish and loss of fish species biodiversity, decreased sediment and nutrient passage, altered hydrology and degradation of water quality and ecosystem health.

These concerns echoed the findings of numerous studies and expert opinions, including the Mekong River Commission (MRC) Secretariat's technical review of the project (MRCS 2011b). A 2010 Strategic Environmental Assessment (SEA), commissioned by the MRC, found that the Xayaburi and other proposed lower Mekong mainstream dams pose "threats of serious and irreversible environmental, social and economic damage" (ICEM 2010: 25).

In the lawsuit, the plaintiffs asserted breaches of the Thai Constitution, the 1995 Mekong Agreement, and customary international law, due to failures to provide information, assess impacts, and ensure public participation in the decision to purchase power from the dam. Particular concerns were that the project had proceeded without a transboundary impact assessment or adequate cross-border consultation. During regional meetings concerning the project, many had stakeholders raised concerns over the poor quality of existing environmental and social impact assessments and lack of information transparency in the development of the dam (MRCS 2011a). Questions were also raised over Thailand's need for the power, given an energy glut in the country and high reserve margin (Greacon and Greacon 2012).

As of December 2018, the lawsuit remains pending and the project is scheduled to commence operations in 2019. Legal questions surrounding the specific duties of Thai state agencies with respect to the Xayaburi power purchase are yet to be answered. The lower court has twice dismissed the lawsuit, prompting appeals to the Thai Supreme Court. Following the lower court's initial dismissal on jurisdictional grounds, in 2014 the Thai Supreme Court accepted the lawsuit on appeal, confirming that state agencies held responsibilities for the impacts of the extraterritorial project, despite its location in Laos. The court also implicitly recognized the intrinsic relationship between environmental degradation and human rights, stating:

"It is widely known that the project may cause impacts to the environment, water quality and quantity, the flow of water, ecological balances of the Mekong basin and other transboundary impacts in

riparian countries, particularly local communities in the eight riparian provinces of the Kingdom of Thailand, which may bear extensive impacts on environmental quality, public health, sanitation, livelihoods, or community interests." (Supreme Administrative Court of Thailand 2014)

While the Xayaburi dam lawsuit remains unresolved, it drew regional attention to the issue of extraterritorial accountability in the context of environmental harm. Across the region, escalating transnational investment is driving large-scale infrastructure projects, with governments facilitating investor-friendly conditions in order to boost economic development and growth. Often, the result is impunity for environmental damage and adverse impacts on human rights, exacerbated by authoritarian governance and weak and poorly enforced environmental laws and social safeguards. Thai investment in the Xayaburi dam in Laos, where civil society is suppressed and environmental standards weaker than in Thailand, followed decades of successful campaigns by local communities against the destructive impacts of large infrastructure projects in Thailand (Hirsch 2010).



The Xayaburi lawsuit followed extensive grassroots campaigning by communities in Thailand and other Mekong countries, with public events and demonstrations under the slogan 'The Mekong River is Not for Sale'.

Damming rights

Economic growth in lower Mekong countries is underpinned by exploitation of natural capital, such as fertile soil and land for agricultural production, timber and forest products, wild capture fisheries and aquatic animals (WWF 2016). While environmental degradation can affect human populations generally, it disproportionately affects those who derive basic needs directly from functioning ecosystems and natural resources (Knox 2018: 3). Significant populations in the region depend on access to land, forests and rivers for food security, livelihoods, culture, and identity, including indigenous, ethnic minority and traditional communities maintaining close relationships to ancestral lands and territories.

The Mekong River basin is home to over 60 million people, with up to 80% directly dependent on the river system to support food and livelihoods (Orr et al 2012). The second most biodiverse river system globally (Ziv et al 2012), the Mekong sustains one of the world's most productive freshwater fisheries. The river system is critical to sustaining connected ecosystems of flooded forest and lakes as well as riverbank and floodplains agriculture. An estimated 100 ethnic and indigenous groups inhabit the basin (ICEM 2010). In Laos, ethnic minority and indigenous peoples predominate in remote and mountainous regions where dams are being developed. Other areas heavily affected by dam construction include those inhabited by Cambodian fishing communities in Stung Treng and Tonle Sap, and agricultural and fishing-dependent communities in Vietnam, also encompassing many indigenous and minority communities.

Xayaburi is the first of eleven planned hydropower projects on the Mekong mainstream, with an additional 120 on Mekong tributaries planned by 2040 (MRC 2018) driven by transnational investment by regional and international corporate actors. The mega-dams will have extensive environmental and social impacts, affecting the river ecosystems and biodiversity as well as community access to land and forests.

The 2010 SEA on Mekong mainstream dams found that if all the planned mainstream projects are built, approx-

imately 55% of the lower Mekong will be converted into reservoirs, fundamentally transforming ecosystems, damaging fisheries and decreasing sediment transport downstream. More than 100,000 people would be displaced, and over half the Mekong's riverbank gardens, many owned by subsistence farmers, would be flooded (ICEM 2010). More recently, the MRC's 'Study on the Sustainable Development and Management of the Mekong River' examined cumulative impacts of all proposed hydropower dams and other developments in the Mekong basin. The study found that planned dams would reduce the amount of sediment reaching the Mekong Delta by 97 % and total fishery biomass by 40–80% by 2040 (MRC 2018). Combined with climate change, loss of fish is likely to cause "acute levels of food insecurity in communities in Lao PDR and Cambodia" (MRC 2018: v).

Environmental rights are human rights

The right to a healthy environment is stated in many national constitutions and regional agreements, underscoring the critical importance of the natural environment and ecosystem functions to the realization of other human rights. In Southeast Asia, the ASEAN Human Rights Declaration states 'the right to a safe, clean and sustainable environment' (Art. 28(f)). However, the scope of the right – including its application to business activities and extraterritorial contexts – remains underdeveloped.

Until recently, the right to environment lacked explicit recognition within the international human rights framework. In January 2018, the former Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John Knox, published 'Framework Principles on Human Rights and the Environment' (Knox 2018). The sixteen principles provide guidance for states aimed at facilitating the implementation of human rights obligations relating to the environment. Rather than creating new obligations, they apply existing obligations in the environmental context. These include procedural rights (such as rights to information, participation in decision-making and access to remedy), substantive rights (such as rights to food,

livelihoods and culture), and rights against discrimination and protection of the groups most vulnerable to environmental degradation (Knox 2013).

The Special Rapporteur acknowledged that while the framework principles reflect the status of actual or emerging international human rights law, they are expected to evolve as understanding of the relationship between human rights and the environment develops (Knox 2018: 3). An important area requiring further elaboration is the specific obligations for states and business enterprises with respect to adverse impacts on human rights and the environment from transnational business operations (Knox 2018: 5).

Faced with a lack of access to political channels and decision-making, communities in the region have attempted to access legal and human rights channels to resist the impacts of projects and seek redress. A growing number of human rights instruments incorporate ETOs for states and businesses to identify, avoid, and mitigate adverse impacts on human rights.

The framework principles provide limited guidance in addressing some of the key challenges for extraterritorial accountability and transboundary harm seen in the case of the Xayaburi dam. Framework principle 12 requires States to ‘ensure the effective enforcement of environmental standards against public and private actors.’ The explanatory note exhorts business enterprises to avoid or mitigate environmental harm that causes adverse human rights impacts, in accordance with the UNGPs, through taking specific steps, including environmental due diligence and compliance with environmental laws. However, the note does not address the scope of obligations in investment contexts that feature weak or corrupt governance and lack of robust environmental safeguards, including with respect to

transboundary impacts. Similarly, the responsibility to cooperate in providing remedy does not directly tackle the lack of effective remedial mechanisms applying to cases of extraterritorial harm.

In a 2017 thematic report, the Special Rapporteur recognized loss of biodiversity and ecosystem degradation as a priority human rights concern. The report states that continued enjoyment of human rights requires “economic and social development that does not over-exploit natural ecosystems and destroy ecosystem services on which human rights depend” (Knox 2017: 4). Because the populations most vulnerable to environmental damage tend to have limited political power or voice, the report also stresses that biodiversity loss increases marginalization and inequality, denying access of “the most vulnerable to basic materials for a healthy life and by reducing freedom of choice and action” (Knox 2017: 9).

Mekong dams pose a significant threat to the region’s biodiversity and the integrity of freshwater ecosystems. Planned hydropower projects are predicted to extirpate over 100 fish and aquatic species and result in proliferation of species that thrive in the altered conditions produced by dams (ICEM 2010). Mainstream projects also threaten endangered fish and aquatic species, including the Mekong Giant Catfish and the Irrawaddy dolphin, important sources of local knowledge, culture and livelihoods. The projects will escalate land clearance and deforestation, including the loss of protected areas and terrestrial species habitat. The resulting degradation of river-based ecosystems will in turn erode fundamental rights to food, water, livelihoods, and culture.

The impacts of Mekong dams also demonstrate important ways in which loss of ecosystem and species biodiversity is linked to the loss of social, political and cultural biodiversity (Pretty et al 2009). Communities displaced from traditional territories and livelihoods also lose cultural traditions, identity and natural resource management practices. While dam construction offers economic benefits, these are routinely overestimated (Ansar et al, 2014), while the real costs of loss of a riverine ecosystem or forest are rarely assessed or considered (Knox, 2017).

Mega-dams are promoted within a particular development model that favors private investment in large-scale infrastructure to generate profit and drive growth. In their campaign against the Xayaburi dam, Thai villagers are fighting to protect not just the loss of food sources and livelihoods, but local traditions and knowledge; a way of life that accords an alternative set of values to the river beyond resource commodification. The singular logic of the development model remakes both natural and social worlds, limiting the space for diverse human societies and the natural biodiversity dependent on them to thrive and flourish (Pretty et al 2009). In order to provide meaningful solutions for prevention and redress, these realities require better understanding and articulation within the framework of business and human rights.

The slow rise of extraterritorial obligations

Faced with a lack of access to political channels and decision-making, communities in the region have attempted to access legal and human rights channels to resist the impacts of projects and seek redress. A growing number of human rights instruments incorporate ETOs for states and businesses to identify, avoid, and mitigate adverse impacts on human rights. The UNGPs, while not explicitly articulating ETOs, require businesses to respect human rights wherever they operate and states to protect against violations of human rights by business actors over which they have jurisdiction. The scope of these responsibilities to extraterritorial contexts requires further elaboration, although jurisprudence and best practices are emerging in national action plans, legislation, and decisions by human rights bodies.⁶⁷ Yet despite increasing recognition of ETOs, remedial mechanisms have been slow to recognize or provide concrete redress for harm.

Community and civil society groups submitted complaints regarding the Xayaburi dam to the Finnish and Austrian National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises, which apply to transnational business actors domiciled in OECD countries and incorporate the UNGPs. They concerned the roles of Poyry (OECD Watch 2012), a Finnish consultant firm that conducted a compliance

review, and Andritz (OECD Watch 2014), the Austrian turbine supplier. While both complaints helped raise the profile of extraterritorial accountability, including the scope of responsibilities of business actors in a project in which they are not lead developer, neither of the voluntary mediation processes produced clear outcomes or remedies for affected communities.

In 2012, Thai communities filed a complaint with the National Human Rights Commission of Thailand (NHRCT) regarding the human rights impacts of Thai investment in the Xayaburi dam. The NHRCT conducted an initial inquiry and organized hearings on the project, but stopped short of a full investigation (Middleton 2017). However, the case helped pave the way for a slew of subsequent complaints concerning the accountability of Thai companies in their outbound investments (NHRCT 2015a), prompting investigations that led the NHRCT to develop an extraterritorial mandate.

One complaint concerned Khon Kaen Sugar, a Thai company and concession-holder of a sugar plantation in Sre Ambel, Cambodia, that resulted in violent forced evictions and the destruction of property, livelihoods and seizure of land from local villagers. Following an investigation and series of meetings, the NHRCT published a report finding that the land acquisition had violated rights to life, self-determination and development, including the right to manage and benefit from natural resources (NHRCT 2015b). The UN Special Rapporteur on Human Rights in Cambodia recognized the complaint as “a success in transboundary human rights promotion and protection (Subedi 2012). But while the report provided important support to the villagers’ claims, it did not result in remediation, which they continued to pursue through other channels, including a lawsuit in the United Kingdom targeting the sugar purchaser (CCHR 2013). A more recent lawsuit filed in Thailand’s civil court against another Thai sugar company embroiled in Cambodian landgrabbing holds potential for delivering more tangible outcomes to affected villagers (IDI 2018).

Following an investigation into the role of Thai investors in forced displacement in the Dawei Special Economic Zone (SEZ) in Myanmar, the THNRC published

recommendations that were formally adopted in a resolution by the Thai Cabinet recognizing the application of the UNGPs to Thai outbound investment (Office of the Cabinet Secretary 2016). Despite the important recognition, the Thai government is yet to take concrete steps to realize the recommendations and ensure implementation through monitoring and enforcement mechanisms. However, Thailand's national action plan on business and human rights, in the final stages of drafting, is expected to include provisions on ETOs.

Other efforts exposed the current limits of extraterritorial accountability in the region. Building on the TNHRC's emerging mandate, in 2014 a group of Thai and Cambodian civil society groups filed a complaint to the Malaysian human rights commission (SUHAKAM) regarding the role of Mega First Berhad, a Malaysian company, in developing the Don Sahong dam - the second on the lower Mekong mainstream. SUHAKAM initially accepted the complaint and attempted to facilitate a meeting, however, the company declined to participate. SUHAKAM ultimately decided that it lacked the mandate to conduct an extraterritorial investigation, instead issuing recommendations urging the company to respect human rights in its operations, and the Malaysian government to ensure compliance with the UNGPs in Malaysian outbound investment (SUHAKAM 2014). The case was cited by SUHAKAM in its proposed Framework for a National Action Plan on Business and Human Rights to highlight the need for a mechanism addressing extraterritorial complaints (SUHAKAM 2015).

Adjusting the lens on human rights

The slow development of extraterritorial accountability stands in stark contrast to the scale of environmental change and impacts on local communities due to the rapid construction of mega-dams in the Mekong basin. Nonetheless, incremental progress can be attributed to the efforts of local communities and civil society building public attention and seeking redress through lawsuits and complaints. The UNGPs, together with the emerging framework on human rights and the environment, offer important tools that can only be concretized through their continued application to particular

cases and contexts, revealing significant and persistent barriers to accountability in the process. Dismantling these barriers requires adjusting the human rights lens to expand the expectations placed on states and business enterprises with respect to extraterritorial accountability. Securing human rights requires state and business responsibilities to meaningfully protect and respect diverse forms of life and ways of being in the world, wherever they are located, and to remediate their loss and destruction.

References

Articles

Philip Hirsch. (2010) 'The changing political dynamics of dam building on the Mekong.'

Water Alternatives Vol. 3(2): 312-323

Carl Middleton. (2017) 'National Human Rights Institutions as Arenas of Transboundary Water Justice: Evaluating case studies from the Mekong River'. Conference paper presented at: International Conference on National Human Rights Mechanisms in Southeast Asia: Challenges of Protection, Asia Center, Bangkok, Thailand, 13-14 July 2017.

Stuart Orr et al. (2012) 'Dams on the Mekong River: Lost fish protein and the implications for land and water resources'. *Global Environmental Change* Vol. 22(4): 925-932.

Pretty et al. (2009) 'The Intersections of Biological Diversity and Cultural Diversity: Towards Integration'. *Conservation and Society* 7(2): 100-112

Guy Ziv et al. (2012) 'Trading-off fish biodiversity, food security, and hydropower in the Mekong River Basin'. *Proceedings of the National Academy of Sciences*. 28 January 2012.

Reports

Chuenchom Sangarasri Greacen and Chris Greacen, "Proposed Power Development Plan 2012 and a Framework for Improving Accountability and Performance of Power Sector Planning", Palang Thai, April 2012.
(Accessed December 23, 2018: www.internationalrivers.org/sites/default/files/attached-files/pdp2012-eng.pdf)

International Center for Environmental Management (ICEM), Strategic Environmental Assessment of Hydropower on the Mekong Mainstream, Mekong River Commission, Hanoi, Vietnam, October 2010.

John Knox, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Mapping report, Human Rights Council A/HRC/25/53, 30 December 2013.

John Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council A/HRC/34/49 2017, 19 January 2017.

John Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council A/HRC/37/59, 24 January 2018.

Mekong River Commission (MRC), The Council Study: Key Messages from the Study on Sustainable Management and Development of the Mekong River Basin, including Impacts of Mainstream Hydropower Projects, Mekong River Commission, 23 November 2017.

Mekong River Commission Secretariat (MRCS), Prior Consultation Project Review Report, Volume 2: Stakeholder Consultations related to the proposed Xayaburi dam project, Mekong River Commission, 24 March 2011.

Mekong River Commission Secretariat (MRCS), Observations and Comments on the Poyry Report on the Xayaburi Hydropower Project, Mekong River Commission, 25 November 2011.

National Human Rights Commission of Thailand (NHRCT) Subcommittee on Community Rights, Report on the Situation of Business and Human Rights in Thailand, Case Studies of Cross-border Human Rights Violations and Implementation of the UNGPs on Business and Human Rights with Proposal of Extraterritorial Obligations, National Human Rights Commission of Thailand, April 2015.

National Human Rights Commission of Thailand (NHRCT), Findings Report

Request for Legal or Policy Recommendations No. 115/2558, 10 March 2015.

SUHAKAM (Human Rights Commission of Malaysia), Strategic Framework on a National Action Plan for Business and Human Rights for Malaysia, Human Rights Commission of Malaysia, March 2015.

SUHAKAM (Human Rights Commission of Malaysia), 2015 Annual Report of the Human Rights Commission of Malaysia, Human Rights Commission of Malaysia, 2016.

Surya Subedi. Report of the Special Rapporteur on the situation of human rights in Cambodia: A human rights analysis of economic and other land concessions in Cambodia. Human Rights Council A/HRC/21/63/Add.1, 24 September 2012.

World Wildlife Fund (WWF) Greater Mekong, Mekong River in the Economy, World Wildlife Fund, November 2016.

Legal Instruments and Decisions

Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (Mekong Agreement), 5 April 1995.

Asia Pacific Forum on Women, Law and Development (APWLD), Bangkok Declaration on Extraterritorial Human Rights Obligations, Bangkok, Thailand, November 27, 2014.

Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration, 18 November 2012

Constitution of the Kingdom of Thailand, Buddhist Era 2550 (2007)

Government of Thailand, Office of Cabinet Secretary, Document No. NR 0503/2758, 26 January 2016.

International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997.

Organisation for Economic Cooperation and Development (OECD), OECD Guidelines for Multinational Enterprises, 27 June 2000.

Supreme Administrative Court of Thailand, Judgement No. KS8/2557, June 24, 2014

United Nations. (2011) Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" framework. Office of the High Commissioner on Human Rights (OHCHR), New York and Geneva, 2011.

United Nations Committee on Economic, Social and Cultural Rights (CESCR). (2017) General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 10 August 2017.

Media and webpages

Business and Human Rights Resource Centre (BHRRC). (2014) "The landmark Xayaburi Dam case in Thailand: What is at stake?" (Accessed 23 December 2018: www.business-humanrights.org/en/the-landmark-xayaburi-dam-case-in-thailand-what-is-at-stake).

Cambodian Center for Human Rights (CCHR) "CCHR welcomes ground-breaking proceedings initiated in the courts of England and Wales against two subsidiaries of UK-based Tate & Lyle plc on behalf of 200 displaced Cambodian villagers", Cambodian Center for Human Rights, 11 Apr 2013. (Accessed December 23, 2018: www.sithi.org/temp.php?url=publication_detail.php&mid=7433).

International Rivers, "Thai Villagers File Lawsuit on Xayaburi Dam", * August 2012. (Accessed 23 December 2018: www.internationalrivers.org/blogs/254/thai-villagers-file-lawsuit-on-xayaburi-dam).

International Rivers, "Court Hears Testimony of Mekong Villagers in Xayaburi Dam Case", 1 December 2015. (Accessed 23 December, 2018: www.internationalrivers.org/blogs/254/court-hears-testimony-of-mekong-villagers-in-xayaburi-dam-case).

Inclusive Development International (IDI), 'Thai court accepts Cambodian land grabbing case, orders mediation', 5 September 2016. (Accessed December 23, 2018: www.inclusivedevelopment.net/thai-court-accepts-cambodian-land-grabbing-case-orders-mediation/).

OECD Watch, 'Siemenpuu et al vs Pöyry Group', 11 June 2012. (Accessed December 23, 2018: www.oecdwatch.org/cases/Case_259).

OECD Watch, 'Finance & Trade Watch Austria et al vs Andritz AG', 9 April 2014. (Accessed December 23, 2018: www.oecdwatch.org/cases/Case_326).

Refining the Role of Business Enterprises with regards to the Protection of Migrants and Refugees

Giorgio Algeri

Giorgio Algeri is a specialist in human rights and migration. He has spent over a decade in conflict-affected and developing countries, working for humanitarian NGOs, civil society organizations, and the United Nations. He recently served as Programme Support Expert with the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Mali to provide technical support in the establishment and implementation of a human rights and international humanitarian law compliance framework for the operations of the Joint Forces of the G5 Sahel (FC-G5S) in the Sahel region (Mali, Niger, Chad, Burkina Faso and Mauritania).

Prior to joining OHCHR, he was Consultant to UNDP and served as Human Rights Officer with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). In addition to Mali and Central African Republic, he has worked in Bangladesh, India, Cambodia, Thailand, , Tunisia, The Democratic Republic of Congo.

More information about Giorgio's experience are available on his portfolio <https://www.gentleorbit.com/>

Human rights have become increasingly central in debates about the role of business enterprises in relation to migrants and refugees, and the heightened threats and risks they have faced over the last decades. This chapter highlights the need to reconsider the traditional passive role of business enterprises in particular where states, which remain the primary duty-bearers of human rights, are weak or fail to fulfill their obligations. In the course of the discussion. The chapter emphasizes the importance of boosting strategic partnerships to ensure public oversight by stakeholders such as Non-Governmental Organizations (NGOs), consumers and local communities. It is precisely by taking up their responsibilities and strengthening collaboration with a wide range of actors that business enterprises could mitigate the adverse human rights impact of their operations and services, and more generally contribute to the well-being and protection of vulnerable migrants and refugees.

In an era marked by large-scale human mobility, business enterprises have progressively become a powerful catalyst of migration. On the one hand, business enterprises have created unparalleled economic opportunities and incentivized significant waves of migrants by recruiting workers and offering a variety of goods and services (Goethals et al., 2017: 335). On the other hand, these market pulls exist against the back-

drop of an unprecedented growth in the number of refugees or other migrants fleeing their home countries⁶⁸ as a result of complex and intertwining factors – including, protracted conflicts mostly in Africa and the Middle East, terrorism, climate change, natural disasters, poverty, and a lack of access to fundamental rights (General Assembly, 2016:1; OHCHR, 2017:7). This has raised concerns about the consistency and capacity of an existing legal and normative protection framework (Zetter, 2015:22). Under such circumstances where migrants and refugees become extremely vulnerable, business enterprises have an onus to go beyond their traditional role of merely pursuing economic ends' and are asked to give greater consideration to their responsibilities in relation to human rights.

The practice with which economic migrants and refugees increasingly use similar routes when leaving their respective countries (United Nations General Assembly, 2016:2) can also cause confusion. Despite the multiple and overlapping reasons for departure, an emergence of "multicausal, 'mixed' migration flows" with "forced migrants" referring to forcibly displaced people is mingled with "voluntary migrants" (Zetter 2015:4). This raises serious concerns about the existing protection strategies and specific obligations which are owed to each status under international law. To this end, business enterprises have a critical role to play

across all domains; such as human resources, health and safety in the workplace and relations with the local community, especially in those settings of high vulnerability where migrants may lack resources, family support, access to national protection and/or assistance because of their precarious status, language and cultural barriers. In this new era where states are weak or fail to fulfill their obligations, business enterprises ought to reconsider their own responsibilities and move from a passive role to become agents of change. Business enterprises may be called upon to promote migrants' and refugees' rights which include: just and favorable working conditions, healthcare, freedom from discrimination, freedom from exploitation, freedom from slavery, women's and children's rights, and the right to adequate standards of living. Business enterprises are now in a position where they must provide migrants and refugees with services, social protections and adequate trainings to align their responsibilities under international human rights norms.

Anti-immigrant rhetoric has been continuously flourishing in the uncertain economic climate found recently in the United States and across Europe. Migrants and refugees – are indistinctly perceived as a burden or a threat to state security rather than looked upon as a benefit – thereupon migrants and refugees rely on smugglers, organized-criminal groups and traffickers for passage. Notably, protection concerns and human rights violations are likely to intensify when migrants and refugees move closer to their destination as “increasingly effective border controls encourage riskier strategies (e.g. hazardous sea crossings or the use of smugglers)” (Zetter 2015:13).

Business enterprises are not passive players in all of this. Accordingly, business enterprises need new strategies that take into account the growing anti-immigrant sentiment and a widening protection gap for refugees and migrants. Countries of destination in Europe and North America are increasingly adopting new forms of “subsidiary protection⁶⁹” sometimes referred to as “Temporary Protected Status⁷⁰” (TPS) to the detriment of those populations who have been granted refugee status. This has resulted in the gradual decline of the protection international standards enshrined in the 1951 UN Convention (Zetter, 2015:18). Perhaps busi-

ness would do well to protect migrants and refugees by making certain organizational changes. These could include the establishment of independent bodies composed of representatives from both the local community and the migrant/refugee community with the dual aim of identifying the respective needs of the group to improve conflict management.

Business enterprises have a critical role to play across all domains; such as human resources, health and safety in the workplace and relations with the local community, especially in those settings of high vulnerability where migrants may lack resources, family support, access to national protection and/or assistance because of their precarious status, language and cultural barriers.

In addition to the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs), international instruments addressing forced labour, child labour, human trafficking and other forms of exploitation⁷¹ are bountiful. Regrettably, vulnerable migrants and refugees continue to be victims of human rights abuses. This vulnerability and victimization persists as many states are unable or unwilling to fulfill their obligations to protect these populations due to a lack of political will, high rates of corruption within the government, or because of a lack of resources. The UN Guiding Principles do not require business enterprises to replace the state duty to protect human rights. Yet, business enterprises have the responsibility to respect human rights by conducting due diligence to assess, mitigate and account for any existing and potential negative impact on migrants and refugees. As well, businesses would do well to ensure grievance mechanisms are in place to remediate commercial related abuses against these vulnerable populations.

With this in mind, it is crucial to analyze the specific socio-economic context of each human right affront. For example, in relation to the labour exploitation of migrant workers in the agricultural sector in Italy, the root causes could be attributed to the existence of organized crime networks⁷², along with the rapid globalization and emergence of business enterprises which threaten small-scale business models. Business enterprises should take broad actions in order to fulfill their commitment to respect human rights regardless of whether the state can or will hold to its duty. To this end, initiatives such as strategic partnerships and alliances with non-state actors such as Non-Governmental Organizations (NGOs) can be crucial, and ultimately beneficial to both business enterprises and vulnerable migrants and refugees. Migration centers which provide advice for legal protection, and incorporate targeted training programs that encompass necessary skills such as : conflict resolution and mediation, hygiene and safety, cultural and psychological issues as well as job placement initiatives can mitigate the risk of human rights abuses against these populations while concomitantly promoting an ethical behavioral standard that provides competitive advantages for business enterprises.

Further steps to promote human rights beyond the UNGPs include compliance with the Ten Principles of the United Nations Global Compact in the areas of Human Rights, Labour, Environment and Anti-Corruption⁷³. Under those principles, vulnerable migrant and refugee populations, especially working in the informal sector should be protected against all forms of discrimination, forced and compulsory labour, including child labour.

Whenever respect of human rights and accountability by governments and businesses are in doubt, consumers, media, and civil society organizations must hold irresponsible businesses accountable for their violations through such measures as boycotts and buycott campaigns. As an example, over the past decade the exploitation of low-skilled migrant labourers from North Africa, sub-Saharan Africa, and Asia employed in Southern Italy has begun to garner the attention of public opinion. International NGOs, such as Amnesty International who have documented evidence of the

labour exploitation⁷⁴ (e.g. long-working hours, arbitrary wages) of irregular migrants on a large scale in at least three regions of Italy (Calabria, Campania, Lazio) (Amnesty 2012 :21-27). The basic right of migrant workers to access justice or the right to seek and obtain a remedy for violations of their labour rights were recognized but rarely implemented⁷⁵ (Amnesty 2012 :2018). Recently, migrant labourers who had been forced to work under unsafe and unhealthy working conditions in Italy's tomato industry organized a boycott campaign near Foggia in Southern Italy. This is a clear example of how social media can be used as an effective tool for social mobilization by urging consumers from other countries to boycott Italian imported canned tomatoes in favor of other local brands. Other valuable actions include the Corporate Human Rights Benchmark (CHRB), which is a multi-stakeholder initiative bringing together seven entities with the aim to measure the human rights performance of large companies and rank them at the international level. The benchmark is based on the UNGPs and international human rights norms which target businesses in the sectors of agricultural products, clothing apparel and extractives, where systematic human rights violations occur (bonded and forced labour, child labour) I (CHRB 2018 :11). This is particularly relevant when applied to the construction and agricultural sectors which rely mostly on the migrant workforce population (Amnesty 2012 : 9). Whereas business enterprises have the incentive to race to the top of CHRB annual rankings ; customers, consumers and civil society are equipped with better information to urge business enterprises to prioritize respect for the human rights of migrant workers who have long been the victims of labour exploitation, bonded and forced labour, and physical and verbal abuses in these above sectors.

As a preventive strategy, external stakeholders can help business enterprises « know and show » their commitment to migrants' human rights rather than being « named and shamed » into meeting their responsibilities, by promoting a robust human rights due diligence (Shift, Oxfam and Global Compact Network Netherlands, 2016 : 30) with the twofold aim to promote and respect the human rights of vulnerable populations.

Business enterprises should put migrants' and refugees' human rights at the core of their human rights

policies and due diligence efforts, and consult with NGOs, civil society, and faith-based organizations. The latter organizations could help assess potential and existing protection threats and risks caused by business enterprises. A recent research project conducted on the employment conditions and access to basic services of refugees and migrant workers in targeted communities in Turkey and in the Gulf countries highlighted the potential and existing threats to these populations (Goethals et al., 2017:341). Such information should inform company human rights policies and the focus of their due diligence.

Involvement of affected communities can help business enterprises who are outsourcing from countries with a high number of refugees and migrant workers to increase the accountability towards « potentially affected stakeholders ». As argued previously, business enterprises should encourage dialogue and interaction with the affected communities and give their perspectives serious consideration. Such views are crucial to assess the implications and adverse human right impacts of operations, products and services of global business. As an example, housing companies which provide refugee accommodation and humanitarian shelters to different governments should be informed of the culture and religious beliefs of the affected refugee and migrant population. Cohabitation of groups of refugees with different ethnic, racial, or religious backgrounds as well as sexual orientation could lead to a clash and/or a great amount of tension. To this end, consultation and participation of refugee communities across all phases of design, construction and follow-up are essential to prevent any further tension or address any specific need which may arise, such as building specific facilities for worship.

Ultimately, both affected communities and companies benefit from such mutual exchanges and « create co-ownership of necessary solutions » to negate adverse impacts on human rights (Shift, Oxfam and Global Compact Network Netherlands, 2016 : 96). In spite of the respective obligations and capacities, , it can be concluded that business enterprises are not bystanders in this equation and have every reason to take concerted and proactive action on migrant and refugee rights. It would be a mistake for business enterprises

to wait and standby for a treaty on business and human rights while there are so many opportunities to immediately improve the nexus between the responsibilities and interests of business enterprises and human rights in refugee and migrant populations.

References

- Amnesty International. (2012) *Exploited Labour : Migrant Workers in Italy's Agricultural Sector* (London : Amnesty International. http://www.amnesty.eu/content/assets/181212_Italy_exploitation_of_migrant_workers_-_Report.pdf (accessed 18 October 2018).
- Corporate Human Rights Benchmark. (2018) "Corporate Human Rights Benchmark Methodology 2018 : For the Agricultural Products, Apparel and Extractives Industries." <https://www.corporatebenchmark.org/methodology> (accessed July 29, 2018).
- Huang Cindy. (2018) "Global business and Refugee Crisis A Framework for Sustainable Engagement." Center for Global Development. <https://www.cgdev.org/blog/global-business-and-refugee-crises-framework-sustainable-engagement> (accessed July 10, 2018).
- Goethals Samantha, Joe Bardwell, Mariam Bhacker and Bahaa Ezzelarab. (2017) "Business Human Rights Responsibility for Refugees and Migrant Workers: Turning Policies into Practice in the Middle East." *Business and Human Rights Journal* no. 2: 335-342.
- <https://doi.org/10.1017/bhj.2017.11> (accessed June 30, 2018).
- Shift, Oxfam and Global Compact Network Netherlands. (2018) "Doing Business with Respect for Human Rights: A Guidance Tool for Companies." https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf (accessed July 15, 2018).
- United Nations Department of Economic and Social Affairs. (2017) (UNDESA). *International Migration Report 2017* (New York: UN. <https://www.un.org/development/desa/publications/international-migration-report-2017.html>).
- United Nations General Assembly. Resolution. (2016) 71/1, New York Declaration for Refugees and Migrants, A/RES/71/1 (October 3, 2016), available from <http://www.un.org/en/ga/71/resolutions.shtml>.
- United Nations Global Compact. "Guide to Corporate Sustainability. Shaping a Sustainable Future." <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed August 2, 2018).
- United Nations High Commissioner for Refugees (UNHCR) Population Statistics Database. "UNHCR Statistics : The World in Numbers." <http://popstats.unhcr.org/en/overview> (accessed August 1, 2018).
- United Nations, The Office of the High Commissioner for Human Rights (OHCHR). (2011) *Guiding principles on business and human rights: Implementing the United Nations 'Protect, Respect and Remedy' framework*, (New York and Geneva : OHCHR, 2011), available from https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- _____. Resolution 36/42, Report on the compendium of principles, good practices and policies on safe, orderly and regular migration in line with international human rights law, A/HRC/36/42 (September 4, 2017), available from <https://undocs.org/en/A/HRC/36/42>.
- _____. *The Corporate Responsibility to Respect Human Rights : an Interpretative Guide*. 2012. (New York and Geneva : OHCHR. <https://www.ohchr.org/en/issues/business/pages/tools.aspx>
- Zetter Roger. "Protection in Crisis: Forced Migration and Protection in a Global Era." Migration Policy Institute. <https://www.migrationpolicy.org/research/protection-crisis-forced-migration-and-protection-global-era> (accessed July 2, 2018).

Child Rights: Rising up the Business Agenda

Dr. Mark P. Capaldi

Dr. Mark Capaldi is a lecturer at the Institute of Human Rights and Peace Studies at Mahidol University, Thailand. Prior to this he has over 25 years of experience working on rights-based programming and advocacy for a number of international non-governmental organisations, particularly on the issue of child rights.

Introduction

Children can be uniquely impacted – either positively or negatively, directly or indirectly, purposefully or unintendedly – by the activities of businesses. Children can be consumers of products and members of communities that are influenced by business activities and operations.

Although it is well acknowledged that the policies and practices of businesses can have an impact on children's rights, children have traditionally ranked poorly on business agendas, perhaps because beyond tackling child labour, they struggle with where to begin. As such, the undesirable aspects of business such as the abuse and exploitation of children can still be easily found in a number of industries such as the extraction industry, travel and tourism, ICT, the service and entertainment sector, and media to name but a few. The phenomenon of child labour is particularly well documented with the ILO estimating in 2017 that there were approximately 152 million children engaged in child labour worldwide (ILO, 2017). However, whilst the predominant concern of business obligations to child rights is generally seen through the lens of eliminating child labour (negative publicity hits profits), conditions for young workers and their families, business infrastructure, marketing and advertising can also lead to other forms of harm. The key is getting companies to turn the negative impact into a positive gain.

Part of the challenge is that companies have not always seen the relevance of child rights to the nature of their business (beyond the norm of eradicating child labour) nor considered children as a priority stakeholder (UNICEF, 2014). Yet engagement on children's rights by the private sector is important on a number of levels which extend beyond solely legal concerns. Apart from anything else, integrating children's rights into

businesses can have real benefits for a company such as good brand reputation, improving risk management from exploitative or abusive practices and increasing employee and consumer satisfaction. Moreover, there are opportunities to develop products and services that are valuable to children's survival, development or general well-being. The flipside of ignoring child rights can be serious for a company's standing and bottom line.

The indivisible, interrelated and interdependent nature of human rights must be factored into consideration when protecting children and adults from the harmful effects that can occur from some business activities. Businesses need to understand that children are different from other stakeholders as they have certain protection needs and a special set of rights. Furthermore, children are not homogeneous and sub-groups defined by gender, age, socio-economic status, minorities, the disabled etc. can be impacted in different ways. This chapter gives an overview of the existing international mechanisms that can help guide and monitor businesses impacts on children. The subsequent section provides a snapshot of some selected successes and challenges of integrating the rights of the child in corporate social responsibility (CSR) policies that are aligned with the UN Guiding Principles on Business and Human Rights whilst highlighting how much more needs to be done. The chapter concludes by identifying a few priority areas where child rights can better influence the agenda and activities of business.

A Framework for Human Rights, Children and Business

The connection between children, business and human rights has already been elaborated in an array of international standards. Numerous obligations exist under international law and a number are specific to the

context of child rights. The Convention on the Rights of the Child (1989) calls on States in Article 32 to “protect children from economic exploitation, hazardous work and work which is harmful to the child’s health or physical, mental, spiritual, moral or social development” and has been further elaborated in General Comment No. 16.⁷⁶ ILO Convention No. 182 requires States to “take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency” (Article 1). Another major convention relating to child labour is ILO Convention No. 138 concerning the Minimum Age for Admission to Employment. However, these treaties are signed by States, not businesses and whilst States should ensure that businesses respect human rights this duty has historically been a challenge to enforce. Not surprisingly, voluntary regulation and compliance by businesses through approaches such as corporate social responsibility (CSR), the Global Compact and even the more recent 2011 UN Guiding Principles on Business and Human Rights (which require States and businesses to be specifically receptive to the rights of particularly vulnerable groups, including children) have been a step in the right direction but at the same time, remain widely criticized for being too weak (Mc Corquodale, 2017).

An important development was felt to have occurred in 2012 when UNICEF, the Global Compact and Save the Children developed the Children’s Rights and Business Principles (UNICEF, Save the Children and the United Nations Global Compact 2012). These were seen as the first comprehensive set of principles (built upon the UN Guiding Principles on Business and Human Rights) to guide companies on the full range of actions that they can take in the workplace, marketplace and community to respect and support children’s rights. The ‘Principles’ illustrate how companies can impact the rights of the child through ten specific commitments that go beyond just the workplace to also include the market place, the community and the environment. According to the Principles, all companies should:

1. Meet their responsibility to respect children’s rights and commit to supporting the human rights of children.

2. Contribute to the elimination of child labor, including in all business activities and business relationships.
3. Provide decent work for young workers, parents and caregivers.
4. Ensure the protection and safety of children in all business activities and facilities.
5. Ensure that products and services are safe, and seek to support children’s rights through them.
6. Use marketing and advertising that respect and support children’s rights.
7. Respect and support children’s rights in relation to the environment and to land acquisition and use.
8. Respect and support children’s rights in security arrangements.
9. Help protect children affected by emergencies.
10. Reinforce community and government efforts to protect and fulfil children’s rights.

The development of the Principles started in mid-2010 and was informed by an Expert Reference Group, external consultations globally, a literature review, interviews and surveys. In mid-2011, various partner NGOs organized consultations on a preliminary draft of the Principles with over 400 children in nine countries: Brazil, Argentina, Philippines, Zambia, Bangladesh, Ethiopia, Senegal, Paraguay and Peru (UNICEF et al., n.d.). Upon launching in 2012, there has undoubtedly been a level of interest by some companies to learn and implement (in part no doubt by the push of the UN and big INGOs in the spirit of collaboration) but others reportedly struggle on how to begin (World Child and Youth Forum, 2013).

A final, more recent push at the international level has come in the form of the Sustainable Development Goals 2030 (SDGs) which were adopted by the United

Nations General Assembly in September 2015 (United Nations General Assembly, 2015). The SDGs replaced the lapsed Millennium Development Goals which whilst lauded for being successful in achieving targets around reducing child mortality or improving children's health and education, had largely failed to address issues around child protection and human rights (Darrow, 2012). The new SDGs 2030 have taken a bolder approach to human rights and also recognize that business is an important partner in all aspects of social, economic and environmental development. Whilst the SDGs are also integrated and indivisible, Goal 8.7 is particularly pertinent due to its' focus on eradicating forced labour, slavery, human trafficking and the worst forms of child labour.

All countries have signed up to the SDGs and combined with the obligations described above under international law, should mean that States hold businesses accountable to protect and respect children's rights. Furthermore, the UN Guiding Principles and the Children's Rights and Business Principles (CRBP) articulate corporate responsibility as a primary concern. Whilst this overall framework is encouraging, as the next section explains, progress in developing business-ess policies to do no harm seems slow and it is still too early to see many companies proactively complying with the promotion and respect of children's rights.

Examples of Progress and Challenges

Six years on from the launch of the Children's Rights and Business Principles, it is not easy to find much published material regarding the implementation and achievements of the Principles nor how businesses are respecting and supporting the implementation of children's rights. The very limited literature available suggests that companies are still struggling to know where and how to start. As stated by Collins 'such a rights-based approach is not an easy adjustment for most businesses to grasp, much less operationalise' (2014: 596).

Eradicating child labour remains the obvious area for intervention by businesses. Most companies globally now make it their company policy and practice not to

employ child labour. Yet media scandals on child exploitation in big businesses are still current. Allegations of child labour have dogged Nestlé for years (Neiberg, 2018) and whilst the company has long had a code of conduct that prohibits the use of child labour in its supply chain, awareness of the code by farmers growing the cocoa remains low (Nestlé, 2017). In 2016, Swedish fashion chain H&M was accused of employing 14 year old workers in Myanmar for more than 12 hours a day, although the minimum working age in the country is 13 years of age. (Butler, 2016). Other multi-nationals such as Gap, Apple and Walmart have faced similar charges in different parts of the world in the last few years (Lamarque, 2016) and an extensive list of goods and services still produced under child labour can be found in the US Department of Labour's List of Goods Produced by Child Labour or Forced Labour (US Department of Labour, 2016). By and large though, high profile trans-national companies have been compelled to act in the face of significant media and consumer pressure and most companies publically commit to address child labour. Unfortunately, the informal economy, which is much less regulated, can more easily have children 'hidden' within the workplace.

Another business sector regularly garnering negative publicity concerning child abuse and exploitation is the ICT and telecom industry. Whilst the Internet is of course an innovative tool for supporting children's rights (e.g. rights to freedom of expression, privacy and information) it is increasingly being found to support the victimization of children through bullying, exposure to inappropriate materials and online child sexual exploitation (UNODC, 2015). Technical innovation can mean that offenders located anywhere in the world can easily access an increasing amount of child sexual abuse and exploitation material, facilitated by financial mechanisms such as virtual payment methods like Bitcoins (Nouwen, 2017). Acknowledging these child rights abuses, tech giants such as Microsoft, Google and Facebook have developed software and tools for detecting and filtering out child abuse materials. They have also joined the new WePROTECT Global Alliance to End Child Sexual Exploitation Online, launched in 2013 that is co-chaired by the U.K., U.S. and the European Commission (The Technology Coalition, n.d.).

The travel and tourism industry, whilst also not necessarily directly participating in child rights violations, indirectly provides an infrastructure which allows abuse to take place. The proliferation of budget airlines, cheaper forms of tourism and the increasing travel of business people and labour is exposing a greater number of children to all sorts of risks (ECPAT International and Defence for Children-ECPAT Netherlands, 2016). Despite concerns by the industry of negative connotations if their sector is associated with child exploitation, many companies within the travel and tourism industry have become members of codes which provide standards to abide by. Most notably, the voluntary but industry-led Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism in 2017 has reported 350 company members (Brosnan, 2018). Similarly, for many years, alongside its charitable foundation and significant financial support to child rights non-governmental organisations globally, Air France has shown videos on its long-haul flights warning against the sexual exploitation of children and the legal penalties (ECPAT, 2012).

Few businesses have extended their child rights impact assessments and protection to broader children's issues that are a result of environmental considerations, decent work, parental or youth employment or consumer marketing for example. Child rights due diligence becomes even more important where there is a need to strengthen accountability to children.

Beyond these targeted elements within the scope of children's rights and the role that companies can take, there are examples of CSR initiatives that are operating independently of self-interest. In the media, MTV, who target a young audience, have aired awareness and prevention campaigns on different child rights issues such as human trafficking (Skuse and Dowman, 2012).

The children's toy company, Lego, references the CRC and the CRBP in its Global Compact commitment (Lego, n.d.) as well as multinational H&M (H&M, 2012). The Body Shop, a well-known beauty products company long dedicated to creating positive social change through a range of human rights campaigns since the 1980s, worked globally from 2009 to 2012 with an international network of NGOs to hold governments accountable to combating child sex trafficking. (The Body Shop, 2018).

However, despite these examples, the Institute for Human Rights and Business has noted limited consideration of children's rights by business (Collins, 2014). There remain many gaps within the current structure of businesses approach to CSR which still focuses primarily on charitable work and misperceptions that child rights are not relevant to their operations or is purely a legal or State concern (Ibid.). As can be seen above, the primary focus is still on the headline catching concerns of child labour, child trafficking and child sexual exploitation. Many of the gaps in preventing other violations of children's rights stem from the voluntary nature of CSR and a corresponding lack of accountability due to low awareness, poor self-regulation, and an absence of meaningful monitoring and reporting. Few businesses have extended their child rights impact assessments and protection to broader children's issues that are a result of environmental considerations, decent work, parental or youth employment or consumer marketing for example. Child rights due diligence becomes even more important where there is a need to strengthen accountability to children. Take for instance where food and beverage companies may target children with advertising for products that are unhealthy or where the pharmaceutical industry prices life-saving drugs beyond the reach of poor parents. Denial about the relevance of such business activities to children cannot be accepted and the need for appropriate legislation and regulation should be advanced.

Not surprisingly, business leaders generally shy away from regulation for fear that it negatively impacts profits posing the question, how do you take the cost of doing good and make it profitable for the company? (World Child and Youth Forum, 2013). However, some of the positive cases given above offers hope that companies

that collectively adopt child rights policies – often in partnership with other stakeholders such as States and NGOs - will influence the industry norm such that other companies feel compelled to join to protect and bolster a positive consumer image.

Conclusion

The connection between business and children rights has been elaborated and the frameworks developed yet the analysis of impact is not readily available. Furthermore, the take-up of the various human and child rights principles and codes remains a concern as without greater monitoring and accountability of compliance (including penalties for failure to comply) their legitimacy is considered weak.

The relationship between children's rights and business is much broader than just the issue of child labour and child exploitation and companies' philanthropy and charitable work is only one aspect of child rights. Other key areas of work requiring attention include the effect on children from marketing strategies, products or services that can lead to harm and community based factors leading from conflict, displacement or other business operations. Despite some exceptions, brand reputation and fear of criticism is what predominantly drives the moral and business case for adopting a child rights approach. Yet the denial that children's rights and business are not interlinked is no longer acceptable; not only does business have a role to play with respect to children's rights, it also has a responsibility.

But the level of responsibility taken has perhaps become somewhat clouded by the continuing traditional interpretation and approach to CSR. Motivations around CSR policies are often varied – they may be driven by philanthropy, morally, altruistically, financially, or to offset negative publicity (Bazilliery and Vauday, 2009) and the voluntary nature of CSR can feed into ambiguity and lack of attention and accountability to child rights.

Nevertheless, the adoption of CSR, codes, the Child Rights and Business Principles and the other mechanisms outlined in this chapter, whilst appearing some-

what slow in uptake is hopefully setting some norms of more accountability to the rights of the child. Whilst companies should be held accountable to the international child rights standards that their countries have signed up to, States need to do more to monitor and enforce. Mechanisms and tools to help do this exist. For example, the UN Guiding Principles (UNGPs) offer a reporting framework (with guidance documents) and many States (particularly throughout Europe) have established National Action Plans on Business and Human Rights which commit to the implementation of the UNGPs. Future challenges must also be embraced as businesses are operating in a world increasingly affected by conflicts, disasters, environmental degradation, political instability and youth unemployment (World Child and Youth Forum, 2013).

As this chapter has shown, businesses have recognized and acted upon child rights although it is clear that much more needs to be done. Child rights are generally among the lowest priority area of businesses as there is a narrow understanding of what child rights are and the role that a company should take. Whilst few businesses would deny responsibility to protect children, there needs to be pressure for them to do more and for them to act. Cooperation between corporations, governments and civil society is key. If a more balanced understanding of the impact of business on children is achieved, then children will hopefully move up the business agenda.

References

- Bazilliery Remi and Vauday, Julian. (2009-10) The Green Washing Machine: Is CSR more than communication? Document de Recherche du LEO. Available at: <https://hal.archives-ouvertes.fr/hal-00448861/document> (accessed July 19, 2018).
- Beauchere, Jacqueline. (2016) WePROTECT Global Alliance releases strategy to end child sexual abuse online. Microsoft on the Issues. Available at: <https://blogs.microsoft.com/on-the-issues/2016/07/13/weprotect-global-alliance-releases-strategy-to-end-child-sexual-abuse-online/> (accessed July 19, 2018).
- Brosnan, Damian. Email message to author July 20, 2018.
- Butler, Sarah. (2016) H&M factories in Myanmar employed 14-year-old workers. The Guardian. Available at: <https://www.theguardian.com/business/2016/aug/21/hm-factories-myanmar-employed-14-year-old-workers> (accessed July 21, 2018).
- Collins Tara. (2014) "The relationship between children's rights and business". International Journal of Human Rights 18: 582-633.
- Committee on the Rights of the Child. General Comment No. 16 On State obligations regarding the impact of the business sector on children rights (UN Doc. CRC/C/GC/16 (15 March 2013).
- Darrow, Mac. (2012) "The Millennium Development Goals: Milestones or Millstones? Human Rights Priorities for the Post-2015 Development Agenda". Yale Human Rights and Development Journal. Available at: www.law.yale.edu/documents/sutton-colloquium/materials/2013/The-MDGs-Milestones-or-Millstones-Human-Rights-Priorities-for-the-Post-2015-Development-Agenda.pdf (accessed July 19, 2018).
- ECPAT International and Defence for Children-ECPAT Netherlands. (2016) Offenders on the Move, Global Study on Sexual Exploitation of Children in Travel and Tourism, ECPAT International.
- ECPAT. (2012) "Corporate Social Responsibility: Strengthening accountability in the fight against sexual exploitation of children", ECPAT Journal No. 4, Bangkok: ECPAT International. Available at: www.ecpat.org/wp-content/uploads/legacy/ecpat_journal_oct_2012.pdf (accessed July 16, 2018)
- H&M. 'Human Rights Policy'. (2012) Available at: <http://about.hm.com/en/About/Sustainability/Reporting-and-Resources/Policies/Human-rights-policy.html> (accessed July 19, 2018).
- ILO. Global estimates of child labour: Results and trends, 2012-2016. The 2017 Global Estimates Report. Available at www.alliance87.org/2017ge (accessed July 20, 2018).
- Lamarque, Hannah, 10 Companies that Still Use Child Labour. Career Addict, 2016. Available at: <https://www.careeraddict.com/10-companies-that-still-use-child-labor> (accessed on July 21, 2018).
- Lego. 'Human Rights', n.d. Available at: <https://aboutus.lego.com/en-us/sustainability/human-rights> (accessed on July 19, 2018).
- McCorquodale, Robert, Smit, Lise, Neely, Stuart, & Brooks, Robin. (2017) "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises". Business and Human Rights Journal, 2(2): 195-224. doi:10.1017/bhj.2017.2
- Nestlé. 'Tackling Child Labour, 2017 Report'. Available at: <https://www.nestle.com/asset-library/documents/creating-shared-value/responsible-sourcing/nestle-cocoa-plan-child-labour-2017-report.pdf> (accessed on July 19, 2018).
- Nieberg, Oliver. (2018) Nestlé sued again for allegedly 'using child and slave labor to make chocolate'. Confectionery News. Available at: <https://www.confectionerynews.com/Article/2018/02/13/Nestle-sued-again-over-child-labor-in-cocoa-supply-chain> (accessed on July 20, 2018).
- Nouwen, Yvonne. (2017) "Virtual Currency Uses for Child Sex Offending Online", ECPAT Journal Issue No. 12 Online Child Sexual Exploitation: An analysis of emerging and selected issues, ECPAT International, Bangkok.
- Office of the High Commissioner for Human Rights. (2014) Frequently asked questions about the Guiding Principles on Business and Human Rights. Available at: https://www.ohchr.org/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf (accessed on July 19, 2018).
- Skuse Andrew and Dowman, Scott. (2012) MTV EXIT ASIA III A Campaign to Increase Awareness and Prevention of Trafficking in Persons: An Independent Review, University of Adelaide and Griffith University. Available at: <http://dfat.gov.au/about-us/publications/Documents/mtv-exit-iii-review-report.pdf> (accessed on July 16, 2018).

The Body Shop. Campaigns, 2018. Available at: <https://www.thebodyshop.com/en-gb/about-us/our-campaigns> (accessed on July 20, 2018).

The Technology Coalition. Fighting Child Sexual Exploitation Online, n.d.. Available at: <http://www.technologycoalition.org/> (accessed on July 19, 2018).

UNICEF, Save the Children and the United Nations Global Compact. (2012) Children's Rights and Business Principles. <https://www.unicef.org/csr/12.htm> (accessed on July 19, 2018).

UNICEF, Save the Children and the United Nations Global Compact. Children's Rights and Business Principles Frequently Asked Questions (n.d.). Available at: childrenandbusiness.org/wp-content/uploads/2013/02/CRBPI-FAQ.pdf (accessed on July 20, 2018).

UNICEF. (2014) Engaging Stakeholders on Children's Rights: A tool for companies, Geneva, UNICEF.

United Nations General Assembly, Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development – The Sustainable Development Goals GA Res 70/1 70th sess, Agenda items 15 and 116, UN Doc A/RES/70/1 (21 October 2015).

UNODC. (2015) Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children, United Nations Office of Drugs and Crime, New York. Available at: https://www.unodc.org/documents/organized-crime/cybercrime/Study_on_the_Effects.pdf (accessed July 17, 2018).

US Department of Labour. (2016) List of Goods Produced by Child Labour or Forced Labour. Available at: https://www.dol.gov/sites/default/files/documents/ilab/reports/child-labor/findings/TVPR_Report2016.pdf (accessed July 19, 2018).

World Child and Youth Forum. Forum Report: Children's Rights – any of your business? March 22, 2013, the Royal Palace, Stockholm, Sweden. Available at: <https://www.globalchildforum.org/forum/stockholm-royal-palace-2013/> (accessed on July 16, 2018).

Perspectives of Disability-Inclusive Business and Human Rights

Dr. Ryuhei Sano

Dr. Ryuhei Sano (Ph.D in Knowledge Management) is currently in the position of Associate Professor, Faculty of Social Policy and Administration, Hosei University, Japan. At the same time, he serves as advisory roles in some organizations in Asia based on his working career on disability and development for years internationally. Dr. Sano has been with a disability of his hand according to the accident at the age of 6. The areas of his expertise are disability and development, international cooperation, inclusive development, and Southeast Asia.

In line with the pursuit of a more “inclusive” society for all, persons with disabilities play more active roles in business activities. What remains a challenge is ensuring all persons with disabilities are able to actively and equitably engage in business from every position. That is to say, from simple recipients of services to core team members of corporations, including entrepreneurs, employers, employees, clients, suppliers, customers and consumers. From this viewpoint, the following chapter aims to provide a roadmap and articulate the main argument for disability-inclusive business and human rights.

CSR and Disability-Inclusive Business

In the past decade, the roles of persons with disabilities in business have evolved significantly. Traditionally, with few exceptions, business enterprises viewed persons with disabilities as the objects of charity or simply targets of Corporate Social Responsibility (CSR). Regardless of the growing celebration of CSR, there has been no clear consensus as to what the term CSR means and how one should measure social responsibility not least related to persons with disabilities. Fortunately, the United Nations Guiding Principles on Business and Human Rights brought clarity by reiterating that the appropriate, socially responsible approach positions persons with disabilities as rights-holders. This means that business enterprises should be inclusive, avoid infringing on the human rights of persons with disabilities and address adverse human rights impacts with which they are involved (OHCHR 2011: 13).

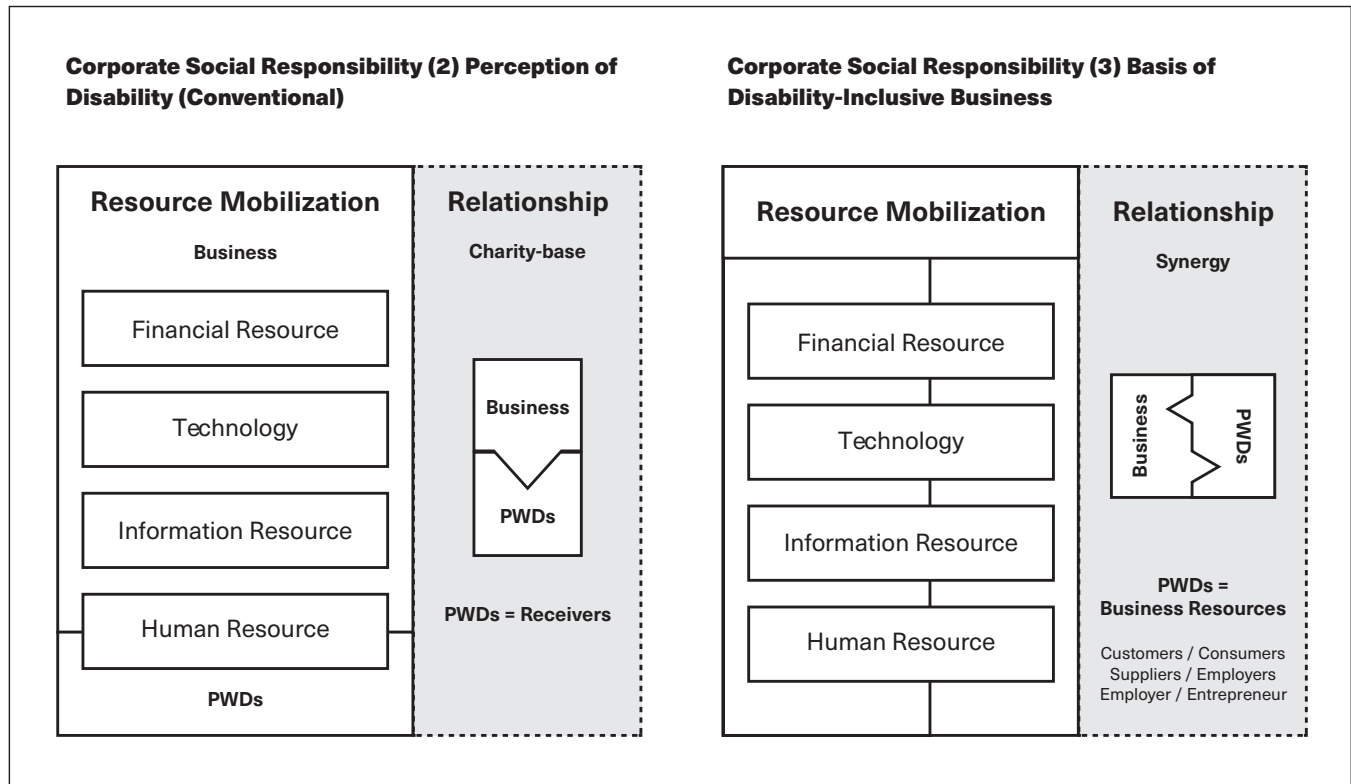
Some unique business-cases came into focus when examining the discourse of disability-inclusive business

at the United Nations level. As stated in the Incheon Strategy to “Make the Right Real”, 2013-2022, of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), disability-inclusive business is a strategy that promotes disability-friendly products, services, employment opportunities and entrepreneurship development (ESCAP 2012: 41). The following chart illustrates the viewpoint of conventional CSR and disability-inclusive business. As shown, a paradigm shift from the vertical way to a horizontal way of connecting could be one new trend for disability-inclusive business (APCD 2012: 10). Nowadays, through the lens of BHR persons with disabilities are given due consideration relative to various positions such as employees, suppliers, employers, entrepreneurs, customers and consumers. From this view, the concept of “disability-inclusive business” could be understood in terms of incorporating and extending opportunities and services to persons with disabilities, to include positively overcoming the conventional barriers they face (Sano et al. 2014: 7).

Awareness of Persons with Disabilities as Employees and Human Rights Holders

Historically, the first international law on work and employment of persons with disabilities was the Vocational Rehabilitation and Employment (Disabled Persons) Convention. The International Labour Organization (ILO) through Article 1 of the Convention defined persons with disabilities as an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment. After more than 30 years, the right of persons with disabilities to

Figure 1: Perception of Conventional Corporate Social Responsibility and Disability-Inclusive Business



work on an equal basis with others without disabilities has been more fully recognized in the principles of Article 27 Work and Employment of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Over 90% of the United Nations Member States have ratified the CRPD and awareness of work and employment of persons with disabilities is higher than before.

While business enterprises are eager to employ persons with various backgrounds for innovation and sustainability, they should respect the human rights of individuals belonging to specific groups or populations that require particular attention, including persons with disabilities (OHCHR 2011: 14). The key concept here is a business working environment that should be open, inclusive and accessible to persons with disabilities. Indeed, it is important for all the enterprises to ensure that reasonable accommodation is provided to persons with disabilities in their workplace. Such a policy commitment meets their responsibility to respect human

rights (OHCHR 2011: 16). According to Article 2 of the CRPD, reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Denial of reasonable accommodation in their workplace could be considered discrimination on the basis of disability (UN 2006).

In practice, Air Asia Malaysia, the biggest low-cost airline company in the world, has been known as a disability-friendly entity by collaborating with persons with disabilities as core training facilitators for years (ESCAP et al. 2010: 5-10). SM Supermalls Philippines has also employed persons with disabilities as their trainers and staff every year (Sano 2015, 6-7). Both enterprises have promoted the employment of persons with disabilities through not only appropriate policies and measures but also linking knowledge of persons with disabilities

with staff training mechanisms. Moreover, they have integrated the findings from their learnings across relevant internal functions and processes, and taken appropriate action in consultation with persons with disabilities (OHCHR 2011: 20). In other words, these business enterprises are not treating persons with disabilities as charity cases, but as rights-holders in their business operations.

In Southeast Asia, there are more emerging business enterprises promoting employment opportunities and career advancement for persons with disabilities. Such enterprises have enabled persons with disabilities to have effective access to general technical guidance, placement services, and on-the-job training. Following up such regional trend, some persons with disabilities have been employed by ASEAN as their secretariat staff (ASEAN Secretariat 2018) and their working environment has been modified to the need of their disability.

Entrepreneurs and Suppliers with Disabilities in Business and Human Rights

In the business sector, persons with disabilities are also entrepreneurs. Entrepreneurs with disabilities can increase representation of persons with disabilities in their workforce (Department of Human Services, 2018). Being entrepreneurs, persons with disabilities can work more independently. They can set their own schedules and reduce transport problems if they use the offices as their residences. However, entrepreneurs with disabilities face not only common barriers which are the same to those without disabilities but also other disability-related barriers. In some cases, the disclosure of their disabilities appeared to be mediated by the visibility of one's disability, while some social entrepreneurs may not want others to know that they have a disability (Caldwell et al. 2016: 223). In a country like Vietnam, entrepreneurs with disabilities have access to business loans and other support from state-based financial institutions that shape business practices when fulfilling their respective mandates (OHCHR 2011: 10). However, the amount loaned is generally lower than loans from banks and other financial institutions. Other difficulties that entrepreneurs with

disabilities face include, as in South Africa, a lack of equipment and machinery for their business, discrimination, lack of business networking, hardships in obtaining start-up capital, knowledge of support centers and education and training (Maziriri, 2018).

In order to support entrepreneurs with disabilities, the use of assistive technologies and improvements in information and communication technologies (ICT) and Internet accessibility for business users with disabilities should be encouraged. The use of technologies for entrepreneurs with disabilities such as reading software and applications for persons with visual impairments can be stimulated through grants, loans and training in their use. The integration of technological interfaces for persons with disabilities in key accounting, taxation and other business management software can be encouraged. Better interfaces for persons with disabilities on websites are also needed, starting with improvement in accessibility of online government services such as business registration, tax filing, and promotion of standard private websites that are friendly to persons with disabilities (OECD 2014, 9-10). In short, technological access is critical as it can encourage more participation of persons with diverse disabilities. At the same time, these technologies and systems could be accessible at minimum cost if they are promoted at an early stage.

Entrepreneurs should be aware that persons with disabilities are also their potential suppliers. Therefore, the products and services should be designed, produced and rendered with the concept of universal design to guarantee equal access to their products, services and environment. Universal design is a strategy for making products, environments, operational systems and services welcoming and usable to the most diverse range of people possible. With universal design, all facilities, programs, products and services consider diversity of consumers. Such diversity includes age, reading levels, learning styles, languages, culture and disabilities. Universal design is a lens through which every aspect of a business can be viewed, and a set of tools by which products, services and customer satisfaction can be improved (United States Department of Labor, 2007). In all contexts, business enterprises should comply with universal design as one internationally rec-

ognized human rights standard, wherever they operate (OHCHR 2011: 25).

Human Rights Viewpoints of Consumers with Disabilities

In the past, persons with disabilities were not really viewed as consumers since most of them were considered poor. Since 15 percentage of the total population in the world is persons with disabilities - World Report on Disability (WHO et al., 2011), - it is to be encouraged that all the business products and services are designed from the viewpoint of persons with disabilities. According to Article 9 of the CRPD, business enterprises that offer facilities and services which are open or provided to the public are encouraged to take into account all aspects of accessibility for persons with disabilities. As one of their rights, customer with disabilities should have access to products and services provided by business owners.

In practice, stakeholders' engagement strategies must consider simple and complex needs of persons with disabilities to make sure persons with disabilities are well represented in the business processes. The principles of universal access and inclusion for persons with disabilities are essential to break barriers in terms of physical environment, information and communication, policy and regulation, and human attitudes and behaviors.

Once the rights of consumers with disabilities are violated, it can cause serious damage and hinder a country's development in many aspects. In some countries, the rights of consumers with disabilities are ignored by some business owners or service providers.

In Thailand, for example, the right to access public transportation of persons with disabilities are not always guaranteed by some providers. One airline, that has flights in domestic routes as well as international routes in some neighboring countries, does not allow passengers with disabilities to be on board if they travel by themselves. The airline also limits the number of passengers with disabilities in each flight. If the number of passengers with disabilities exceeds the limit, they will not be allowed to board. They will only be refunded for the tickets without compensation for their time and inconvenience. Hence, even though they book tickets in advance, passengers with disabilities can never know if they will be able to be on flights or not. Besides, passengers with disabilities are required to sign a form stating that the airline shall not be responsible for any injures or damages that may occur. Even a passenger with mild mobility disability, who could walk up to the aircraft by herself, was requested to sign the form or not be allowed to get on the airplane. As denial of reasonable accommodation in their business service could be considered discrimination on the basis of disability (UN 2006), such airline should express their commitment to meet their responsibility to respect human rights through a statement of policy (OHCHR 2011: 16).

Another area of business that is not fully accessible for customers with disabilities is the financial business. Customers with disabilities have reported that their financial needs are not being fully served by the traditional banking system. However, some financial institutions are trying to narrow the gap between customers with and without disabilities as they would benefit from creating and offering banking and insurance products that better meet the needs of a group of customers which is far from insignificant. Some of these financial products and services include tax-advantaged savings accounts for people with disabilities and their families. Bank of America, for example, also offers auto loans for persons with disabilities to facilitate the purchase or refinancing of an accessible vehicle. Even more conveniently, applicants can fill out the form online and receive a decision within a minute. Inclusive marketing is also important to guarantee equal access to the products, including financial products and services. The financial institutions can advertise their products and

services relevant to customers with disabilities, such as loan programs or support that is available online as well as in-branch services. For example, when customers with disabilities have to go to a branch to conduct transactions, open accounts or apply for loans, they may need information in an accessible format (Papathanasakis, 2017). The financial institutions can provide services such as brochures and other information in braille, sign language interpreters and talking ATMs. When customer with disabilities are made aware of the products and services available, it becomes easier for them to do business with financial institutions, and trust that their needs will be met (Papathanasakis, 2017). However, in some countries the financial products and services are not accessible. Some banks do not allow blind persons to open bank accounts while other banks do not approve loans for persons with disabilities, fearing that clients with disabilities may be unable to pay back the loans. To access the loans for their businesses, there are some persons with disabilities obtaining loans by using names of other people.

Future Steps

In line with Article 8 of the CRPD, it is important for all to continue to raise awareness throughout the business field regarding persons with disabilities, as it can foster respect for the rights and dignity of persons with disabilities in the business context. The advertisement about persons with disabilities hanging out with friends who do not have disabilities has supported the idea that persons with disabilities are not isolated or segregated anymore. Such business enterprises have shared a view on disability that is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties (OHCHR 2011: 16).

In practice, stakeholders' engagement strategies must consider simple and complex needs of persons with disabilities to make sure persons with disabilities are well represented in the business processes. The principles of universal access and inclusion for persons with disabilities are essential to break barriers in terms of physical environment, information and communication, policy and regulation, and human attitudes and be-

haviors. All the business stakeholders are expected to understand the viewpoints of persons with disabilities and their families. Besides this, the disabled community and stakeholders should be involved in the design of service delivery policy and services. The disabled community can also engage in the co-designing of service delivery using different methods and activities such as face to face forums and interviews, online discussions and satisfaction surveys by phone or Internet. Such methods would go some way to ensuring persons with disabilities have voices in service delivery design.

In this "new era of business and human rights", there are more spaces for new types of inclusion that need reinforcing by regulation and policies. Disability-inclusive businesses should be places where persons, with and without disabilities, learn and work together towards the future.

References

- ASEAN Secretariat (@ASEAN). (2018) "ASEAN Secretariat staff member Jasper Rom just won gold medal with the Philippines chess team and bronze individually at the 2018 Asian Para Games in Jakarta!" Twitter, October 10, 2018.
<https://twitter.com/ASEAN/status/1049981674409340928>
- Asia-Pacific Development Center on Disability. (2012) Perspectives of Disability-Inclusive Business in Asia and the Pacific, 2012, 10.
- Caldwell, K., Parker Harris, S., & Renko, M. (2016) Social Entrepreneurs with Disabilities: Exploring Motivational and Attitudinal Factors. *Canadian Journal on Disability Studies*, 5(1), 211-244.
- Department of Human Services, Australian Government. (2018) Protocol for Engaging People with Disability. Accessed October 1, 2018.
- Director General for Employment, Social Affairs and Inclusion (European Union). (2014) Policy Brief on Entrepreneurship for People with Disabilities. Organization for Economic Cooperation and Development, 2014, 9-10.
- Eugine Tafadzwa Maziriri. (2018) "Six challenges that impede entrepreneurs with disabilities in South Africa." Accessed September 10, 2018.
<http://theconversation.com/six-challenges-that-impede-entrepreneurs-with-disabilities-in-south-africa-91764>.
- Office of Disability Employment Policy, United States Department of Labor. (2007) Universal Design. Accessed August 25, 2018.
<https://www.dol.gov/odep/media/newsroom/universal.htm>
- Office of the United Nations High Commissioner for Human Rights. (2011) United Nations Guiding Principles on Business and Human Rights, 2011, 3-26.
- Ryuhei Sano. (2015) Disability-Inclusive Business: New Strategy. Japan Council on Disability, Society for All 418, 6-7.
- Ryuhei Sano, Tirapot Chandarasupsang. (2014) Knowledge Management-based Classification Method for Disability-Inclusive Business. *Disability, CBR and Inclusive Development*, Vol. 25, No.3, 7.
- Spiro Papathanasakis. (2017) Meeting the Needs of Disabled Customers is Good Business. The Financial Brand Newsletter, Accessed August 31, 2018.
<https://thefinancialbrand.com/68136/pwd-banking-disabled-customer-ada/>
- United Nations. (2006) Convention on the Rights of Persons with Disabilities, Accessed August 1, 2018. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>
- United Nations Economic and Social Commission for Asia and the Pacific. (2012) Incheon Strategy to Make the Right Real, 2013-2022, 2012, 41.
- United Nations Economic and Social Commission for Asia and the Pacific, Asia-Pacific Development Center on Disability, Japan International Cooperation Agency. (2010) Senior Officials' Meeting on South-to-South Cooperation on Disability, 2010, 5-10.
- World Health Organization, World Bank. (2011) World Report on Disability, Accessed August 1, 2018. http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf.

Securing Freedom in Global Supply Chains

Chloé Bailey

Chloé Bailey is Program Officer for Legal and Business Initiatives at the Freedom Fund, an international non-profit organization dedicated to identifying and investing in the most effective frontline efforts to end modern slavery.

Amol Mehra

Amol Mehra is the Managing Director at the Freedom Fund. He previously served as the executive director of the International Corporate Accountability Roundtable (ICAR).

Once considered consigned to history, slavery is firmly back at the top of the human rights agenda. Slavery did not end with the global abolitionist movement of the nineteenth century. Today, it is estimated that more than 40 million people across the globe are living in situations of modern slavery (ILO, 2017) – exploited and forced to work through coercion, physical and mental threats or abuse, without being able to leave.

Modern slavery is an overarching term that takes different forms, defined by a common thread of exploitation of a person for commercial or personal gain. Forced labour accounts for the largest proportion of victims, which conservative estimates place at 25 million people (ILO, 2017). Of these, approximately 16 million people are in forced labour in the private economy (ILO, 2017), working in mines, factories and fields to produce raw materials and manufacture products destined for the vast and complex supply chains that lie at the heart of the globalised economy.

Although modern slavery can be found in every country, forced labour is most prevalent, and workers most vulnerable, at the bottom of supply chains located in states where weak legal frameworks fail to protect and uphold labour standards. When combined with the proliferation of business models fueled by a constant drive for lower costs and faster turnaround times, a race to the bottom by suppliers has enabled slavery practices to flourish. For those that benefit from the exploitation of workers, forced labour is a profitable business, generating an estimated \$51.2 billion in profit every year (ILO, 2014).

No industry is untouched by this scourge, and the central role that corporations should play in efforts to

address it is now irrefutable. Over the past decade, continued revelations of slavery conditions that have been traced to the supply chains of major corporations – from smartphones produced with coltan mined with forced child labour in the DRC (Amnesty International, 2016), to seafood caught by trafficked migrant workers in Thailand (Hodal et al., 2014) - have shone a spotlight on business responses to the issue.

In this article we argue that despite the emergence of good practice among corporate actors in certain sectors, current responses to addressing modern slavery have so far had limited impact on reducing the prevalence of forced labour in supply chains. Although the introduction of legislation has raised awareness of the issue among business, and despite some signs of progress among corporate leaders that have publicly demonstrated their commitment to addressing modern slavery, this has not been accompanied by a concrete shift in business models that fuel the demand for forced labour within supply chains. From here, we argue that anti-slavery efforts need to be redoubled through a multi-tiered approach that focuses on the implementation of stricter regulation, the adoption of both positive and negative corporate incentives to act, and the prioritisation of approaches that build and enhance worker power.

Capitalizing on the business and human rights agenda

The endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011 broadened the scope of human rights protections beyond

positive obligations of states by recognising the role of business in respecting human rights, setting the scene for renewed action against modern slavery. Marking a shift away from voluntary corporate social responsibility initiatives, the UNGPs made clear that companies have a responsibility to avoid causing human rights harms, including forced and compulsory labour, by carrying out human rights due diligence in their global supply chains and by supporting remedial mechanisms where violations occur (UN, 2011). Despite their non-binding nature, the UNGPs, combined with related developments like the OECD Guidelines for Multi-national Enterprises (OECD, 2011), signalled a new convergence of opinion on how to address business impacts on human rights.

The past five years has seen a gradual transformation of these non-binding requirements into legislation specifically targeting the reduction of modern slavery in supply chains. Increased awareness and concern among consumers, investors and policymakers on the prevalence of modern slavery – highlighted by investigations revealing the extent to which everyday consumer goods are tainted by slavery practices and amplified by a burgeoning anti-slavery movement – led to calls for governments to take steps to regulate corporate action to take greater accountability for labour standards. Initial legislative responses focused on requiring large businesses to publicly disclose their efforts to eradicate slavery from their supply chains. In 2011 the California Transparency in Supply Chains Act was enacted, requiring retailers and manufacturers doing business in California to disclose their efforts to eradicate slavery from their direct supply chains. This idea of modern slavery disclosure was adopted to much fanfare by the transparency in supply chains provisions included in the UK Modern Slavery Act (MSA) in 2015. Adopting a light-touch approach and premised on the notion of encouraging a race to the top in corporate responses, section 54 of the Act imposes a legal obligation on all companies that carry out business in the UK with a total turnover of £36 million per year (approximately \$47 million USD) to publish an annual statement as to the steps it is taking to eliminate modern slavery in its business and supply chains (Modern Slavery Act 2015). Crucially, this provision does not stipulate the information to be included in

a modern slavery statement, in principle allowing a company to state that in fact no steps have been taken. Other countries have signalled their intention to follow suit, notably Australia where the Draft Modern Slavery Bill borrows key elements from the UK and Californian legislation, while responding to some of the critiques levelled at its predecessors.

In comparison, the USA has focused on strengthening its public procurement regime. The Federal Acquisition Regulation, issued in 2015, prohibits the government from awarding a contract unless the company certifies they will not sell a product suspected of being produced with forced or child labour, or that they have made a good faith effort to determine whether forced or child labour was used (BHRRC, 2017).

The enactment of the French *Devoir de vigilance* law in 2017, and upcoming legislation in the Netherlands targeting child labour, have broadened the scope of obligations for companies, both requiring the adoption and implementation of human rights due diligence plans. Although its remit is broader than modern slavery, covering all human rights harms, the French law in particular has increased the stakes for business by establishing a legal right of action for victims to seek damages as a result of non-compliance. (Brabante and Savourey, 2017). More recently, initiatives advocating for the adoption of similar mandatory due diligence regimes in Europe – the Responsible Business Initiative in Switzerland and #ykkösketjuun campaign in Finland – signal an encouraging trend among European states in particular towards binding regulation to prevent modern slavery harms. Interestingly, these new developments are yet to be replicated more globally, with those states outside Europe that have signalled an intention to legislate on modern slavery preferring to adhere to the UK-based disclosure model.

Creating impact through business relationships

Globalisation has increased the reach and scale of business relationships, with supply chains spanning dozens of countries an integral way of doing business for both large and small corporations. They are the

beating heart of economic activity that exists within and between borders, connecting up to 80% of the \$74 trillion global economy (UN, 2013).

As governments have responded to modern slavery concerns through a raft of regulatory measures, businesses have become increasingly aware of the role they are expected to play by setting conditions upon their relationships – with partners, franchisees and suppliers – throughout their supply chains. In key consumer-facing sectors – apparel, agriculture and electronics in particular – a growing level of consumer and competitive pressure to act have led to the majority of multinational corporations developing policies to this effect. Addressing modern slavery is now seen as a business-critical issue for corporate credibility, with over 75% of companies surveyed in 2016 admitting that there is a likelihood of it occurring in their supply chains (Lake 2016).

Corporate responses have typically taken the form of introducing supplier codes of conduct that reference ILO prohibitions on forced or child labour, carrying out third party audits of known suppliers, and delivering training programs for staff. These measures are reflective of the current industry standard, characterised by a lack of visibility beyond first tier suppliers, reliance on corporate self-regulation and a hands-off approach to ensuring the respect of fundamental rights of workers.

Bucking this trend, a small cohort of leading companies have begun to proactively take robust action to understand, assess and manage slavery risks in their operations and supply chains. Notable good practices have emerged in the apparel sector, with high-profile brands including ASOS and H&M spearheading transparency efforts by publishing their global supplier lists. Meanwhile in the electronics industry, Apple and Microsoft have adopted measures to mitigate risks of forced labour by adapting their purchasing practices to source raw materials responsibly (KnowTheChain, 2018).

More broadly, the past decade has seen a proliferation of business-led initiatives to address modern slavery harms at a coordinated scale by setting industry-wide standards. For their part, groups like the Responsible Business Alliance, Seafood Taskforce and Sustainable

Supply Chain Initiative have driven the conversation forward among business members on the need to adopt anti-slavery practices in their supply chains by implementing sector-wide audit and compliance processes. The majority of these initiatives take a multi-stakeholder approach by including international NGOs, and to a lesser extent trade unions, among their membership in an effort to harness their expertise and build broader alliances for reform. Despite their role in creating standards and developing common goals, multi-stakeholder initiatives targeting modern slavery practices have not been immune to criticism, particularly with regard to their non-binding nature, lack of enforcement and absence of worker involvement.

Getting past the starting blocks

The wave of government and business initiatives witnessed over the past decade as a response to growing awareness of the scale and potential of modern slavery to exist in global supply chains may have moved the needle in the right direction but is yet to deliver substantial reform.

Legislative gaps have impeded full-scale reform of corporate efforts. While some government efforts such as the 'Dirty List' in Brazil, established legally binding provisions to combat modern slavery– others including the UK MSA, once described as a 'gamechanger' (Lake, 2016), do not stand up to scrutiny. Civil society, as well as some businesses, has been vocal on the fundamental flaws of the MSA, including the failure to publish a list of companies required to report, and the lack of a centralised registry of modern slavery statements. However it is the lack of a modicum of enforcement that has impeded its effectiveness. In the face of corporate pressures, with top-down purchasing practices intended to deliver maximum profit at the lowest cost, light-touch legislation like the MSA that sets certain standards for disclosure yet fails to accompany them with any mechanism for scrutiny or enforcement is no match. Evidence of compliance with the MSA clearly demonstrates the failure of this approach. Three years after the introduction of the Act, less than 6,000 of the 11,000 companies estimated to be covered by the Act have published a modern slavery statement, and of

these, only 19% meet all three minimum requirements (BHRRRC 2018). With no penalty for failure to report, and no penalty for doing nothing, businesses are able to essentially maintain the status quo without fear of retribution or reputational damage. Moreover, a lack of enforcement creates an uncompetitive market, penalising those that decide to put their head above the parapet and disincentivising anything other than the adoption of the most basic standards.

Power exists within workers and communities on the frontlines of addressing modern slavery, and nascent efforts such as the worker-driven social responsibility model provide an opportunity to reframe solutions by harnessing the pressure for reform from the bottom-up.

Instead, stronger avenues of regulation are required to push corporate laggards to act. Following the model adopted in the USA, procurement, customs or trade regulations have a key role to play by incentivising business to act. With a value estimated at \$9.5 trillion a year (Morgner and Chêne, 2014), government purchasing power represents a significant slice of the global economy. At the same time as requiring companies to take positive action to address modern slavery risks, governments should equally have a legal obligation to carry out due diligence of their supply chains, with the consequence that companies that engage in practices linked to forced labour are prevented from bidding for government contracts. In a welcome move, in September 2018 the UK announced its intention to expand the transparency in supply chains provisions of the MSA to procurement (Mordaunt 2018), although given the lack of sanctions included in the current legislation, it is unclear to what extent this will create an incentive upon contractors to act.

For those corporations that fail to take responsibility for addressing modern slavery in their supply chains,

enhanced legal liability has the potential of creating a powerful deterrence effect. Although the vast majority of states have laws that recognise corporate criminal liability for human trafficking and forced labour offences, very few companies have been investigated or prosecuted; development in this area through increased enforcement is key to push companies to take the necessary steps to eliminate modern slavery from their supply chains (Mehra and Shay, 2015). Equally, the movement towards adopting human rights due diligence seen in certain European jurisdictions signals the potential to course correct by requiring companies to develop and implement human rights due diligence plans or run the risk of a civil lawsuit when they fail to do so.

Taking stock of current industry initiatives to tackle modern slavery in supply chains, the vast majority are characterised by a top-down approach where solutions are imposed by companies rather than developed through engaging with workers (FLEX 2018). Efforts to drive transparency of supply chain information have the power to equip a broad range of actors, including civil society, the media, consumers, investors and workers themselves with critical information that can be leveraged to build power. Still, such efforts must also be delivered hand in hand with steps to address the root causes of exploitation. Evidence from the frontlines – including our own work at the Freedom Fund – shows that abuse continues unabated in the depths of the supply chain, far from the eyes of brands and retailers. The increasing size and complexity of global supply chains spanning multiple countries has meant that most corporations, willingly or not, have little to no visibility beyond the first tier of their supply chains. Yet it is at these stages of resource extraction and downstream manufacturing where workers are most vulnerable to rights violations, driven by social and economic pressures to seek work in exploitative situations and accorded few if any labour protections. Even those corporations highly ranked on the numerous benchmarks established to assess modern slavery responses are not beyond reproach, regularly finding themselves named and shamed in investigative reports.

Power exists within workers and communities on the frontlines of addressing modern slavery, and nascent

efforts such as the worker-driven social responsibility model provide an opportunity to reframe solutions by harnessing the pressure for reform from the bottom-up. Tested in the agricultural sector in Florida, USA, and the apparel sector in Bangladesh, this approach empowers worker-led organisations to develop, monitor and enforce programs to improve wages and working conditions. Participating brands and retailers are required to sign legally binding agreements wherein they must provide financial support to their suppliers to help drive up labour standards, as well as stop doing business with suppliers who violate these standards (WSRN, 2017). Compliance is ensured through monitoring and enforcement mechanisms that are responsive to worker voice, including worker rights education, inspection regimes independent of retailer influence and robust complaint mechanisms. The Fair Food Program - standard bearer for the worker-driven responsibility approach – has been found to be substantially more effective than other corporate compliance programmes tackling labour rights issues, with the focus on resolving workers' problems rather than improving a brand's reputation held out as a key element of its success (Brudney, 2016).

The alchemy of efforts to address modern slavery

Globally, momentum continues to build in the fight to eliminate modern slavery. Universal condemnation of the scale of slavery practices that continue to persist in global supply chains has been accompanied by a wave of responses seeking to stem the tide of exploitation. While we acknowledge and welcome the positive steps that some government and corporate actors have taken on this front, the commendable efforts of this leadership group do not disguise the fact that far too many lag behind, as do the incentives for them to act. Current action remains stuck in first gear, focused too heavily on corporate self-regulation and disclosure initiatives focused on policy and process that have little to no impact for the workers at the bottom of the supply chain that continue to experience systematic violations of their fundamental rights on a daily basis.

Where do we go from here? There is no silver bullet to eliminate modern slavery from global supply chains. It is entrenched in the way corporations do business that cannot be resolved through the adoption of policies and processes that pay lip service to reform. Instead, as Professor John Ruggie suggested in the UNGPs, we need a 'smart mix' of measures – national and international, mandatory and voluntary – that operate throughout the supply chain ecosystem (Ruggie, 2007). Encouraging legislative developments that go beyond disclosure through the introduction of mandatory human rights due diligence and the adoption of procurement and trade incentives demonstrates an increased willingness among states to drive up corporate anti-slavery standards that needs to be replicated in other jurisdictions. In order to effect transformational change that percolates through to the roots of the supply chain, business responses to modern slavery should place more emphasis on the adoption of enforceable standards focused on the protection of workers' rights and access to justice. In particular we believe there is real potential in the broader-scale adoption of the worker-driven social responsibility model that amplifies worker voice and enables workers to directly enforce their own rights through rebalancing the power asymmetries inherent in the globalised supply chain system. Scaling bottom-up solutions in this way is not a panacea, however. It is only through the totality of supply chain efforts - strengthened government regulation, incentives on corporations to act, and worker empowerment – that we will witness a sea change in supply chains.

References

- Amnesty International. (2016) "This Is What We Die For": Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt. London: Amnesty International
- Brabante., Stephane and Elsa Savourey. (2017) French Law on the Corporate Duty of Vigilance: A practical and multidimensional perspective. *International Revue of Compliance and Business Ethics* 50. http://www.bhrinlaw.org/frenchcorporatedutyofvigilance_articles.pdf
- Brudney, James J. (2016) "Decent labour standards in corporate supply chains: the Immokalee Workers model" in *Temporary Labour Migration in the Global Era: The Regulatory Challenges*, edited by Joanna Howe and Rosemary Owens, 351-376. Oxford: Hart Publishing.
- Business and Human Rights Resource Centre. (2017) *Modern slavery in company operations and supply chains*. London: BHRRC
- Business and Human Rights Resource Centre. *Modern Slavery Registry*. Last modified 1 October 2018 <https://www.modernslaveryregistry.org/>
- Focus on Labour Exploitation. (2018) *Seeing through transparency: making corporate accountability work for workers*. London: FLEX.
- Hodal, Kate., Chris Kelly, and Felicity Lawrence. (2014) "Revealed: Asian slave labour producing prawns for supermarkets in US, UK." *The Guardian*, June 10, 2014. <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour>
- International Labour Organization. (2014) *Profits and Poverty: The Economics of Forced Labour*. Geneva: ILO
- International Labour Organization (ILO) and Walk Free Foundation. (2017) *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*. Geneva: ILO
- KnowTheChain, (2018) *Information and Communications Technology Benchmark Findings Report*. https://knowthechain.org/wp-content/plugins/ktc-benchmark/app/public/images/benchmark_reports/KTC-ICT-May2018-Final.pdf
- Lake, Quintin. (2016) *Corporate leadership on modern slavery*. London: Hult International Business School.
- Mehra, Amol and Katie Shay. (2015) *Persisting Harm: Corporate Responsibility and Accountability for Modern Forms of Slavery*. SSRN Electronic Journal <https://ssrn.com/abstract=2635029>
- Morgner, Matthias and Marie Chêne. (2014) *Public Procurement Topic Guide*. Berlin: Transparency International.
- Organisation for Economic Co-operation and Development. (2011) *OECD guidelines for multinational enterprises*. Paris: OECD
- Rt Hon Penny Mordaunt MP, "Speech on Modern Slavery at UNGA 2018". Speech, New York 24 September, 2018 <https://www.gov.uk/government/speeches/penny-mordaunt-speech-on-modern-slavery-at-unga-2018>
- Ruggie, John Gerard. (2007) *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*. Geneva: UN
- United Kingdom. *Modern Slavery Act, 2015, c.30*
- United Nations. (2011) *Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" framework*. New York: UN
- United Nations. (2013) *Global Value Chains and Development: investment and value added trade in the global economy*. New York: UN
- Worker-Driven Social Responsibility Network. (2017) *What is worker-driven social responsibility?* <https://wsr-network.org/what-is-wsr/>

The UN Guiding Principles and the Informal Economy: A Focus on Homeworkers in Global Supply Chains

Marlese von Broembsen

Marlese von Broembsen is the Law Programme Director for Women in the Informal Economy Globalising and Organising (WIEGO). Previously she taught law and development at the faculties of law, University of Cape Town, South Africa and North Eastern University, USA. Marlese was a Harvard South Africa fellow, and a visiting researcher at the Institute for Global Law and Policy, Harvard Law School from 2015-17. She has published on labour law, development, global value chains, and the informal economy.

Laura Alfors

Laura Alfors is the Director of the Social Protection Programme at the global research-action-policy network Women in Informal Employment: Globalizing & Organizing (WIEGO) and is a Research Associate in the Department of Sociology at Rhodes University in South Africa. She holds degrees from Rhodes University, Cambridge University, and the University of KwaZulu-Natal. Laura's research interests center on the intersections of social policy, urban policy and employment, particularly informal employment.

Introduction

Katerina⁷⁷ lives and works in a Petrich, a Bulgarian town close to the Greek border. Like many of her neighbours, Katarina is a homemaker—she is contracted by a local factory (or workshop) to work from her home. She hand-sews heels and uppers onto men's leather shoes. Other Petrich homeworkers pack socks, do embroidery, sew on buttons, or sew garments. Factories deliver the raw materials to homeworkers' homes, and collect the completed products. Katerina and her neighbours know that these shoes are destined for Italy. They even know the brands' names.

It takes Katarina an hour to finish one pair of shoes. She is paid BNG 1.2 per pair, which translates into 0.61 euros. Katarina tries to complete 10 pairs of shoes a day, for which she is paid just over 6 euros, for 10 hours of work. On average, homeworkers in Bulgaria earn one third of the national minimum wage of GN 510 (260, 42 euros) (von Broembsen and Hughes 2018). By threatening to withhold payment, factories coerce homeworkers into working long hours to meet deadlines:

They put us in extremely high stress by the time-frame, especially in the final part of the period they put pressure on us. They tell us that if we don't give them the full order, we will not be paid for anything (Ana, homemaker, Bulgaria)

Bulgaria has ratified International Labour Organisation (ILO) Convention 177 on Home work, which provides that homeworkers should be treated on equal terms with other workers, and the government has amended the Labour Code accordingly. Nevertheless, the factory refuses to increase Katarina's rate. Because the government has ratified the ILO Convention, UNITY (the trade union that represents informal workers) could submit a report to the ILO's Committee of Experts on the Applications of Conventions and Recommendations (CEACR) to put pressure on its government to enforce the legislation. There is a risk, however, that if labour costs rise in Bulgaria, the Italian shoe companies and the German, English and Greek garment companies will source products from another country.

This chapter explores the extent to which the UN Guiding Principles on Business and Human Rights, which places responsibility on both governments and business, might protect homeworkers, who are one category of informal workers.

Two important international law instruments incorporate the UN Guiding Principles' supply chain management due diligence framework: The ILO MNE Declaration⁷⁸, and The OECD Guidelines for Multinational Enterprises (the "Guidelines"). This chapter focuses on the OECD instrument for two reasons: first, the OECD

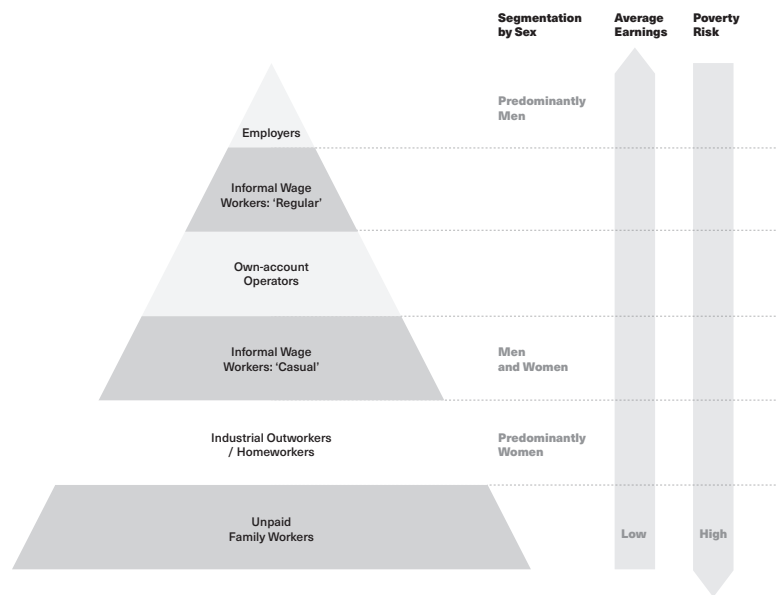
Guidelines incorporate the UN Guiding Principles' recommendation that states should provide a non-judicial grievance mechanism,⁷⁹ making it compulsory for all signatory countries to establish a "national contact point" (NCP). NCPs promote and implement the Guidelines, but they also review complaints by trade unions, non-profit organizations, governments, and even members of the public of corporate non-compliance (Simons and Macklin, 2014). This means that there is a grievance mechanism that homeworkers could use. Second, in 2017, the OECD published the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (the "Guidance"), which recognises homeworkers as legitimate workers and includes recommendations for their equal treatment with other workers.

Situating homework as a category of informal work

The latest ILO statistics show that over 60 percent of global employment is now in the informal economy (ILO, 2018). The informal economy is heterogeneous, operating across most economic sectors, with different statuses in employment and different relationships to firms in the formal economy (Chen, 2012). Whether a worker is self-employed and employs others (employer), or is self-employed and does not employ others (own-account), or works without pay to support the family business (contributing family worker) makes a difference to the worker's earnings and her risk of poverty (see Figure 1 below).

All six categories of informal workers in Figure 1 might participate in a supply chain: factories subcontract to small informal businesses that employ others (category 1) at the apex of the pyramid; factory workers may be informal, lacking in legal and social protection (category 2); informal "own account" operators (category 3) might sell their own products, while also producing orders for factories; seasonal factory workers are informal waged-workers (category 4); homeworkers are also known as industrial outworkers (category 5) and unpaid family workers assist their homemaker or own-account relatives (category 6). The pyramid shows that women are over-represented in categories 5 and 6, which earn less than the other categories.

Figure 1. The Pyramid of Status in Employment: Income, Risks and Gender



Source: Chen, M.A. 2012.

Homeworkers are neither fully independent self-employed workers, nor are they fully dependent employees.⁸⁰ They are sub-contracted workers supplying goods (which can range from garments to processed food) at piece rates to local contractors who in turn supply factories or buying houses which feed a demand from global and/or domestic value chains.

Within these low-value added mass produced chains there is intense pressure to keep manufacturing costs low (Gereffi et al, 2005; Barrientos et al., 2011; Von Broembsen 2018). Outsourcing to homeworkers allows producers to compete for contracts through paying low wages, not incurring the costs of social protection, and transferring the costs of production (such as electricity, water, transport and some equipment costs) onto the homemaker (WIEGO, 2013; ILO, 2017; von Broembsen, 2018). As Katarina's story illustrates, most homeworkers have little option but to accept these terms, and have little autonomy to decide the timing and pace of their work. As a result, their risk of poverty is high, their earnings are lower than many other types of informal worker, and certainly below statutory minimum wages (see Figure 1).

The OECD Due Diligence For Responsible Supply Chains in the Garment and Footwear Sector: Protection for Homeworkers?

The OECD Guidelines for Multinational Enterprises (the “Guidelines”) apply to the forty-seven countries that adhere to the OECD Declaration on International Investment and Multinational Enterprises.⁸¹ The Guidelines represent governments addressing Multinational Enterprises (MNEs) that are operating from, or in, signatory countries. The Guidelines were amended in

2011⁸² to incorporate the UN Guiding Principles on Business and Human Rights by adding a chapter on human rights and a section on supply chain management. The latter adopts the UN Guiding Principles’ risk-based, due diligence framework.

In 2017, the OECD published the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (the “Guidance”). The Guidance incorporates the OECD Guidelines (and therefore the UN Guiding Principles). It recognizes that particular characteristics of the garment and footwear sector make it a high-risk sector for labour rights violations.

The Guidance recognizes that subcontracting is ubiquitous in garment and footwear supply chains. According to the Guidance, subcontracting is a high risk factor for labour rights violations because of a lack of transparency. It recognizes that factories subcontract both in response to MNEs’ procurement practices (such as short lead times and changes in orders that require more workers), and because specialized tasks (such as screen-printing or embroidery) are not done in-house. The Guidance recommends that MNEs that authorize subcontracting, establish a system that pre-qualifies subcontractors that comply with their “internal protocol”; and require suppliers to disclose whether they intend to subcontract, and to provide information on the sub-contractor.

The OECD Guidance outlines MNEs’ responsibilities to: (a) draft a human rights policy; (b) undertake a due diligence of its supply chains to assess whether any act or omission in the production process might be contravening domestic law and/or causing human rights

violations to workers; and (c) implement remediation processes.

The four components of a due diligence are: to identify human rights impacts that might or have occurred; to prevent human rights violations where the MNE has identified a risk and to mitigate the impact where rights violations have occurred; to remedy any rights violations; and to account for how it has dealt with labour rights “impacts”. The Guidance adds recommendations under each component specific to the garment and footwear sector. It concludes with twelve “modules” that address “sector-based risks”, which include low wages; lack of trade union and organizing rights; and subcontracting to homeworkers.

In the section that follows, we analyse the Guidance’s provisions that apply to homeworkers.

Identifying labour rights abuses: Scoping exercise

The Guidance recommends that enterprises should undertake a “scoping exercise” to identify risks of human rights abuses in their supply chains to determine the high risk countries, high risk product lines, and “which population groups could be most affected by the harm, local risk factors that could worsen harms, the underlying causes of harm, and the actors that are involved in the harm”. The scoping should be undertaken every two years through desk-based research, supplemented by engagements with “stakeholders” and research, including by national and international NGOs. (p. 59). It lists several risk factors that should be taken into account during the risk assessment, including its own business practices. For example, if the MNE has short production cycles or several seasons per year, it means that lead times are shorter, which carries the risk of excessive and/or forced working hours and use of unauthorized outsourcing, including to homeworkers. Particular sourcing models also increase risks: if the MNE’s relationships with its suppliers are short-term, there may be no time to prevent or mitigate identified risks.

The enterprise should rank the risks – in terms of how many people might be affected and of how serious a

nature the risks are – and prioritise a due diligence in the riskiest supply chains. Workers should participate (through focus groups, participatory assessments and worker interviews) in designing how MNEs should assess suppliers.

Enterprises should commit themselves to “meaningful engagement” with “affected stakeholders” throughout its due diligence process “to understand what they deem to be material information” (p.88). The Guidance identifies home workers as a particularly vulnerable group of workers (p58).

“Responsible Sourcing from Homeworkers”

Module 12 is addressed to brands, buyers and manufacturers and outlines what enterprises should do to ensure that homeworkers are contracted “responsibly”. It aims to “minimise the risk of the marginalisation of Homeworkers” and to “create economic and development opportunities” for them (p. 180). Importantly, it argues that informality does not constitute illegality. Homeworkers are legitimate workers, who should receive equal treatment to factory workers and be “formalized”:

Homeworkers should be viewed as an intrinsic part of the workforce entitled to receive equal treatment and therefore should be formalised in order to achieve good terms and conditions of employment (p. 182).

Formalisation is understood as providing employment contracts; equal conditions of work to other workers; piece rates that meet minimum wage requirements; and social security and health insurance. Formalisation should not impose expectations on homeworkers that further marginalise homeworkers (e.g. the obligation to work in a particular centre may marginalise homeworkers who can only work from home).

The module argues that suppliers and even governments that categorise homeworkers as “self-employed” entrepreneurs amounts to “neglecting the responsibility to provide more formalised contracts.” (p. 111). It argues that the first step to formalization is recognition of ‘worker status’; followed by permitting homeworkers

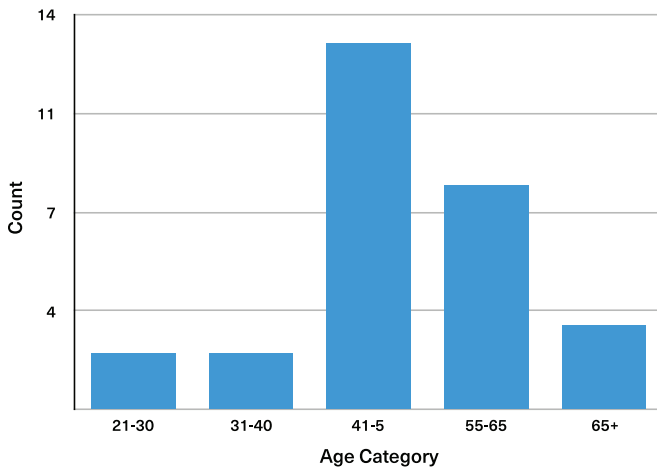
to organize. Collective organisation enables homeworkers’ participation in social dialogue, which is necessary to improve their terms and conditions of employment.

Under the “identify” step of the due diligence framework, enterprises are encouraged to identify product lines and sourcing countries where homework is most prevalent, and to prioritise assessing suppliers and product lines in these countries to ensure that homeworkers are protected.

The “prevent and mitigate” responsibility has five components. First, enterprises are encouraged to establish “internal protocols” with respect to homework and “pre-qualification systems” for intermediaries or agents that outsource work to homeworkers. Second, they should include contractual provisions in their agreements that requires suppliers, intermediaries or buyers to keep a record of homeworkers, including the quantity of goods that homeworkers make and how much they are paid; records of how long it takes to make items to ensure that piece rates make it possible for homeworkers to make the minimum wage; and records of any social security contributions. Third, they should provide intermediaries with training; fourth, they should partner local organisations concerned with formalizing homework; and finally they are encouraged to engage with local or national government to provide homeworkers with rights so that they are treated equally with other workers, including with respect to social security.

How might these provisions help Katarina and other homeworkers in Bulgaria? First, the Guidance establishes the legitimacy of homeworkers as workers in supply chains. This is important, because there have been calls for homework to be banned. Homeworkers make important arguments for why enterprises should support, rather than prohibit, homework. Factories do not hire older workers. For example, Thai factories do not hire workers over 40 years of age (Von Broembsen and Harvey, 2018); and Indonesian factories have forced people over 50 years of age to resign (Pieper and Putri, 2017). In a recent survey of 30 homeworkers in Bulgaria (Von Broembsen and Hughes, 2018), the vast majority of homeworkers are over 40 years old, as shown in Figure 2 below:

Figure 2: Distribution of Homeworkers by age



Prohibiting homework would therefore exclude many people over 40 from the labour market. Women homeworkers also argue that they need to work from home to fulfill domestic and reproductive responsibilities – cooking, cleaning, collecting water and fuel, caring for children, grandchildren and sick or disabled relatives. Homework also enables women who live in villages outside of cities to access work, as the contractors bring raw materials to them, and fetch finished products. For many, travelling is unaffordable, and not possible on a daily basis. Finally, homework is a means for women to engage in paid work in societies where cultural norms preclude women from working outside the home (Von Broembsen, 2018).

Second, the Guidance notes the importance of collective organization and collective ‘social dialogue’. In most countries, informal workers are not recognized, and their organisations are not allowed to register as trade unions. Bulgaria is progressive in this regard, as informal workers are able to register their organisations as trade unions. Had UNITY not been registered as a trade union, it would not have been able to use the ILO reporting mechanisms to put homeworker concerns on the table.

The Guidance’s position on formalization is helpful. It stresses that formalization should not be equated with getting homeworkers to register and/or move out of their homes to centers, but rather it places the responsibility on enterprises to ensure that homeworkers are

formalized first through written contracts to prevent employers arguing that homeworkers are self-employed, and second, through the provision of social security. This understanding of formalization (as legal and social protection) reflects ILO Recommendation 204 on Formalising the Informal Economy.

On the face of it, the transparency requirements are helpful. However, it is questionable whether these provisions are enforced. Most homeworkers do not know the names of the brands for which they are producing, and factories are at pains to hide the identity of their buyers. Homeworkers fear that if they complain, they will lose their jobs (von Broembsen, 2018; Sinha & Mehrotra, 2016).

The Guidance’s position on formalization is helpful. It stresses that formalization should not be equated with getting homeworkers to register and/or move out of their homes to centers, but rather it places the responsibility on enterprises to ensure that homeworkers are formalized first through written contracts to prevent employers arguing that homeworkers are self-employed, and second, through the provision of social security.

In 2016, Women in Informal Employment Globalising and Organising (WIEGO), worked with two of its homeworker members, HomeNet South East Asia and HomeNet South Asia to develop a set of recommendations for the Global Labour University, which participated in negotiations on the OECD Guidance. Their recommendations represent suggestions that have the potential to make global guidelines more relevant to informal worker struggles. Suggestions under the “identify” “prevent” “mitigate” and “remedy” pillars, include the following: To identify rights violations, suppliers

and contractors should (1) be required to disclose the names, addresses and contract details of any homeworkers not only to MNEs, but also to organisations and trade unions that are organizing homeworkers; (2) enterprises should include in their supply agreements a requirement that written contracts that include the name of the MNE buyer be concluded homeworkers, and that they be given a copy; (3) MNEs should pay for homemaker organisations to provide 'know-your-rights' training to homeworkers in their mother tongue.

To prevent rights violations, MNEs should (1) recognise representative organisations of homeworkers (either unions, associations, or cooperatives) as legitimate partners, together with unions, for collective bargaining. (2) They should insist on specific contract provisions with homeworkers (such as no payment details); make its due diligence report publically available on its website and to government, unions and to representative organisations of homeworkers.

To mitigate rights' violations, MNEs (1) should design grievance procedures with union and homeworkers organizations' participation so that homeworkers are protected from losing their work if they complain. (2) Homemaker organisations should co-decide what the remedies should be, and how they should be operationalized. (3) Remedies should include some form of restitution (as per the UN Guiding Principles) such as buyers contributing to a social protection fund for homeworkers and informal (factory) workers.

Conclusion

There is significant scope for instruments arising out of the UN Guiding Principles – such as the OECD Guidelines for Multinational Businesses – to provide a set of tools to promote better working conditions for homeworkers. In particular, the fact that the Guidelines establish the legitimacy of homeworkers as workers is crucial. This is a central – and often primary – struggle for all informal workers whose work is not recognized as real work. As the set of recommendations developed by WIEGO show, however, guidelines developed without the participation of informal worker voices may miss key details that could make a fundamental difference to whether homeworkers are protected or not.

Organizations of homebased workers, including homeworkers, see collective action as an important pathway to improved conditions and they are starting to mobilize on a global scale. In 2015, 60 organizations from 24 countries gathered in New Delhi for the first Global Conference of Home-based workers. It culminated in the Delhi Declaration⁸³ which confirmed their commitment to organizing and action (Roever, 2015). Without the voices and participation of these organizations into global rule-setting processes, the homeworkers who sit at the very bottom of global value chains will continue to face extreme exploitation.

References

- S. Barrientos, G. Gereffi & A. Rossi. (2011) "Economic and Social Upgrading in Global Production Networks: A New Paradigm for a Changing World", 15 *International Labour Review*.
- Chen, Martha Alter. (2012) "The Informal Economy: Definitions, Theories and Policies." WIEGO Working Paper No. 1. Cambridge MA: WIEGO. Available at: http://www.wiego.org/sites/wiego.org/files/publications/files/Chen_WIEGO_WP1.pdf
- G. Gereffi, J. Humphrey & T. Sturgeon. (2005) "The Governance of Global Value Chains," 12(1) *Review of International Political Economy*
- ILO/WIEGO. (2014) "Women and Men in the Informal Economy: A Statistical Picture, 2nd ed." ILO: Geneva. Available at: https://www.ilo.org/stat/Publications/WCMS_234413/lang--en/index.htm
- ILO. (2017) *Purchasing Practices and Working Conditions in Global Supply Chains: Global Survey Results 10 INWORK Issue Brief* http://www.ilo.org/wcmsp5/groups/public/—ed_protect/—pro-trav/—travail/documents/publication/wcms_556336.pdf (accessed 17 June 2017).
- ILO. (2018) "Women and Men in the Informal Economy: A Statistical Picture, 3rd ed." ILO: Geneva. Available at: https://www.ilo.org/global/publications/books/WCMS_626831/lang--en/index.htm
- Pieper, Anton and Prashasti Putri. (2017) "No excuses for homework: Working conditions in the Indonesian leather and footwear sector." Available at: <http://labourbehindthelabel.net/wp-content/uploads/2017/03/2017-08-No-excuses-for-homework.-Working-conditions-in-the-Indonesian-leather-and-footwear-sector.pdf>.
- Roever, Sally. (2015) "The Invisible Garment Workforce." WIEGO Blog. Available at: <http://www.wiego.org/blog/invisible-garment-workforce>
- Simons, Penelope and Audrey Macklin. (2014) *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage*. Routledge: London.
- Sinha, Shalini and Firoza Mehrotra. (2016) "Working in the Shadows: Women Homeworkers in the Global Supply Chain "(unpublished paper)
- Von Broembsen, Marlese (2018) 'Constitutionalizing Labour Rights: Informal Homeworkers in Global Value Chains' 34 *International Journal of Comparative Labour Law and Industrial Relations*, Issue 3, pp. 257–280
- Von Broembsen, M and Harvey, J. (2017) "Decent work for homeworkers in global supply chains: existing and potential mechanisms for worker-centred governance", commissioned by the Global Labour University.
- Von Broembsen, M & Hughes, K. (2018) "Bulgarian Homeworkers in Global Supply Chains: Their Terms and Conditions of Work" (prepared for the ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR)
- WIEGO. (2013) "Informal Economy Monitoring Study: Home-based Worker Sector Report." Available at: <http://www.wiego.org/sites/default/files/publications/files/IEMS-home-based-worker-report.pdf>

An Interview with Fair and Sustainable Consulting

Marjoleine Motz

How does Fair and Sustainable employ the UN Guiding Principles on Business and Human Rights in your offerings and services?

Well, we are a consultancy agency, so it depends on the type of assignments. So, for instance, when we make an offer to evaluate particular development programs involving public-private partnerships, we mention the Guiding Principles along with various other lenses like gender. When we work directly with private sector partners, it is of course the central topic. We will ask how they work on the Guiding Principles, if they have done human rights due diligence, and if they haven't then we will try to explain why it is necessary and how we can help them execute it. In that sense, we use it as part and parcel of how we present ourselves. Sometimes it's a stronger element of the work and other times it is less important partly because we have projects where there are no private sector players around the table, for instance.

What are the challenges you face working on BHR in Africa?

There are several challenges, depending on who you work with. If we take the farm level, for instance, for a lot of smallholder farmers, this is a very difficult concept. If we want to discuss BHR, we need to bring it to a very practical level. Sort of unpack the Guiding Principles by using examples that are close to their daily experience, in how they work together, how they sell their products, etc. If you work with trading companies it could be similar, because they could also see this very much as a western concept. But if you explain that it is about responsibilities, and that also their trading partners have a particular responsibility in the human rights arena, then it becomes a different kind of conversation. It only works if we bring very practical examples, very close to their daily reality. Otherwise, it's sort of "ya, not my priority, I first need to do this or that". Everybody asks things about labour rights and environ-

mental issues, so that is often where we start and then make the link to the Guiding Principles and everybody's responsibilities.

You offer consultancy services, do these tend to be continuous or one-off efforts?

Sometimes it is a one-off, people want our advice on human rights due diligence, for instance, and then they have the sustainability team take it from there. And then follow up, it depends, some companies want follow-up. Sometimes our role is to behave as their critical friend. Their internal team will do work and then they invite us in to be a critical observer and make sure that the work is of good quality. So, in consultancy, sometimes you would like to give follow up, but you're not always in a position to do so. You are not always invited to do that.

From a consulting perspective, what gaps, barriers, or obstacles stand out as stifling progress or undermining buy-in in the field of business and human rights?

I think that if I look at NGO's, particularly the development agencies, sometimes they have an approach to human rights due diligence where they have clarity on the concept and use it in their lobbying, but when they set up a public-private partnership, they do not really know how to make it practical for the companies. They just lack practical experience with companies. So, they keep thinking as a big policy-maker, so to speak, and that is not what a sourcing manager or a sustainability manager in the company is. So that is one where we often bump into obstacles.

If I look at the private sector, it really depends on the size of the company. Larger companies, also multi-nationals, often have a bigger team, more financial resources to really do this due diligence process. If you look at small or medium sized enterprises that are in a normal multicultural settings, and are important

players in the market, for them it's far more complicated because they cannot do everything in house. Also they might work with many fresh products, from many different locations. This means interfacing with many different sustainability and quality managers, as well as different certifications. Due diligence gets a lot more complicated with all of these different variables. You have to ask quite a lot of questions to your suppliers, look at their background and the context in which they operate, etc. So, there is a challenge of how to make it manageable and we fight to sort of simplify the process. So, take them through a few steps, so that they can prioritize maybe the products / supplier combination which would be higher risk than others. Then work through that and slowly work on the others. For instance, if you buy oranges from Spain that might be less risky than buying oranges from Brazil, if you think about social issues. That's how we help them look at their portfolios, because otherwise it can be very, very complex.

Do you find that the companies that you work with understand what human rights entail in a business setting or do you have to help them to understand how it works and the consequences/importance of human rights in relation to business activities?

In general, they understand the underlying principles of division of responsibilities irrespective of whether national laws indicate particular obligations or not. This is especially true when there are international trading relationships present. Where you sometimes need to give further explanation is around the human rights wording, because the language is different from what is used within business arenas. So, if you are able to clarify that these human rights are about collective bargaining or people having a contract, etc. then, it becomes clearer to them. "Now I understand my responsibilities". Another aspect that is a bit complicated, is in how to attribute things that go wrong in the field to a party that may only be partly or very indirectly involved. These kinds of grey areas are hard to teach around. So, when you're talking about a European trader expanding production or acquiring more land or including more farmers, then it is very clear. But if you are talking about an existing trading relationship and the supplier has decided to buy more land and build a new storage facility

these are often personal decisions that you, in a trading relationship, are not directly involved in. So, that kind of element of the Guiding Principles is complex and in some locations it is definitely more complicated. When the political situation is very unstable or in a post-conflict transition, it is hard to get your head around how far responsibility stretches or what must be done to remediate particular things. It's not new, but when you see it in practice that is far more difficult and can require a fundamental change in thinking.

Food safety issues have changed enormously over the last 10-15 years and these have become part of their normal business processes. The same thing can happen around human rights. They just have to start understanding how.

In your opinion, what are the most challenging issues around which to implement the UNGP's?

There is some reluctance to get involved in a lot of the social issues at the production location. They find that to be uncomfortable and awkward. It can feel like they are mingling into local problems and especially when we talk about some more difficult areas like discrimination, sexual harassment, position of women, a lot of related issues, or the entire bargaining process. A lot of trading companies are too hesitant to speak, because they really consider these as very internal issues that they have no say in. So, there it's very important to clarify how they could approach those topics with suppliers. That is, get to understand better and in more detail what is happening on the ground before you actually indicate that a set of things are a risk to you and pursue a process for improvements. In that sense, a change in thinking is necessary because, for instance, things that they do not necessarily feel responsible for slowly become part of their responsibilities. We make reference to all of the things that have evolved around food safety regulations. Food safety issues have changed

enormously over the last 10-15 years and these have become part of their normal business processes. The same thing can happen around human rights. They just have to start understanding how.

How does Fair and Sustainable Consulting connect their dual promotion of human rights and poverty eradication?

If we are negotiating a work assignment, especially with public-private partnerships, we look at the structure of the partnership and if we feel that programme elements are not working towards poverty alleviation as they claim to be, we will address that before we accept the assignment. We don't want to be part of programmes that go against either of those principles. We just leave it, we just don't do it. This doesn't mean that we abandon projects if things are not properly formulated in the programme design. If there is a willingness to look at it and make changes where necessary, we will take it up. If not, we will evaluate if it is the right kind of project for us to work on. Take a large company, if they are in the news on a very negative basis and they approach us, we will always have the conversation. But if we feel that they are window-dressing, then we stop. That is not what we want to be a part of. But if a lot of the negative campaigning, media attention has sort of started a process within the company and they really want to have a look at changing, then we're quite willing to work with that. Otherwise we stay away. In that sense, for us, human rights and poverty alleviation are important elements to our work, and we don't want to be involved in programmes that go against it.

The zero draft of a binding treaty was recently published and treaty negotiations seem to be inching along. How might a treaty on business and human rights impact your work and consulting in the field as a whole?

I think it will push more and more companies to pay attention to human rights due diligence, which is a very positive thing. So it might mean more work for us and other consultancies working in this arena and it might support a lot of trade unions and NGO's that want to set up public-private partnerships in the future. It will be a positive change. In any case, we are still respon-

sible for our own work. We have to ensure that we are working on programmes and projects that our true to us, and make the most of those.



New (and Old) Challenges and Opportunities

Chapter Synopses: New (and Old) Challenges and Opportunities

Responding to four key questions, Sara Blackwell provides insights about how the Sustainable Development Goals (SDGs) can and should be utilized to reinforce and advance the three pillars of the UNGPs. The SDGs provide a compelling opportunity that “the BHR community can and should capitalize on.” Blackwell makes a strong, empirical case for taking an integrated, holistic approach that couples the UNGPs and SDGs. There is a risk of governments and companies championing the SDGs without the “principled blueprint laid out by the UNGPs.” But this is precisely why those in the BHR field should be active to “course-correct” and “help steer the ship” to ensure that the SDG and BHR agendas reinforce one another. Responding to a final question about sources of optimism in working toward business respect for human rights, Blackwell delivers a hopeful message that focuses on students and young practitioners who are moving into this space: “It’s hard for me to not be optimistic when I see the energy, innovation, and wider representation that they’re bringing to the table, particularly as more diversity should be reflected within the BHR community (and almost all other professional communities).”

Dr. Chaz Austin tackles the causes and consequences of the Gig Economy (also known as the Freelance Economy) in the United States. Austin makes a compelling case for mandating training that would prepare the incoming workforce to become their own brand, behave entrepreneurially, create multiple income streams and forge the protections traditionally offered through employers: insurance, retirement packages, collectives to imitate the function of unions, etc. Austin suitably concludes that confronting the gig economy will require all hands on deck: “In order for freelance workers to succeed in their new roles, these issues must be addressed collaboratively by: the workers themselves, workers’ groups, the business community, and governmental agencies.”

Our interview with Ussarin Kaewpradap provides frontline perspectives from a union advocate working in a climate where anti-union sentiments are promi-

nent. When fielding questions about automation and initiatives that have the potential to dislocate union, Kaewpradap reminds that the challenges of the day – technologies that may marginalize the workforce and absent tripartites – are nothing new. The nuances may be novel, but the core of the issues remain the same. And this is why Kaewpradap and many other union advocates return to the fundamentals. Speaking about the disingenuous tripartite in Thailand and a “hostile stance to labour,” Kaewpradap proposes that the path to a true tripartite remains the same and starts with a concrete step:

If the government and business community in Thailand wants to prove that they value the tripartite, my message is clear: ratify ILO C87 and C98 so that workers can freely exercise their rights to freedom of association and collective bargaining.

Speaking about the fourth industrial revolution, Kaewpradap notes that. Automation does not have to displace workers. Worker friendly automation is possible if there is intent and concerted efforts to use new technologies to create “win-wins.” Kawpradap explains:

In many Nordic and European countries, the unions are working together with companies to help companies create new policies to allow the workers to learn new systems. The goal from the start was to accomplish a win-win. Skill development training enabled the workforce to utilize new technology! This type of model shows that convergence is possible.

Convergence is possible, but it will not occur by happenstance. And this is why Kaewpradap concludes by reiterating that the “international global unions are really, really important at this moment as they are trying to ensure that labour is not left behind,” and conveying an optimistic yet serious note:

Think of the possibilities. These advancements can lessen hazards and increase productivity. But this is precisely why we have to be relentless about protecting the interests of labour as new technologies

come about. We have to push back against efforts that are initiated to kill the workforce and push the workers into informal sectors.

Prof. Luca Belli presents a human rights perspective on the international of things IoT and calls for a movement to towards responsible IoT. Belli explains that while the IoT is not easy to define, it is already well in motion in the form of smart cities, industry 4.0, and “billions of so-called “smart” devices around us that can be uniquely identified and are able to collect, store, process and communicate a wide range of data about their functioning and about the environment – and, therefore, also the individuals – around them.” The Internet has reached into the physical world and, while this has the potential to increase efficiency of products and services, it also presents a range of threats to individuals and their rights. Accordingly, Belli makes a strong case that in order to safeguard humanity and comply with the UNGPs, states and business enterprises that are involved in IoT systems “must act in synergy, analysing risks and elaborating and implementing effective policies, regulation and adjudication, prompting a Responsible Internet of Things (RIoT), where people’s privacy and security are at the centre of the new digital ecosystems.” Citing forecasts like “500 billion devices are expected to be connected to the Internet by 2030,” the chapter effectively conveys how vital it is to make leaps towards readiness. Indeed, the human rights issues that arise relative to the IoT are many, underscoring the need for effective IoT regulations and strategies that involve civil society collaboration, emphasize user awareness, adopt good practices, employ a “design-thinking” approach” based on baking human rights protections into products and services rather than solely relying on a strictly legal approach based on the classic notice and consent strategy, which has shown to have clear limits, in this digital era.

Akiko Sato discusses the role of investment in this new era of business and human rights and considers the tenability of ethical investment. The UNGPs provide an important instrument for ethical investment as the Principles specify the responsibilities of investors, providing an objective measure of ethics and sustainability. The chapter illustrates an evolving landscape where ethical considerations, and human rights in particular,

are becoming “indispensable as part of risk management.” Ethical investment does not occur in a vacuum. It is the result of action from governmental, consumers and other stakeholders. Citing a range of initiatives, regulatory frameworks and cases, Sato provides a sense of the mounting pressures and incentives pushing investors to get serious about human rights. Sato paints an optimistic picture of ethical investment and the BHR agenda. Trailblazing ethical investors, Sato argues, are setting a high bar. They are heeding the voices of civil society, positioning human rights defenders as allies rather than obstacles, probing their own direct and indirect human rights impact as investors and exhibiting a willingness to forfeit short-term gains to secure long-term interests. And, as the chapter argues, this represents a window of opportunity to steer ethical investment down a path of meaningful human rights-based due diligence, decision-making, and responses.

In *Debating Ethical Consumption* Dr. Elisabeth Valiente-Riedl interrogates the potential potency of consumption as a driver of social and political change. Valiente-Riedl considers the conditions that make ethical consumption possible, including means, meaningful choice and adequate information. The chapter brings attention to trappings including “fair-washing,” the fragmentation of causes and “corporate cooptation as well as the manifestation of ‘ethics lite’ over meaningful advocacy.” Valiente-Riedl advises something of a tempered approach from those looking to advance the BHR agenda through ethical consumption. On one hand, there are limits and trappings that stakeholders need to be wary of. On the other hand, “its potential transformative capacity suggests that human rights practitioners and advocates invest in ethical consumption as a long-term project, with a view to help shape its integrity and effectiveness as a meaningful advocacy tool.”

An Interview with Sara Blackwell

Sara Blackwell is an international human rights lawyer, admitted to practice in the state of New York in the United States. She has been working in the field of business and human rights for over six years, currently serving as the Associate Director of the Investor Alliance for Human Rights, a collective action platform connecting institutional investors with tools and strategies to promote corporate respect for human rights. Prior to this, Sara was an Advisor at Shift, where she directly supported companies, civil society organizations, governments, and a range of other actors on practical implementation of the UN Guiding Principles on Business and Human Rights. Prior to joining Shift, Sara was Legal and Policy Coordinator at the International Corporate Accountability Roundtable (ICAR). She has also worked with the Fair Labor Association, EarthRights International, the Center for International Environmental Law, and Green Advocates International in Liberia. Sara holds a JD from Georgetown University Law Center and a Bachelor of Arts degree in political science and human rights from Barnard College of Columbia University, where she graduated summa cum laude and Phi Beta Kappa. All views expressed in this interview with Sara are her own and cannot be attributed to any organizations that she is affiliated with.

What key opportunities do the SDGs present in advancing the business and human rights agenda?

If pursued in a meaningful way, the SDGs provide a promising platform for furthering business respect for human rights and, more specifically, positive outcomes for the people affected every day by the choices that companies make. The 2030 Agenda has garnered a notable amount of attention from the business community (not to mention influential government leaders, top investors, and even celebrities!) that the BHR community can and should capitalize on. Human rights are woven into the very fabric of the Global Goals and are indispensable to their achievement. So, it should go without saying that human rights should be central in every company's SDG strategies and actions. And rather than seeing the SDGs as a distraction or divergence from the BHR agenda, advocates and all stakeholders within our space should view them as an opportunity to bring more companies and governments on board and widen the circle of actors contributing to this space. Additionally, the Business and Sustainable Development Commission has noted that there are market opportunities worth upwards of US\$12 trillion in pursuing the Global Goals, which has certainly perked the ears of the finance community. We should seize the chance to influence where and how the private sector is channeling this energy. Indeed, there is a real risk that the change envisioned by the SDGs will not be achieved unless we do so.

How might states and business enterprises best integrate the SDGs into their other efforts to align with the UNGPs?

Doubling down on efforts to implement the UNGPs is truly one of the most meaningful ways that governments can contribute to the 'people part' of the SDGs and is certainly the most meaningful way in which business enterprises can play a role in making the 2030 Agenda a reality. Advancing corporate human rights due diligence and providing real remedy for victims of corporate human rights abuse should be continuously prioritized by states and companies alike, and this work can be very credibly linked to a whole host of targets under the SDGs. I aimed to showcase this approach when I was at Shift, where I authored a compendium of 15 case studies that demonstrate what this integrated, holistic approach can look like in practice, including how these specific linkages can be made. The case studies can be explored in detail at shiftproject.org/sdgs.

Is there a threat of governments or companies conflating commitments to the SDGs to satisfy their obligations under the UNGPs? If so, how might those in the field deal with this pitfall?

There's certainly a risk that governments and companies will fail to follow the principled blueprint laid out by the UNGPs in their efforts around the SDGs, and we've unfortunately already witnessed this happening

in some circles. There's a temptation to revert back to what might be "easiest" to contribute to from a capital allocation standpoint, which often boils down to philanthropic activities, rather than what's most meaningful and what results in the most impact. There's a real need to course-correct against this impulse, and those of us in the business and human rights field can help steer the ship by more frequently and consistently linking our work to the SDGs agenda so that these connections are better understood. And we can also step outside of our familiar circles much more often in order to integrate our voices into the development, finance, and broader sustainability spaces, where human rights are far too often missing from conversations.

What gives you hope or optimism about the future of business and human rights?

I speak to students as often as I can, and I'm constantly awed by the fact that future BHR practitioners are finding this space earlier and earlier in their academic careers and in broader and broader spaces. It's hard for me to not be optimistic when I see the energy, innovation, and wider representation that they're bringing to the table, particularly as more diversity should be reflected within the BHR community (and almost all other professional communities). We certainly have a lot of work to still do in this area, but I do think that we're at least headed in the right direction.

The Gig Economy: How Freelance Work is Re-defining the 21st Century Workplace in the United States

Dr. Chaz Austin

Dr. Chaz Austin, Ed.D. <http://chazaustin.com> currently works with private clients around the world, and teaches free courses that prepare people to self-market for The Gig Economy, for Los Angeles Pierce College.

He created and teaches three courses for LinkedIn Learning:

“Creating a Career Plan” <http://goo.gl/IFMDCj>

“Succeeding in a New Job” <https://goo.gl/IYxRSH>

“Transitioning Out of Your Job” <http://goo.gl/YtWBkr>

His most recent book is “101 Ways to Find Work . . . and Keep Finding Work for the Rest of Your Career!” <http://goo.gl/MUzuwK>.

Introduction

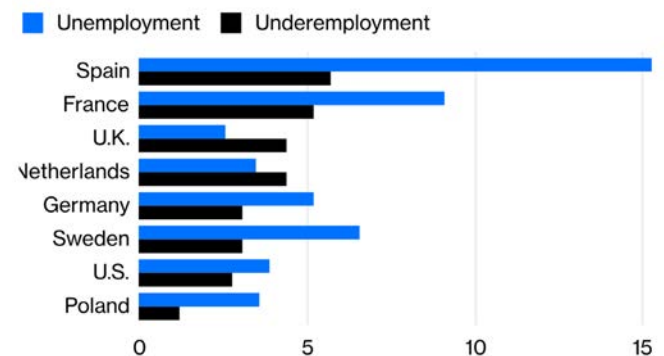
In the United States, The Gig Economy, also known as the Freelance Economy, the On-Demand Economy, or the Sharing Economy, is supplanting the traditional workplace environment of the 20th Century. According to the Freelancing in America survey, 36% of the current workforce are freelancers, and by 2027, that number is predicted to rise to over 50%.

While this chapter will focus on labor conditions in the United States, this situation is by no means confined to the U.S. According to Bloomberg News in a column entitled *Underemployment Is the New Unemployment*, “Western countries are celebrating low joblessness, but much of the new work is precarious and part-time.”

In fact, Noam Chomsky, Institute Professor Emeritus at the Massachusetts Institute of Technology, has dubbed the new workforce “The Precariat,” as our working lives have become precarious.

According to a recent paper authored by David Bell and David Blanchflower, *Underemployment in the US and Europe*, underemployment “has replaced unemployment as the main indicator of labor market slack.”

Unemployment and underemployment levels in selected economies



Sources: National statistics agencies, Eurostat

* August 2018 or most recent available

This is nothing short of a sea change in the lives of workers in these settings. In the U.S., the traditional model, which worked for decades, followed a fairly simple formula: get an education, prepare a résumé and cover letter, learn how to interview and how to dress for an interview, apply for a job, interview for it a few times, start the job that paid a salary plus benefits. Then stay with that company for many years, even decades, move up the corporate ladder and finally, retire with a pension (and possibly have you and your family’s health insurance covered) until your demise.

Various factors have undermined that model. These include:

- The emphasis on short-term profits. When a company needs to show higher profits quarter over quarter, they will always be looking at simultaneously increasing revenue and trimming expenses. Particularly in mature industries, where there is little opportunity to increase market share, a company will turn to finding ways to lower its overhead. The largest expense for any company is labor. So, if a company can find ways to cut, it will do so.
- And in the U.S., the sheer expense of companies having to pay health insurance benefits to workers and their families.

Ways to cut labor expenses include:

- Hire workers on a part-time basis. If you work less than 30 hours a week in the U.S., an employer is not legally required to pay you any benefits
- Outsource jobs to another state or another country where the hourly rate is substantially lower.
- Use a robot to do the job. Robots never call in sick, form unions, need sick, vacation or personal days, or health insurance. When a robot breaks down, you simply replace it with a new robot
- Hire workers on a project basis, which avoids the provision of benefits.
- Hire younger people, who work cheaper.

Corporate loyalty is gone. There is little upside for companies investing in a workforce for the long term. What has been the normal flow of school - to - career for decades is going away. Few of us saw this coming. We are left unprepared, and having difficulty navigating this new landscape. Workers are doing what they and the generations before them have always done, expecting the same results. They have been blindsided, using the same tools that have always worked for them, but these are no longer producing the desired results.

As the U.N.'s "Guiding Principles on Business and Human Rights" states, "Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. *This should include, for example, policies and procedures that set financial and other performance incentives for personnel.*" (italics mine). But businesses have disconnected their employees.

The author trains people to understand the shift, to confront this new reality, and to navigate this new world.

Unfortunately, most jobseekers are still being prepared for a working world that no longer exists. Both colleges and high schools are guilty of continuing to train their students for the past. In the author's Doctoral Dissertation, *A Model for Creating a Mandatory Career Course Program Integrated into a College Curriculum*, the secret to the efficacy of this training was - and remains - that it be mandatory. Unless people are required to deal with these issues, they most likely will not confront them.

The first task is to make people aware of the changes. This is invariably an upsetting conversation. Most of us do not want to face the often-grim reality of changed opportunities that await us, particularly when we were prepared for something very different. But it is vital for us to comprehend in order to adjust our behavior and strategy.

Unfortunately, most jobseekers are still being prepared for a working world that no longer exists. Both colleges

and high schools are guilty of continuing to train their students for the past. In the author's Doctoral Dissertation, *A Model for Creating a Mandatory Career Course Program Integrated into a College Curriculum*, the secret to the efficacy of this training was - and remains - that it be mandatory. Unless people are required to deal with these issues, they most likely will not confront them. This mandatory training needs to be enforced by a combination of governmental institutions, businesses and schools in order to be effective.

The New Rules

1. The working world has become vastly different. In the United States, I use the American football analogy, "they moved the goal posts, but nobody told you." It is my job to tell people the bad news.
2. Corporate loyalty and job security are disappearing, if not already gone. Long-term job stability and security, which had been the norm for decades, is becoming a thing of the past. Sadly, experience is undervalued, and often ignored. Employers want everything, but are unwilling to pay for it.

Full-time Jobs are becoming more and more scarce. We are moving from being employees to becoming freelancers/contract workers. According to the Fourth Edition of *The American Heritage Dictionary*, a freelancer is defined as "a person who sells services to employers without a long-term commitment to any of them."

And to extrapolate from this new reality, it's useful if we think of ourselves as our own business. Predisposed to behaving that way or not, in order to survive - and flourish, one must think entrepreneurially. Two additional factors emphasize the need for this: most of us will have multiple careers, and ageism is real.

3. The "ammunition" we counted on in the past that would all but guarantee us gainful employment and a successful career - our education, résumé, cover letter, learning how to interview

- are still necessary, but today are insufficient. Training people for The Gig Economy means teaching them how to self-market, which entails constant self-promotion. And there is a natural resistance in most people to pursuing this approach. Most of us were not taught to sell, much less to sell ourselves. We learned the skills that we needed in order to pursue gainful employment in a particular field (chemistry, financial advising, graphic design, etc.). But in order to become successful in The Gig Economy, we must all learn to Define, Articulate and Sell our own, personal brand.

This is no less than a re-contextualization of what it means to work. Unlike so much of education, training people this way is not about filling their minds with more facts, but opening them up to new ways of thinking. As Plutarch said, "The mind is not a vessel to be filled, but a fire to be kindled."

People usually do not enjoy learning how to self-market, nor will they necessarily enjoy practicing it for the remainder of their working lives. It can be an uncomfortable and awkward process, but it is a necessary skill. It is important that we learn to adapt.

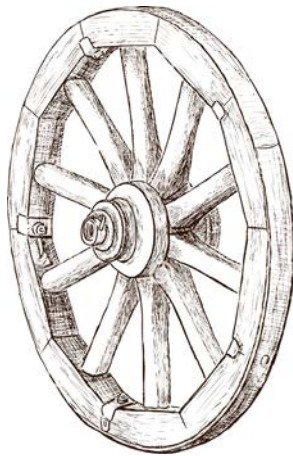
Thirty years ago, virtually none of us knew how to use a computer; today millions and millions of people are adept at using smart phones (which are actually small computers). Just as one moves from one country to another and needs to learn the language of their adopted land, self-marketing for most of us is a new language we must learn. The management of one's career has shifted from institutions to the individual, so to navigate - and prosper - in this new world of work, the worker must take charge.

Critical Thinking and Action

The foundation underlying this training is Critical Thinking, simply explained as being aware of how to get from here to there. But awareness (or how one is "wired") is

insufficient. First one must be aware of what needs to be done, and then be in action to produce the desired results.

So one begins at the end. What is the career goal, and is it monetizeable? Next, the steps that need to be taken to reach the goal must be defined, and then implemented. And a huge part of this is learning how to find the resources (specifically, the people) with whom to collaborate. Relationships are the key to success (how one is “connected”).



The Wheel: The Multiple Income Streams Approach

A new strategy is called for. As R. Buckminster Fuller said, “You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete.” This new model is The Wheel, also known as The Multiple Income Streams Approach.

The hub is one’s core brand or skill set. We will use “musician” as the hub in this example, but it will serve for any vocation in any industry.

The spokes extending from the hub are the various ways a musician can derive income from his or her talents. This might include: studio musician, touring musician, teacher (private lessons, clinics, K-12, after school programs, high school and/or college level), producer, audio engineer, arranger, manager of other

artists, mixer, songwriter, booking agent, product endorsements, etc.

When creating a career strategy, the goal is to find as many ways as possible to generate income. This is an appropriate response to a freelance workplace where the emphasis needs to be on finding work — not jobs.

A business does not rely on a single client. As one approaches their own career (brand) as a business, this model frees a person from relying on one “client,” and is designed to create a steady stream of income from multiple sources.

The Wheel replaces the traditional concept of having a job at a company (one client). The working world is too fluid and volatile to expect a supportive work environment to last very long. Even if one has a “good” boss who treats them well and recognizes their contributions to the team, he or she may not last in the job. Job stability is under threat from: management shakeups, mergers and the resulting layoffs, outsourcing, robotics, buyout packages, etc., etc. Unfortunately, this is the “new normal”.

People serve loyally with companies for years, only to be shown the door for reasons having nothing to do with their job performance. They leave feeling that their contributions were ultimately neither valued nor appreciated. Loyalty is not rewarded as it once was. Employers care less and less about their worker; the focus has shifted to shareholder value.

For decades, we have relied upon the safe harbor of the full-time job. We can no longer afford to do that. The Wheel is a worker’s hedge against the instability of the employment landscape of the 21st Century.

The author’s Doctoral Dissertation addressed the need to practicalize higher education by expanding career coursework into an ongoing career curriculum, beginning in a student’s freshman year of college. Career development needs to serve as a finishing school for a college degree, the place where all a student has learned is combined into an awareness of the talents and skills they have developed, and how those can now be marketed to potential clients.

Two caveats to this excerpt from the Dissertation Abstract:

1. Colleges were targeted because they at least have career development departments. But the conversation ideally should begin in Middle School, when students are 11 - 14 years of age.
2. This course program synthesizes two approaches to learning: traditional academia and the for-profit approach. Broadly speaking, traditional academia has focused on communication and critical thinking skills, and disdained vocational training. A classic college education has not included teaching students the skills they need to find a job after graduation.

As the cost of higher education has risen, parents and students increasingly look at the ROI (return on investment). Rightfully, they are concerned about spending thousands of dollars on education, only to discover that they are either a) unprepared and thus unable to find gainful employment upon graduation, or b) have no idea what they want to do in their careers.

Into this void has stepped for-profit education. For-profit colleges have shifted the focus from communication and critical thinking skills to job-related vocational training. The mandate is along the lines of, "we will teach your child the specific job-related skills he or she needs to find gainful employment in their field of interest."

And it works. These students are armed with the skill-set they need to find work (along with a crippling debt load; it's predicted that many/most students who took out loans will still be paying them off when their own children are in college). But in the author's experience as a college professor for two decades, because they lack communication and critical thinking skills, they do find entry-level jobs, but lack what's needed to get promoted or develop their personal brands and start their own businesses.

In order, students need to discover:

- What are they selling?

- Who do they know who can use what they are selling?
- How can they be of help?

Expressed another way, they learn to define, articulate and sell their personal brand.

Training People to Navigate the Gig Economy

The author's second book, *101 Ways to Find Work . . . and Keep Finding Work for the Rest of Your Career!* (ISBN-13: 978-1-305-11136-3, ISBN-10: 1-305-11136-2) is used as the textbook in these training courses.

The training is focused more on context than content. It provides a shift in consciousness about what work is in the 21st Century.

The concepts of the courses have all been designed to be relevant, valuable and universal. They conform to the chapters in the textbook, and include:

- Think of yourself as a freelancer.
- Beyond the concept of "freelancer," it's useful to think of yourself as your own business and your own brand.
- "Passion," which employers like to see in candidates, is not enough. The author coined the term "Monetizeable Passion," to describe a passion at which one can make a living. It separates hobbies from projects/enterprises/business endeavors that are commercially viable.
- "Knowing" and "awareness" are insufficient. It's essential that one gets into action and in order to produce results. "Knowing is not enough; we must apply. Being willing is not enough; we must do." (Leonardo da Vinci).
- Always focus on the audience. What do they need? In terms of work, this means having an appreciation for the employer's perspective.
- We all belong to multiple affinity groups or tribes. Tribes are the people with whom one has something in common. These tribes can be: gender-based (women's groups), geographic (same city, or country), ethnic, religious (mem-

bers of the same church), by hobby (belong to the same hiking group, biking group, chess club, book club, etc.), by education (attended the same college and both belong to its alumni association), industry-based (we're both chemists, electrical engineers, financial advisors, etc., and both belong to the same industry associations and groups both online and offline, etc.).

- The people in one's tribes are those most likely to help in one's career quest (or anything else, for that matter) because we have something in common. This is human nature. It is one's mandate to take advantage of this fact in developing a career.

Branding

The first step is to define one's brand. What are the *specific* monetizeable, marketable and transferable skills one can offer to potential clients? What does one do that people will pay for? And specific does not mean broad concepts like "hardworking," "good team player," "fast learner," "able to work independently," etc. Instead, it's the languages in which one has fluency, proficiency in software programs and apps, and proven accomplishments in one's field.

There are certainly other people who can do what an individual does (just as, broadly, a cola is a cola, and a smartphone is a smartphone). As cola makers and smartphone manufacturers need to have their potential customers perceive an advantage their product has versus the competition, so an individual needs to have his or her customers understand and appreciate what's special about what they offer. After counseling and training hundreds of people over more than fifteen years, the author has concluded that no two people have exactly the same brand. The challenge is to have the individual understand, define and learn to articulate the "specialness" of their brand, and the particular benefits of that brand to the potential customer.

Brand is relationship and reputation.

Education

As recently as 20 or 30 years ago, having a college education was a virtual guarantee of finding a job in one's

chosen career. A college degree was the answer. This is no longer true.

Today, neither a college degree - nor even a graduate degree - guarantee anything. They, along with résumés and cover letters, are simply more tools that need to be monetized.

The higher education system in the U.S. has failed its students for decades by not properly preparing them to take on roles in the workplace. There is a veritable chasm between what students are taught and what the business world requires of them.

What students need to realize about a college education in the 21st Century is that it's benefits, in order, are:

1. The contacts one can make
2. The credibility it confers
3. What one actually learns

Higher education is still based on preparing students for the factories of the early 20th Century. The educational system in the U.S. has not kept pace with the modern world. It is rooted in the past, still offering theory and busy work. It's largely about "teaching to the test."

In deciding whether to pursue more education, be it towards a degree, license, or certificate, the individual must weight the costs versus the benefits, just as any business does when deciding whether to spend money.

Ultimately, what we are doing is putting people in touch with their monetizeable passion, training them how to articulate it, and showing them how to find the people who can benefit from their talents, skills and experience. The focus always needs to be on the needs of the client, to be of service and a contribution to others. As Muhammad Ali said, "Service to others is the rent you pay for your room here on earth."

Conclusion

The Gig Economy is forcing workers all over the planet to divorce themselves from the protection of “the company” and the salaries and benefits those entities have traditionally offered. In this new world of work, millions of individuals who never expected to behave entrepreneurially will face a myriad of challenges they never imagined they would be forced to confront.

Issues that will need to be addressed individually and by society as a whole include: unionization, portable health insurance, disability benefits, liability insurance, retirement plans, etc.

In order for freelance workers to succeed in their new roles, these issues must be addressed collaboratively by: the workers themselves, workers’ groups, the business community, and governmental agencies. New world. New rules. Just as with any individual who needs to define their brand, we must first become aware of the new environment, and then take action - in this case, together - so that in the 21st century, all of us don’t simply survive, but we thrive.

An Interview with Ussarin Kaewpradap

Ussarin Kaewpradap is an International Affairs Specialist for Trade Union Organizing Strategies for Development and Inclusion with the State Enterprises Workers' Relations Confederation (SERC).

You speak about automation as both a challenge and opportunity for unions and labour. What can be done to help mitigate risks and optimise the potential benefits of the fourth industrial revolution?

New technologies will continue to be initiated all the time. There is no way to stop that. But if new technologies can help workers reduce difficulties or risks and increase productivity that is not something trade unions will oppose. The question is whether the aim is to help workers or displace them. If employers or governments see automation as a way to replace workers completely, replacing the workforce with machines, that is something that is not acceptable. Intent and purpose is really important in this conversation. In many Nordic and European countries, the unions are working together with companies to help companies create new policies to allow the workers to learn new systems. The goal from the start was to accomplish a win-win. Skill development training enabled the workforce to utilize new technology! This type of model shows that convergence is possible.

Focusing on the Thai context, the Thai parliament approved a law for trade and investment in the Eastern Economic Corridor (EEC), with the hope of developing the Eastern provinces of Thailand to lead in the ASEAN economic zone. This EEC straddles 3 provinces in the Eastern part of Thailand; Chachoengsao, Chonburi and Rayong. The government hopes to complete the EEC by 2021 and this will modify these areas into hubs for new technologies and services with strong connectivity to other ASEAN countries by land, sea and air. The investment of this project came from a mix of state funds, public-private partnerships (PPPs), and foreign direct investment (FDI). The government has identified four "core areas" that are essential in making the EEC a renowned economic zone: (1) increased and improved infrastructure; (2) business, industrial clusters, and innovation hubs; (3) tourism and; (4) the creation of

new cities through smart urban planning. The government predicts the creation of 100,000 jobs a year in the manufacturing and service industry by 2020 through the EEC. But here is the issue. So far, the ministry of labor has not designed any program for readiness and the type of worker friendly automation that we see in Europe. Such education programs are not in motion around the EEC. Now the skills of workers are not in alignment with the technologies. These are the type of situations where trade unions are essential. We do not oppose the automation or technological advancements around projects like the EEC. Our stance is that governments and companies should be working with unions to ensure that the new technologies in the EEC do not leave workers behind. And, as the EEC shows, the type of skills development we're advocating for are good for everyone. The reason to be optimistic is that it is possible to train workers and prepare them for the upcoming or unexpected challenges. New technologies can be good for labour if a win-win mindset is present.

In an era when attention pulls between the UN Guiding Principles, the Global Compact, Benchmarks, Indices, new Laws and Regulations, and copious CSR and sustainability initiatives, you bring the focus back to the Tripartite. How can the Tripartite guide stakeholders both in terms of understanding and practice?

In my personal opinion, a true tripartite mechanism is irreplaceable and the bedrock for understanding, cooperation, support and collective problem solving. And it is not only about the tripartite but the development of the country. If development does not empower labour and treat them as stakeholders, what is the point of development? How can that development be good for the country? Without a tripartite, there is the risk of a type of development that leaves workers behind. This leaves employers with dissatisfied workers who do not have incentives to do high-quality work and government officials with a working class that struggles to

feed their family. Employers and government officials directly benefit from a satisfied workforce. But in the Thai context, we are a long way away from a true tripartite. The government and business community have taken a hostile stance to labour. Unions are seen and treated as a threat to business and development. The government and business community have chosen a path that constantly seeks cheaper labour and maximum profits by compromising the rights and well-being of workers. The tripartite in Thailand is not a tripartite at all. Labour does not have a legitimate seat at the table. And the government has not taken the role of leader with a mandate to protect the populace. As a result, Thailand's tripartite does not translate to the type of laws and regulations that ensure responsible conduct and sustainability. This is why I and many other union advocates in Thailand continue to call for a true tripartite that positions workers as key stakeholders and beneficiaries of economic development.

ities. These advancements can lessen hazards and increase productivity. But this is precisely why we have to be relentless about protecting the interests of labour as new technologies come about. We have to push back against efforts that are initiated to kill the workforce and push the workers into informal sectors. Unfortunately, this seems to be the trend right now. I'm particularly concerned about places like Thailand, where there is low percentage of union density and no union representatives in certain sectors to defend the interest of workers. That is a formula for a wave of more discrimination and marginalization of the working class, which is the vast majority of the population. The international global unions are really, really important at this moment as they are trying to ensure that labour is not left behind, especially in places that lack a true tripartite. This is not easy work. But it is the only way to ensure that advancements unfold responsibly.

A true tripartite mechanism is irreplaceable and the bedrock for understanding, cooperation, support and collective problem solving. And it is not only about the tripartite but the development of the country. If development does not empower labour and treat them as stakeholders, what is the point of development?

If the government and business community in Thailand wants to prove that they value the tripartite, my message is clear: ratify ILO C87 and C98 so that workers can freely exercise their rights to freedom of association and collective bargaining.

What makes you optimistic about this new era?

The new era will be a wave of automation and new technologies. We know that. There are reasons for an optimistic, hopeful mindset. Think of the possibil-

The Need for a RIoT (Responsible Internet of Things): A Human Rights Perspective on IoT Systems

Prof. Luca Belli

Luca Belli, PhD is Professor of Internet Governance and Regulation at Fundação Getulio Vargas (FGV) Law School, where he heads the CyberBRICS project, and associated researcher at Centre de Droit Public Comparé of Paris 2 University. Before joining FGV, Luca worked as an agent for the Council of Europe Internet Governance Unit. Over the past decade, Luca has authored and edited more than 30 research outputs in English, French, Italian, Portuguese and Spanish, amongst which “De la gouvernance à la régulation de l’Internet” (Berger-Levrault, 2016); the “Net Neutrality Compendium” (Springer, 2016); “Platform Regulations: How Platforms are Regulated and How They Regulate Us” (FGV, 2017) and “Gobernanza y Regulaciones de Internet en América Latina” (FGV, 2018) and the “Community Network Manual” (FGV-ITU-ISOC, 2018). Luca’s works have been i.a. quoted by the Organization of American States Report on Freedom of Expression and the Internet (2013); used by the CoE to elaborate the Recommendation of the Committee of Ministers on Network Neutrality (2016); featured in the French Telecoms Regulator (ARCEP) Report on the State of the Internet (2018), and published or quoted by various media outlets, including Le Monde, BBC, The Hill, O Globo, El País, El Tiempo, La Vanguardia and La Stampa.

Fundação Getulio Vargas Law School, Rio de Janeiro | luca.belli@fgv.br

Introduction: The Rise of the Internet of Things (IoT)

The Internet of Things (IoT) is heralded by its proponents as a true propellant of the next industrial revolution, able to generate considerable gains in efficiency and prompt growth “at an astronomical rate.”⁸⁴ The concept of IoT is quite flexible and, to date, it does not enjoy a universally agreed definition. However, the various authors conducting research on the IoT – and the distinct definitions that each of them provides – converge highlighting that the main feature of this phenomenon is the connection of the physical world, composed by all “things,” with the digital world of the Internet.

The IoT can therefore be broadly defined as a network linking uniquely identified physical objects together with electronic networks and software applications enabling data collection, communication and processing. Device manufacturers and service providers generally hail the evolution towards such interconnection as enabling the rise of “smart technologies” facilitating extensively marketed phenomena such as “Smart Cities”, “Smart Farming” and the “Industry 4.0”, which are based on the widespread data collection and processing allowed by the exploitation of IoT systems.

In fact, the IoT already encompasses billions⁸⁵ of so-called “smart” devices around us that can be uniquely identified and are able to collect, store, process and communicate a wide range of data about their functioning and about the environment – and, therefore, also the individuals – around them. Indeed, the purpose of the IoT is facilitating the connection of all everyday objects and devices to electronic networks, which may be the Internet but also closed networks such as private intranets, in order to enhance data collection and improve efficiency through data processing.

The IoT builds upon the success of a number of technological enablers⁸⁶ that make the interconnection of billion devices possible. Due to its potential, the development of the IoT is considered with great attention by several stakeholders both from the private sector, particularly telecommunication operators, service providers and device manufacturers, and from public bodies eager to shape an IoT policy environment able to facilitate business and attract investments, while preventing, avoiding – or at least mitigating – privacy and security risks.

In this perspective, the International Telecommunication Union argues that the identification, data collection, processing and communication capabilities of the

IoT shall make “full use of things to offer services to all kinds of applications, whilst ensuring that security and privacy requirements are fulfilled.”⁸⁷ Indeed, connected devices and, consequently, IoT systems are instrumental to deploy services based on increasingly fine-grained, ubiquitous and voluminous data collection and processing capabilities, likely to increase efficiencies in areas such as smart city services, public surveillance, healthcare, building management systems. The wide range of data collected and shared by the devices parts of the various IoT systems is indeed nurturing complex data processing, producing insights that allow increasing the efficiency of both processes and devices involved.

The IoT is therefore a concept comprising a growing number of technologies able to expand the reach of the Internet into the physical world, allowing to monitoring – potentially permanently and ubiquitously – both the status of the connected objects and of the surrounding environments. In this perspective, the interconnection of every object can also generate risks for the protection of personal data of the individuals adjacent to the connected things as well as for their personal security and for public safety, should the devices be hacked. Indeed, the possibility to remotely control or manipulate connected devices may lead adversely affect the enjoyment of individuals’ fundamental rights, not only interfering with individuals’ privacy⁸⁸ with particular regard to family life, home and correspondence, but also as regards the security of person, non-discrimination or to access information.⁸⁹ When such networks and devices are not conceived, maintained and secured in the most responsible fashion, their users as well as all peoples monitored by senders embedded in the “smart” things may suffer nefarious consequences on an ample spectrum of rights.

In this perspective, states and business enterprises that are involved in IoT systems must act in synergy, analysing risks and elaborating and implementing effective policies, regulation and adjudication, prompting a Responsible Internet of Things (RIoT), where people’s privacy and security are at the centre of the new digital ecosystems. It is important to stress IoT systemically in order to understand the complexities, risks and benefits of such phenomenon and frame it responsibly.

The IoT is therefore concept comprising a growing number of technologies able to expand the reach of the Internet into the physical world, allowing to monitoring – potentially permanently and ubiquitously – both the status of the connected objects and of the surrounding environments... When such networks and devices are not conceived, maintained and secured in the most responsible fashion, their users as well as all peoples monitored by senders embedded in the “smart” things may suffer nefarious consequences on an ample spectrum of rights.

The purpose of this chapter is, therefore, to briefly investigate what technological evolutions are driving – and being enabled by – the IoT, what could be the impact of the IoT on individuals’ fundamental rights and what elements could allow public and private stakeholder to comply with the United Nations Guiding Principles on Business and Human Rights (UNGPs), by building RIoT systems. In this perspective, this paper will be structured in three sections. The first section will analyse the IoT phenomenon, stressing the intimate link between the IoT and the Big Data and Artificial Intelligence phenomena. The second section will briefly scrutinise the impact that the aforementioned phenomena may have on the full enjoyment of fundamental rights, providing some concrete examples. The concluding section will provide some suggestions on how tech-businesses developing connected objects can implement the UNGPs effectively.

The Interplay between IoT, Big Data and Artificial Intelligence

According to Gartner (2014), the IoT will reach 26 billion units by 2020, up from less than a billion of

connected devices in 2009, while Cisco (2016) predicts that 500 billion devices are expected to be connected to the Internet by 2030. It is therefore important to stress that IoT systems are going to be ubiquitous and pervading the offline environment where we live without living clear ways of opting out and avoid the impact of connected objects' connectedness.

The integration between physical and digital worlds fostered by the IoT and the data collection capability it facilitates are likely to affect not only the performance of services and connected devices but also to deploy direct effects on individuals. Notably, the fact that objects are permanently connected with other objects, applications and communications networks, and that such objects can be remotely controlled directly impact individuals. Such impact does not only concern the way individuals interact with objects but also and crucially the relationships amongst people, between people and businesses as well as between people, businesses and public bodies.

Indeed, due to their undoubted potential for data collection, sharing and processing, IoT systems are deemed as an indispensable element to power data-hungry services, based on the exploitation of Big Data⁹⁰ analytics and of Artificial Intelligence⁹¹ (AI) capabilities, which are driving the technological evolution of both public and private sector.⁹²

However, it seems important to stress that, despite the hype around the IoT within technology circles, the majority of technically uneducated people may be unaware that their personal data are harvested and shared – more or less securely – by the objects that can be commonly found in the environments where they live, work or play with their children.⁹³ In such context, the deployment of IoT systems hold promise to confuse and deceive individuals, who may not even notice the tiny RFID tags and sensors that are embedded in connected devices, thus making it nearly impossible to perceive that everyday objects are connected to the Internet and can collect, transmit and process data about their surrounding environment.

Such ambiguity should therefore be corrected by the development of clear and effective policies, regula-

tion and adjudication able to assist IoT developers to exercise their corporate social responsibility, while raising individuals' unawareness of the impact that IoT systems will deploy on their environment. Notably, robust data protection and cybersecurity frameworks are especially relevant to foster the sustainable development of IoT systems, avoiding that individuals are deceived and personal data are misused. This consideration becomes even more significant considering the intimate intertwinement existing between the IoT and two related phenomena, Big Data and AI, which the IoT is supposed to nurture with a continuous flow of very diverse personal and non-personal data.

IoT solutions are already implemented in several sectors, such as connected cars, mobile health or smart metering solutions for utilities like gas or electricity, where Big Data analytics and AI are increasingly deployed by a number⁹⁴ of business actors. On the one hand, Big Data analytics and AI applications are the "key enabler[s] allowing realising the full potential of the IoT"⁹⁵ as they rely on the processing of massive data datasets, bringing together data from different sources – including for example GPS location data of specific devices, social media postings, meta-data from communications, etc. – that are scrutinised algorithmically in order to find correlations. On the other hand, the data collection capabilities provided by IoT systems become instrumental to fully exploit the potential of Big Data and AI which are based on the extensive use of high volumes of varied data to improve decision-making or product and service efficiency.

To understand the correlation between the IoT and the Big Data phenomenon, it seems useful to offer two examples of how data collected and generated by a multiplicity of connected things can be combined to nurture Big Data and AI for both private and public services. A classic example is the establishment of so-called Smart City services, where data from sources such as sensors installed in public transportations and police vehicles, connected (traffic) lights and information on public events can be combined to foresee and optimise traffic flow in real time and identify the areas that are in immediate need of attention. The media and entertainment industry is also a telling example of how IoT data can enrich Big Data analytics and AI

processing information collected and generated by digital platforms, such as music or video streaming services, and connected devices such as connected TVs or speakers. Indeed, such information collection and processing will allow to garner deeper understanding, infer patterns and make data-driven decisions that are becoming essential to predicting the interests of audiences, extract insights on specific groups of customers and effectively targeting them with customised advertisements for media.

However, the collection of large amounts of data, from a wide spectrum of sources and sensors may occur in the unawareness of the individuals about which data are collected by online platforms and mobile apps and, of course by connected “things.” Furthermore, it is important to stress that the main criteria driving the design and implementation of Big Data analytics and AI capabilities may not be the respect of individuals’ fundamental right, but rather cost minimisation and private profit maximisation. As such, IoT-powered Big Data and AI can become a tool to discriminate specific populations,⁹⁶ for instance excluding entire groups from having access to specific rights, services or opportunities, based on opaque algorithmic decisions or predictions.⁹⁷

Importantly, the massive datasets that IoT systems hold promise to generate and the ubiquitous sensory capabilities that characterise IoT systems can not only maximise predictive intelligence but also surveillance capabilities facilitated by AI technologies, raising important privacy and security questions, while predicting and automating an increasing number of aspects of our daily lives. At its core, AI analyses and optimises data for a variety of purposes spanning from, voice-assistance, to the prediction of consumer habits, to self-driving cars or medical diagnoses. Therefore, combination of AI and IoT-generated data could be utilised to help individuals in their daily tasks, increasing productivity and improving health care but could also give rise to more dystopic scenarios, based on ubiquitous surveillance and AI-defined decisions directly implemented into the offline world of connected infrastructures and smart homes and devices.

The interconnectivity of all objects (to be) produced and AI systems or the use of IoT systems to feed Big

Data analytics are therefore poised to affect every aspect of our lives and environments. Such scenario has remarkable implications for individuals’ right. The following sections will identifies some of the most substantial challenges, that both public administration and business entrepreneurs need to address as urgently as possible, in order to guarantee that the development of the IoT and its interplay with Big Data and AI are a driver for positive change rather than the propellant of a dystopic future.

Human Rights Issues Raised by IoT Systems

The rise of IoT systems and the possibility that such systems continuously collect and supply data to computing technologies taking decisions over humans raises a number of public policy issues related to the IoT governance,⁹⁸ with particular regard to privacy, security, free development of personality and non-discrimination.

Data collected and generated by sensors embedded in everyday objects, such as smartphones, toys, wearable devices and urban furniture can often be precise enough to understand and predict accurately the lifestyle, commercial behaviour and other relevant patterns of entire groups of individuals or of a specific person. As pointed in the previous section, the dissemination of connected devices and the incorporation of sensors in all “things” will transform data collection into a permanent and omnipresent practice, thus giving rise to several human rights concerns.

Indeed, the range of risks to which individuals are exposed⁹⁹ in IoT environments is not limited to loss of privacy and security, enabled by connected devices permanently collecting data and, subsequently, storing, processing and transferring them in an unsecure fashion. On the contrary, such risks are conspicuously amplified, on the one hand, by the exploitation of IoT systems to feed Big Data and AI able to take decision on individuals and, on the other hand, by the possibility that such connection between computing and devices can concretely shape the physical environment where individuals’ live and impact individuals physically.

Loss of individual control over personal data becomes a very likely scenario, considering that not only the per-

manent and automatic data-collection capabilities of connected objects but also that data collected by connected devices and sensors are often “repurposed” to be processed for a different objectives. Such objectives can be substantially dissimilar from the mere functioning of the connected “things” and processing may be executed by an organisation other than the one originally in charge of the data collection. Furthermore, the fact that connected devices can collect data automatically, rather than requesting individuals to provide such data wilfully, poses serious risks regarding individual awareness of and consent to data collection.

This is the case, for instance, of sensors in public areas or in public transportations –increasingly common in Smart City projects¹⁰⁰ – that capture an ample range of personal data, such as images of passersby or unique identifiers of peoples’ mobile phones.¹⁰¹ This type of collection and processing is unlikely to be deemed as compliant with core data protection principles such as lawfulness, fairness and transparency¹⁰², which are at the basis of privacy frameworks in more than 120 countries around the world. On the contrary, to respect individual’s data privacy, the entities who deploy and implement IoT systems shall make sure their data collection practices are compatible with legislation and, chiefly, that the individuals whose data are collected are duly informed as to what type of data about them is collected and for what purpose.

This scenario is particularly flagrant when data collected via IoT systems feed Big Data analytics. Although it may be argued that the purposes of Big Data analytics are frequently unknown prior to the analytics and that the interest of such analytics is precisely the capacity to reveal unexpected inferences and correlations, it is important to emphasise that this cannot be a justification to operate opaque analytics and to deceit or mislead data subjects. As such, when personal data are harvested via connected devices and utilised for Big Data, it is essential that individuals be aware that data collection is ongoing and that the secondary purpose of the analytics be compatible with the original one. As an instance, data collected through connected urban furniture to analyse and increase urban safety should not be used to profile passersby for commercial purposes such as determining the amount of their (life,

health or car) insurance premiums.

In this perspective, it is useful to stress that a distinction must be stricken between the collection of data via IoT systems to power analytics whose purpose is the detection of general trends and data-collection and processing that are operated to extract inferences about individuals and make decisions affecting them. In this latter case, the mix of IoT systems and Big Data analytics may not only be incompatible with the original purposes for which data were collected by the connected devices and sensors but is also likely to create new personal data about individuals. A telling example may be the utilisation of car sensors to collect and process vast amounts of data about a given vehicle, for instance for maintenance purpose and car-performance enhancement, but also to identify patterns in the driver’s behaviour and create a profile to determine the amount of insurance premiums. In this perspective, organisations utilising data collected by IoT systems must be able to find the suitable moment where appropriate information on what data are collected and for what purpose can be provided to the affected individuals, so that they can retain meaningful choice to authorise or deny the collection and (specific types of) processing of their data.

Furthermore, it important to always keep in mind the systemic nature of the IoT to realise the interdependence of privacy and security issues. The connection of thousands or millions of diverse devices brings a proportional number of vulnerabilities and, therefore, risks that can be exploited by cyber-attackers whose level of sophistication is increasingly high. Hence, practices such as data encryption, de-identification of personal data and the implementation of strict access control mechanisms are essential to prevent unwanted dissemination of data and effectively protect the privacy of all people impacted by a specific IoT system.

With regard to the impact that IoT systems may have on security, it is important to stress the double dimension of such policy issue, encompassing both individuals’ right to security and informational security. As demonstrated by Miller and Valasek (2015), who elaborated a method to remotely took control over the brakes and accelerator of Jeep connected cars, the hacking of

unsecured IoT systems may have direct consequences on individuals' lives. On the other hand, cybersecurity concerns may directly impinge upon public safety, as compromised IoT systems may allow hackers to access and remotely control public infrastructures such as connected machineries in hospitals, traffic lights, power plants etc. In this perspective, IoT security is not only essential to preserve individuals' privacy or security but also to guarantee public safety against unwanted infiltration and manipulations. Therefore, the security of all components of IoT systems must be a priority to be considered as indissociable from privacy protections, rather than a minor or optional concern for developers.

Lastly, it must be stressed the increasing interdependence between IoT systems and the software and computing capabilities provided by AI companies. The influence of such companies on connected device developers may be explained considering the fundamental importance of software and computing power to guarantee that connected devices function smoothly. Bloomberg Technology has recently reported an example of such influence, highlighting that Alphabet (Google's parent company) and Amazon, which provide leading voice-assistance software powering a wide range of smart-home gadgets, are reported to actively ask device makers to modify the device parameters to receive continuous streams of data that can be harvested and processed by the software providers. In such scenario, smart-device users may be unknowingly¹⁰³ – and likely unwillingly – providing a wide range of information regarding the use of the smart device, regardless of whether the device being switched-on or off.¹⁰⁴

Aware of the fact that connected object and sensors enable constant collection and sharing of data, it becomes essential for individual to retain knowledge and control on when and how their personal data are collected, by whom and for what purposes. Furthermore, to facilitate the secure use of connected devices, it becomes essential to utilise reliable mechanisms for authentication and authorization able to prevent unauthorized access to IoT systems and preserve data integrity.¹⁰⁵ Lastly, the use of data anonymisation techniques becomes increasingly important to facilitate the use and reuse of data collected via IoT systems while

reducing risks connected with the loss of control over personal data.

Conclusions: Unleashing the RIoT

To maximise the benefits and reduce – and ideally eliminate – the risks determined by the emergence of IoT systems, public and private stakeholders are called to cooperate and give full force to the UNGPs. States must embark on their duty to protect individuals against human rights abuses by developing appropriate strategies, policies, regulation and adjudication mechanisms that guarantee the protection of privacy and security and clearly define boundaries so that the IoT may not be used to do harm to individuals. Corporations must meet their responsibility to respect Human Rights, acting with due diligence, assessing when IoT systems can have adverse impacts on individuals and designing products and services that prioritise the respect of individuals' rights. In addition, both public and private actors shall provide access to effective remedies, both judicial and non-judicial, for victims of any harm produced by the use of IoT systems.

Governments and business actors should jointly develop and implement IoT plans, starting by developing frameworks for risk-assessment of IoT security, categorising IoT devices according to risks and vulnerabilities and, importantly, assessing the level of dissemination in the market. Secondly, public and private actors should promote – and individuals should demand – the adoption of software best practices in all IoT devices. Such practices include privacy and security by design¹⁰⁶ and through the entire development lifecycle of every element composing the IoT system, as well as the possibility to “patch” and update software, manage user identity and, importantly, the existence of a permanent point of contact to signal the existence of software and hardware vulnerabilities.

Importantly, an essential element of any strategy aimed at successfully implementing the UNGPs is to seek the involvement of civil society. In this respect, the users of connected device and the public generally should play a key role in the IoT governance. Communication and education of the public are key elements and should

not be seen as unilateral processes but rather as ways of mutually informing and contributing to more secure and reliable IoT systems. Information sharing regarding software and device vulnerabilities is a clear example of how multi-stakeholder cooperation is not simply useful but necessary. Indeed, the implementation of secure IoT systems requires a collaborative effort as no stakeholder alone can identify and patch vulnerabilities to secure the entire system. On the other hand, national policies – including with regard to education – are essential to raise awareness regarding the challenges of IoT. Legal frameworks must consider individual knowledge and consent to personal data collection as essential requirements, as every person shall be able to choose whether to be part of an IoT system or not and data collection and processing should never be arbitrary imposed.

Transparency should be ensured so that people are appropriately informed about the nature and the purpose of data collection and have clear and intelligible information regarding what personal data are collected about them, with whom such information is shared, as well as how to access and rectify or delete such data at any moment. To this latter extent, the development of national legal frameworks guaranteeing meaningful data privacy in an environment where the IoT, AI and Big Data are common practice should be seen as an essential element.

States should at a minimum having proper data protection framework in place, mandating to:

1. obtain consent to data collection while providing meaningful information,
2. minimise the amount of data collected to avoid potential risks and abuses,
3. guarantee that data subject enjoy the possibility to easily access,
4. rectify and delete personal data,
5. and adopt all necessary provisions to maintain personal data secure.

To comply with their responsibility to respect human rights, private sector actors should, at a very minimum:

1. make a policy commitment to the respect of human rights;
2. adopt a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
3. and have in place processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.¹⁰⁷

Furthermore, innovative manners of letting individuals express their consent to (certain) types of personal data processing should also be explored, shifting the focus of data protection to a “design-thinking” approach, rather than relying on a strictly legal approach based on the classic notice and consent strategy, which has shown to have clear limits.¹⁰⁸ In this respect, the concept of “Data Control by Design”¹⁰⁹ (DCD) should be explored by policymakers, to complement the classic privacy by design approach through the implementation of appropriate technological tools putting individuals at the centre of data processing, allowing them to choose what personal data about them can be processed and for what purposes.

The DCD concept aims at expanding privacy by design, by promoting the adoption of interoperable data control tools allowing the collection of personal data, while letting the individuals defining how her data can be utilised.¹¹⁰ The use of such a design thinking approach, implemented through “machine readable”¹¹¹ technological solutions, would put individuals at the centre while allowing devices and software collecting and processing data within IoT systems automatically understand and respect user choices as regards their data. Furthermore, the DCD concept may prove suitable to frame IoT systems as individuals would be able to predefine via interoperable solutions how they want their data to be collected and processed rather than having to express their consent or not to the data collection operated by every single connected object. Such dichotomy, generally proposed by data protection frameworks and based on either accepting loss of con-

trol over data in exchange of the possibility to utilise to services or denying access to data while losing the possibility to utilise services, is indeed highly inefficient as it does not allow for a more nuanced approach where individuals may chose only in certain types of processing or collection only from certain types of devices.

Lastly, when we consider the potential pervasiveness of IoT systems and the great variety of uses and potential abuses that can be done of such systems, security considerations become uppermost in the list of issues to be effectively and systemically addressed by responsible businesses and governments. Importantly, Weber (2015) points out that, since a variety of heterogeneous processes are concerned into the design, implementation and maintenance of IoT systems, the achievement of security and privacy relies on the pursuit and implementation of the four fundamental goals:

1. resilience to attacks so that the system avoids single points of failure;
2. data authentication;
3. access control on the data provided;
4. meaningful privacy, including data anonimisation, to avoid – or at least make very difficult – to extract inferences by processing personal data without the data subject consent.¹¹²

These goals should be pursued while keeping in mind that, in an IoT environment, everybody is vulnerable and the best way to mitigate risks is to educate individuals about their, rights, their roles and responsibilities in the digital age. It is only through collaboration and synergy that public and private actors and civil societies will be able meet the challenges presented by the IoT, maximise its benefits and avoid risks, thus unleashing a true RIoT (Responsible Internet of Things).

References

- Amigo I. 8 May 2018. The Metro Stations of São Paulo That Read Your Face. Citylab. <https://www.citylab.com/design/2018/05/the-metro-stations-of-sao-paulo-that-read-your-face/559811/>
- Angwin, J., Larson, J., Mattu S., and Kirchner, L. 23 May 2016. Machine Bias. ProPublica. <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>
- Bastone N. 20 February 2019. Google says the built-in microphone it never told Nest users about was 'never supposed to be a secret'. Business Insider. <https://www.businessinsider.nl/nest-microphone-was-never-supposed-to-be-a-secret-2019-2/?international=true&r=US>
- Belli L., De Filippi P. and Zingales N. (Eds). (2015) Recommendations on Terms of Service & Human Rights. United Nations Internet Governance Forum. <https://www.intgovforum.org/cms/documents/igf-meeting/igf-2016/830-dcpr-2015-output-document-1/file>
- Belli, L., Schwartz, M. Louzada L. (2017) Selling your Soul while Negotiating the Conditions: From Notice and Consent to Data Control by Design. Health and Technology Journal. 7(4), 453-467. Topical Collection on Privacy and Security of Medical Information. Springer-Nature. <http://link.springer.com/content/pdf/10.1007%2Fs12553-017-0185-3.pdf>
- Cisco. (2016) At a Glance: Internet of Things. <https://www.cisco.com/c/dam/en/us/products/collateral/se/internet-of-things/at-a-glance-c45-731471.pdf>
- Day M. 12 February (2019) Your Smart Light Can Tell Amazon and Google When You Go to Bed. Bloomberg Technology. <https://www.bloomberg.com/news/articles/2019-02-12/your-smart-light-can-tell-amazon-and-google-when-you-go-to-bed>
- European Commission. January (2013) Report on the Consultation on IoT Governance. http://ec.europa.eu/information_society/news-room/cf/dae/document.cfm?doc_id=1746
- Gartner. 19 March 2014. Gartner says the Internet of Things will transform the data center. <http://www.gartner.com/newsroom/id/2684616>
- Greenleaf, G. 24 May 2018. Global Convergence of Data Privacy Standards and Laws: Speaking Notes for the European Commission Events on the Launch of the General Data Protection Regulation (GDPR) in Brussels & New Delhi, 25 May 2018. UNSW Law Research Paper No. 18-56. <https://ssrn.com/abstract=318454>
- GSMA. December 2015. Unlocking the Value of IoT through Big Data. Version 1.0. https://www.gsma.com/iot/wp-content/uploads/2015/12/cl_iot_bigdata_11_15-004.pdf
- High P. 30 October 2017. Carnegie Mellon Dean of Computer Science on the Future of AI. <https://www.forbes.com/sites/peter-high/2017/10/30/carnegie-mellon-dean-of-computer-science-on-the-future-of-ai/#4a8a2df32197>
- IoT Analytics. 8 August 2018. State of the IoT 2018: Number of IoT devices now at 7B – Market accelerating. <https://iot-analytics.com/state-of-the-iot-update-q1-q2-2018-number-of-iot-devices-now-7b/>
- ITU (International Telecommunication Union). 2012. Next Generation Networks – Frameworks and Functional Architecture Models: Overview of the Internet of Things. Series Y: global information infrastructure, internet protocol aspects and next-generation networks. Recommendation ITU-T Y.2060 (06/2012) renumbered as ITU-T Y.4000 on 2016-02-05.
- ITU (International Telecommunication Union). (2005) The Internet of Things. ITU Internet Reports. Geneva: ITU.
- Leswing K. 21 Oct. 2016. A massive cyberattack knocked out major websites across the internet. Business Insider. <https://www.businessinsider.com/amazon-spotify-twitter-github-and-etsy-down-in-apparent-dns-attack-2016-10>
- Miller J. 12 August 2013. City of London calls halt to smartphone tracking bins. <https://www.bbc.com/news/technology-23665490>
- Maddox T. 18 February 2018. Cisco: The Internet of Everything is at tipping point. TechRepublic. <https://www.techrepublic.com/article/cisco-the-internet-of-everything-is-at-tipping-point/>
- Miller C. and Valasek C. 10 August 2015. Remote Exploitation of an Unaltered Passenger Vehicle. www.illmatics.com/Remote%20Car%20Hacking.pdf
- Ng A. 5 June 2018. Amazon will stop selling connected toy filled with security issues. Cnet. <https://www.cnet.com/news/amazon-will->

stop-selling-connected-toy-cloud-pets-filled-with-security-is-
sues/

O'Neil C. (2016) Weapons of Math Destruction: How Big Data
Increases Inequality and Threatens Democracy. New York: Broad-
way books.

Pasquale F. (2015) The Black Box Society – The Secret Algorithms
That Control Money and Information. Cambridge and London:
Harvard University Press.

Privacy International. 15 February 2019. The police can use IMSI
catchers to track your phone, and even intercept your calls and
messages. [https://privacyinternational.org/feature/2729/police-
can-use-imsi-catchers-track-your-phone-and-even-intercept-
your-calls-and](https://privacyinternational.org/feature/2729/police-can-use-imsi-catchers-track-your-phone-and-even-intercept-your-calls-and)

Sicari S., Rizzardi A., Grieco L.A., Coen-Porisini A. (2015) Security,
privacy and trust in Internet of Things: The road ahead. Computer
Networks 76.

Weber R.H. (2015) Internet of things: Privacy issues revisited. Com-
puter Law & Security review. 31.

Ethical Investment

Akiko Sato

Akiko Sato is an attorney-at-law, engaged in human rights issues both in Japan and South East Asia; specialized in Access to Justice for socially vulnerable people such as persons with disabilities, and Business and Human Rights. MA in Development Studies major in Human Rights from International Institute of Social Studies of Erasmus University Rotterdam in The Hague and a JD from Hitotsubashi University in Tokyo. Involved in Business and Human Rights project in UNDP Asia-Pacific in 2017. Conducted some field research on land grabbing and labour exploitation in Cambodia as a member of Human Rights Now, Japan-based human rights NGO. A fellow of Asia Centre, a thinktank focusing on politics and human rights in Asia based in Bangkok.

The role of investment – revisiting the conventional contention

Given that economic growth is sometimes achieved at the expense of human rights, investment is a controversial but crucial topic in the field of business and human rights. The question is how investment can occur in a way that ensures the well-being and human rights of the people involved. On the one hand, it is true that investment is a means for stimulating the economy, creating jobs, developing infrastructure, and ideally enriching the daily life of ordinary citizens. On the other hand, many precedents prove that investment can do harm if it is not done with care. In this chapter, the author would like to invite readers to reconsider what ethical investment means and why this idea can affix financial return and the Business and Human Rights agenda. On the basis of a number of recent initiatives by leading investors and actual cases on the ground both in private and public investment, there is evidence of a growing tendency to position ethics and increasingly human rights as a central consideration when investing in projects.

The evolving discussion on the importance of taking an ethics into consideration

The discussion around ethical investment is evolving for a number of reasons including religious conviction, politics and the latest trends around sustainability and BHR. The common thread is civil society. Civil society has made an influential impact on investment through advocacy particularly around the environment and human rights. What sets ethical investment apart from investment or development in general is that ethical

investors heed the direction of civil society. Ethical investors see themselves and their finances influence more directly as a part of civil society. At present, ethical investment is becoming increasingly aligned with the fundamental discourse of UN Guiding Principles on Business and Human Rights (hereafter UNGP) which is the first globally agreed guidelines explicitly aimed at holding companies accountable for human rights. The UNGPs demand that private entities respect human rights throughout their supply chain. When it

The main objective of the PRI is to incorporate ESG into investment practice. These three factors, namely environment, social, and governance, are crucial as both obstacles and opportunities. Land grabbing, forced relocation, shortages of natural resources, structural weakness, corruption, pollution, deforestation or climate change, all of these ESG issues can be detrimental to human rights and to financial forecasts. Any number of terminologies could be used – ethical, responsible, ESG, human rights-friendly. In the end, ethical investment is about giving consideration to the direct and indirect impacts investors can have on people's lives.

comes to the role of investors, they are expected to influence companies using the 'power' and leverage they can exercise through their financial influence. This cause-effect relationship is the very reason we come across, quite often, the discourse on the role of institutional investors.

Among a number of initiatives for ethical investment, the Principles for Responsible Investment (hereafter PRI) launched in 2006 which UNEP Financial Initiative and UN Global Compact proposed is no doubt well known to various stakeholders. It was established in an attempt to 'understand the investment implication of environmental, social and governance (ESG) factors and to support its international network of investor signatories in incorporating these factors into their investment and ownership decisions'. Looking at long-term interests rather than short-term growth, it promotes sustainable as well as responsible investment since it believes ultimately investors could receive higher profit from this pattern of decision making. Even though it is totally a voluntary scheme, the number of signatories is more than 2,250 including some of the biggest and influential national pension funds such as Norwegian Government Pension Fund or private asset management companies such as ABN AMRO Asser Management as of 2018.

The main objective of the PRI is to incorporate ESG into investment practice. These three factors, namely environment, social, and governance, are crucial as both obstacles and opportunities. Land grabbing, forced relocation, shortages of natural resources, structural weakness, corruption, pollution, deforestation or climate change, all of these ESG issues can be detrimental to human rights and to financial forecasts. Any number of terminologies could be used – ethical, responsible, ESG, human rights-friendly. In the end, ethical investment is about giving consideration to the direct and indirect impacts investors can have on people's lives.

The advantage of 'ethical' considerations from investors

For many years, the easiest and most effective way to cut costs so as to maximise profit, at least on the finan-

cial balance sheet, has been to seek cheaper labour and operating costs. In these scenarios, social fragility enables private companies to run their business simply by complying with national laws and legislation while ignoring international human rights norms. But the absence of reliable rule of law is a structural weakness that leaves projects and private actors susceptible. Take for example land rights. When ownership of land is not recognized and registered appropriately, people may be unable to claim their rights. States may assert ownership and create a special economic zone without providing adequate compensation for those who lose their means to live on. Investors may take advantage of this situation and experience immediate financial gain. However, these investors become part of the suffering and social tensions that result.

The reasons why investors should be ethical are not only humanitarian but also practical. If investors continue with practices such as the one described above, there is a constant risk of fallout and the possibility for social, political and legal challenges against beneficiaries of the suffering. Legal challenges might be filed to a court and last for a decade. There is also the bad reputation that can result will damage the image of investors. Investors may experience more informal backlash from local communities. And there is also the possibility that if governmental changes occur, investors that are seen as unethical may be uprooted. These are serious notes not only with regards to ethics, but also to the integrity of financial portfolios. Ethics are indispensable as part of risk management. The critical process for investors is to identify any risk which may reduce their profit in the future. In this regard, disputes with local people can damage their asset.

Conventionally, investors only react in a passive manner towards ESG issues taking place in projects where their money is used. From the civil society perspective, investors do not tend to show their commitment to the outcome OF their money spent. However, this attitude is transforming. In January 2018, BlackRock, one of the largest investors, sent a letter to companies with an emphasis on its expectation to respond to societal issues saying that 'To prosper over time, every company must not deliver financial performance, but also show how it makes a positive contribution to society.'

Another proactive action made by investors was the launch of the Investor Alliance for Human Rights in October 2017, which aims to 'provide a collective action platform to facilitate investor advocacy on a full spectrum of human rights and labour rights issues'. It issued a statement on 'Responsible Sourcing in the Jewelry Supply Chain' echoing the report published by Human Rights Watch in February 2018. This statement demands that companies in this controversial industry be held accountable for human rights violations which are prevalent in their supply chains through conducting human rights due diligence (hereafter HRDD) as prescribed by UNGP and the OECD guideline focusing on this particular sector. Interestingly, this initiative is not limited to their traditional deals with companies but attempts to go beyond that. The alliance also issued a statement to call on companies for strengthening the protection of human rights defenders (hereafter HRD) where they are exposed to high risks against even their lives. HRDs are those who are usually acting against investments that infringe on human rights. This statement clearly shows how investors transform their role from maximizing temporary financial profit to making society more sustainable.

Furthermore, investors request companies to disclose so-called non-financial information including ESG factors so that they could identify whether companies recognize issues to be addressed and seek a way to mitigate them. This, of course, would be useful for investors in a sense that they could also prevent risk to their money. Influenced by the EU Directive on disclosure of non-financial information and diversity information, regulations in other countries has sought to make disclosure of non-financial information compulsory such as the one in Singapore and Hong Kong. This set of actions indicate promising momentum that involves meaningful cooperation with civil society.

How to incorporate HRDD into investment agreements effectively and successfully?

In complying with UNGP, investors should be asked to meet the same commitments as other private entities: release the commitment to human rights from the top management, identify human risk throughout its value chain, mitigate that human rights risk, and provide

access to remedy (see UNGP 15). Similar to companies who constitute multiple suppliers, investors must explore human rights risks of borrowers accordingly since any human rights violation attributed to the investment could also be the responsibility of investors.

Apart from the UNGPs, several guidelines indicate how investors need to proceed such as the Equator Principles, risk management frameworks adopted by financial institutions, or the Environmental and Social Framework by the World Bank which was enacted on 1 October 2018 and is applied to all its investment project financing. This framework adopts the term 'Environmental and social due diligence' but when looking into the content, it says 'The purpose...is to assist the Bank in deciding whether to provide support for the proposed project and, if so, the way in which environment and social risks and impacts will be addressed in the assessment, development and implementation of the project'. This kind of framework could harmonize with the UNGPs, although it is criticized for failing to address the human rights dimension enough.

Two cases will be shared to provide a better understanding of the vitality of ethical investment. The first case is the Thilawa Special Economic Zone (SEZ) project in Myanmar funded by Official Development Assistance (ODA) of the Government of Japan which led to the establishment of a grievance mechanism involving multistakeholders. The second case is about private investment taking place in China which resulted in supply chain disclosure.

The Thilawa SEZ Case

The Thilawa SEZ, located 23 km southeast of Yangon, the capital city of Myanmar, is the first large-scale SEZ in Myanmar. Myanmar Japan Thilawa Development Ltd. (MJTD), a public-private partnership joint venture initiated by Myanmar and Japan founded in 2013 has been operating it. Japan International Corporate Agency (JICA) has supported this project through an ODA loan as well as technical assistance.

It was revealed that the affected and relocated people were not taken into consideration sufficiently throughout the construction process. The significant adverse

impact such as loss of farmland and/or access to farmland, loss of livelihood opportunities, impoverishment, loss of educational opportunities, substandard housing and basic infrastructure, access to adequate water all came into focus.

Global civil society including some prominent international NGOs accused this investment of having a serious affect on the society. Since the government of Japan realised that they could no longer underestimate the influence of voices from the ground, it announced the introduction of support for income restorations as well as multi-stakeholder engagement and compliance management efforts in late 2014. While the Myanmar government was the principle duty bearer, the Government of Japan, JICA and MJTD also held responsibilities and their action, while responsive rather than proactive and debatable with regards to sufficiency, is evidence of the active role investors can play.

The apparel company case

It is well known that garment manufacturing is a precarious industry in developing countries. In China, there are many factories which produce tons of clothes to be exported to developed countries including Japan. In January 2015, a statement revealing serious labour rights violations in select manufacturing contract companies, including overtime work, low wages, high risk and non-safety work environment, strict management and punishment system, and dysfunctional labour union, was released by a human rights NGO based in Tokyo. In response to the demand to deal with it, the Japanese company whose suppliers were responsible finally disclosed the list of its suppliers in 2018 and introduced a new grievance mechanism to rectify similar human rights violations in the future. It is expected that this practice will influence other companies to ensure alignment with Pillars 2 and 3 of the UNGPs.

Recently, select investors have decided to take more proactive actions. They divest their funds in cases where they conclude that investment may be harmful to human rights in the short or long term. However, it is debatable whether, rather than pulling out, they could be more meaningful by continuing to utilize their leverage to make the situation better. Consumers, on the

other hand, are also challenged whether they would agree to bear some part of responsibility as a beneficiary. In other words, will consumers be willing to pay higher prices to promote ethical investment?

The way forward

In comparison with existing international human rights instruments, the UNGPs clearly describe what they demand of private entities, filling an important gap in the realm of ethical investment. Stakeholders have an opportunity to shape this understanding and area of practice further. Ethical investment has the potential boost economies in a way that leaves no one behind. Through being ethical and taking human rights seriously, investment is able to bring benefits to both society and those seeking return on capital. Without an ethical dimension, investment runs a high risk of being unsustainable, short term and damaging in terms of the environment and society.

Debating Ethical Consumption

Dr. Elisabeth Valiente-Riedl

Dr Elisabeth Valiente-Riedl is a researcher and lecturer at the University of Sydney. Her primary research focusses on the impact of market-based advocacy strategies and the marketisation of research, advocacy and service delivery in the social justice sector, specifically relating to the ethics of contemporary development strategies and actors.

Introduction

'Ethical consumption' is a complex and multi-faceted concept to unpack. It exists as a description of a diverse set of practices, often wedded to contrasting if not opposing value sets, as well as a normative and aspirational goal for rearticulating the relationship between the economy and society. It is debated in theory and in practice and has experienced inter-disciplinary uptake in scholarship as well as multi-stakeholder interest in industry. It also serves as a rolling experiment which, in its short history, attracts a growing support base at the same time that its critics also grow in numbers. In this chapter, we look critically at the debates surrounding ethical consumption with the aim of shedding light on its effectiveness as a tool for advancing human rights. To do this, we begin with an examination of 'consumption' as a concept which stretches beyond mere economic transaction. We then turn to the logic of 'ethical consumption' and the rich debate regarding its scope to drive social change. Herein we find that ethical consumption is vulnerable to corporate cooptation as well as the manifestation of 'ethics lite' over meaningful advocacy. Yet its power lies in harnessing the potency of consumption as a driver of social and political change through embedding market relations with broader values including human rights. Moreover, its potential transformative capacity suggests that human rights practitioners and advocates invest in ethical consumption as a long-term project, with a view to help shape its integrity and effectiveness as a meaningful advocacy tool.

Contesting (ethical) consumption

A concern with 'consumption' traditionally falls neatly in the remit of economic scholarship. Individuals are conceptualized with reference to a specific economic function as 'consumers', and a subset of behaviors is

theorized vis-à-vis the logic of transactions within the market-place. Specifically, 'rational choice theory' frames conventional understanding of what motivates us as consumers and posits that we strive to maximize our 'utility' based on 'self-interest' (see Dickinson and Carsky, 2005: 27). As such, consumers are seen to function as individual entities in an essentially atomized marketplace. Despite not working in concert, this ability to choose and thereby influence the market and actors within, sees consumers treated as a powerful collective force in the functioning of the economy. Hutt first coined the term 'consumer sovereignty' in 1934, observing that consumers direct production through their purchasing choices (Dickinson and Carsky, 2005: 28). Yet, this observation came with the caution that under conditions of 'monopoly power' wielded by big business, consumer sovereignty could not be achieved. Indeed, beyond a competitive marketplace, there are a number of assumptions made within economic theory, that highlight potential threats to consumer sovereignty in practice.

Not only do economists assume conditions of competition in the market, which ensures consumers have meaningful choices between products and businesses, but they also assume that consumers have adequate information on which to base their decisions. Yet the conditions of production, the terms of remuneration and the labor rights and human rights that possibly fall by the wayside are typically missing from product packaging. Moreover, even economists recognize that the price system does not account for what is innocuously termed as 'externalities' (see Laffont, 1989). This term refers to the hidden costs, most popularly referring to environmental costs, which are not built into production and exchange, and which therefore do not form part of the 'information' or 'cost' that consumers base their purchasing decisions on. These weaknesses in the application of theory to practice have heightened

import when we consider the importance of consumption to livelihoods for the producers on the other end of the transaction. For example, the commodities on which developing countries typically rely continue to face poor returns in the global marketplace (see Robbins, 2003). They also have heightened consequence when we consider that consumption is pervading more and more areas of daily life. For example, services [in areas such as education and health] which were traditionally delivered as 'public goods' by governments, are now subject to the competitive norms of 'consumption' (Hansen and Schrader, 1997: 443). As such, both the fallibility but also increasing importance of consumption to our social world, including the achievement of human rights, informs the call for ethical consumption.

For some ethical consumption emerges as a pragmatic response acknowledging consumption as an all-pervading force, for others ethical consumption contains a more revolutionary agenda, which is usurped and undermined by more moderate interpretations of the phenomenon. While the 'market' and 'movement' credentials of ethical consumptions are heavily debated (e.g. see Jaffee, 2007: 11-35; Valiente-Riedl, 2012), at a minimum, ethical consumption can be understood as a market reform or market correction-oriented phenomenon. In this, it largely builds on the conceptual foundations laid down within conventional economic theory. In the first instance, as the discussion above has shown, there remain significant barriers for consumers to make 'informed' choices. Herein, social labels – a key device within ethical consumption – directly work to address "the lack of information [consumers receive] regarding production methods" (see Basu and Hicks, 2008: 470). In this way, ethical consumption works to strengthen the operation of the consumer sovereignty thesis. Indeed, and perhaps somewhat simplistically, we could conclude that ethical consumption simply broadens traditional categories of 'utility' beyond price and quality, extending for example, to a concern with 'externalities' but also the social cost of production and the behavior of the businesses which sell products and services in the marketplace. Yet exactly herein lie the more transformative elements of ethical consumption.

Purchasing decisions for ethical consumers stretch well beyond individualized economic considerations

and as such, transform their economic agency into political agency. The function of 'buying' becomes an act of 'voting'. Indeed, for Dickinson and Carsky (2005: 25-6), ethical consumption substitutes 'utility' with 'consumer vote' and replaces 'self-interest' with 'community interest'. The ramifications of this are significant as this re-articulates ethical consumers as agents of broader social and political movements. Harrison (2005: 66) highlights the political import of ethical consumption:

The rise of market campaigning and ethical purchase behavior has brought with it notions of a consumer responsibility. Since responsibility is traditionally an idea belonging more to citizenship, it has helped to restore to consumption the idea of citizenship.

Through this fusing of 'consumption' and 'citizenship' we see 'ethical consumption' push beyond the boundaries of economic transaction to highly political transaction. Despite this transformative conception of ethical consumers, the transformative potential of ethical consumption is debated.

Sword, pen or shopping cart?

A popular English saying claims that 'the pen is mightier than the sword', professing that change is best pursued through words instead of violence. The ethical consumption phenomena seeks to marry the realms of consumption and citizen action and suggests we might place 'shopping' your way to change as a third option! In this section, we consider some of the debates that continue to raise questions about the scope to achieve social justice through (ethical) consumption. On the one hand, there are competing sets of priorities which manifest diverse and sometimes opposing ethical markets. On the other, many see ethical consumption as a rite of the privileged, with limited relevance and opportunity for marginalized consumers to participate. More broadly, the role of ethical consumption as a phenomenon which transforms or alternatively reinforces traditional market relations is contested. Within this, its capacity to influence business behavior remains a sticking point. This is where it's 'market' or 'movement' credentials are heavily debated. We will look at each of

these contentious issues in turn.

In the first instance, the values that underpin ethical consumption are not homogeneous. Indeed, for many, there is a strong tension between the concepts of 'ethical consumption' and the 'ethics of consumption', where the latter demands we consume less to achieve sustainability rather than more irrespective of higher ethical standards (Barnett, Cafaro and Newholm, 2005: 21). Within a strategy of 'ethical consumption' itself, there are many competing ethical considerations which remain divisive (see Low and Davenport, 2007: 129). For example, concerns with health, the environment, labor rights, livelihoods and so on do not always align. We might consider, as an illustration, fair trades emphasis on advancing economic and labour rights with our purchases compared to arguments for 'buying locally' to minimise our carbon footprint. As discussed earlier, there is also a deeper philosophical dispute contesting whether the end-game is working within or in opposition to the market. Low and Davenport (2007: 339-34) note that the medium of shopping reinforces rather than opposes the logic of the market. This again is evident in the fair trade example, which was originally conceived as a solidarity movement, working to challenge and overcome traditional market values and practices. Today many 'fair trade businesses' continue to hold this vision and criticize the emergence of a 'fairtrade labelling' market which partners with conventional businesses in conventional exchange pathways (see Valiente-Riedl, 2016).

Broadly, the impact that ethical consumption has on business structures and behavior is a leading concern which continues to divide support for ethical consumption today. In many ways, ethical consumption can be fundamentally understood as a strategy that seeks to influence business behavior through influencing (ethical) consumer behavior. The capacity for consumers to direct businesses is recognized through claims that businesses are subject to a 'triple bottom line' (see Elkington, 2018). According to this thesis, not only do they compete on price to boost profit margins (this correlates with a conventional conception of 'utility' which conceives of consumers as motivated by price), rather, businesses are also affected by environmental and social sustainability considerations. However, many see

this 'partnering' with conventional businesses as problematic. They cite the potential for 'fair washing' the general behavior of a business, despite only minimal commitments to ethical practice (see Jaffee and Howard, 2016 for a discussion of this concept). Mayo (2005: xviii) goes so far as to claim that ethical consumptions has presented business with significant market opportunities with limited effort at change:

the discovery... [of ethical consumers] by commercial giants is also leading to shallow 'ethics lite' products, stripped of their values and their transformative power

The integrity of ethical partnerships and products, however, is not the only hurdle consumers face in ethical markets.

Ethical consumption pre-supposes 'consumer choice'. Herein we see the geo-politics of 'ethical consumption' emerge, with participation typically restricted to the wealthy class of consumers who can afford it (see Barnett, Cafaro and Newholm, 2005: 22 and Streek, 2012: 46). Low and Davenport (2007: 341) argue that "the idea of being an ethical consumer as conceptualized has little resonance with Southern consumers". On the other hand, some argue that this uneven scope to participate in ethical markets is appropriate:

It could be argued that the greater the monetary value of the vote, the greater the responsibility. Thus, the rich bear a greater burden in the context of economic markets and it becomes not quite one person, one vote. We argue that consumers, particularly rich consumers, should do more than maximize their utilities (Dickinson and Carsky, 2005: 26).

Moreover, the level of disenfranchisement may be relative to the form of ethical practice available. Clouder and Harrison (2005: 91) note that while 'boycotting' (positive buying like fair trade) is restricted to wealthier consumers, 'boycotting' is available across the board. So, while there is significant skepticism that ethical consumption presents as an 'exclusive club' which only privileged consumers can wield their power through, there remain optimistic interpretations of this imbalance as well as hope that more and more consumers will have opportunity to participate as ethical consump-

tion slowly becomes the 'norm' rather than the exception. The phenomenal expansion of ethical markets in many sectors and countries attests to this potential scalability.

Here, the rush of big corporations to participate in ethical markets or flog ethical products/make ethical claims of their own – irrespective of the strength of their offerings – is itself evidence that ethical consumers are influencing the market and actors within. It also reveals an opportunity for human rights actors to influence the integrity of ethical offerings and to ensure that individual consumers are provided with meaningful ethical offerings to choose from.

The future of ethical consumption is hard to predict and expectations, of course, are divided on what ethical consumption can and should achieve. For some, ethical consumption co-opts traditional political action. Streek (2012: 46), for example, raises concern that ethical consumption not only excludes those living in poverty, but also works to de-value collective action in the public arena, a form of political action which does not exclude participants by 'purchasing power'. These kinds of observations raise concern about the limits of the various strands of action within the ethical consumption repertoire, which seamlessly blend into commercial markets. On the other hand, optimism that ethical consumption by a few has the power to transform values that underpin market relations also persists. For example, Clouder and Harrison (2005: 89) point to the 'primary' and 'secondary' effects that ethical consumption can have on an industry or sector as a whole. Here, the rush of big corporations to participate in ethical markets or flog ethical products/make ethical claims of their own – irrespective of the strength of

their offerings – is itself evidence that ethical consumers are influencing the market and actors within. It also reveals an opportunity for human rights actors to influence the integrity of ethical offerings and to ensure that individual consumers are provided with meaningful ethical offerings to choose from.

Conclusion

Consumption has long been contested and debate has re-emerged in strength as interest in the impact of the economy and actors within has grown. As consumption increasingly dominates daily life – in and beyond the purchase of commodities – there has also been increasing interest in the political and social dimensions of our purchases. This has resulted in the broadening of instrumental conceptions of 'consumer' to richer concepts such as 'consumer citizen'. In this context, the emergence of 'ethical consumption' into contemporary vernacular and market arrangements is not surprising. However, the role and limitations of ethical consumption and its market-opposing, reinforcing, or reforming credentials remain as contested as the causes ethical consumers take on with their wallets. The jury is also out on whether ethical consumers exert positive influence on business behaviour or alternatively, have their dollars co-opted by businesses masquerading their products as ethical. Yet amid this confusion and contention, and perhaps because of it, an imperative for human rights advocates and practitioners to invest in ethical consumption emerges.

We might best conceive of ethical consumption as a live and malleable experiment. It is this malleability that makes ethical consumption worth investing in, both in proactive pursuit of its capacity to drive change as well as defensive action to stave off potential misleading co-optation of consumer support by big business. Ethical consumption remains only one of many tools available to advance human rights, and equity concerns alone demand that practitioners and advocates continue to draw on a broad advocacy toolkit. Yet one thing is certain, as more and more consumers support ethical consumption, it is increasingly integral that they have guidance in making ethical choices and that their efforts to advocate for meaningful change are not co-opted. The demonstrated capacity for ethical

markets to mobilise individuals to a collective cause is also worth channeling towards the achievement of human rights. While the ongoing problems with ethical markets remain, 'the horse has bolted' and for better or worse, those individuals that choose to vote with their dollars rely on authoritative and legitimate voices and purchasing options to guide their choices. While time will tell if ethical consumption can deliver on its promises, it remains an emerging and evolving strategy that will benefit from applied contestation and multi-stakeholder development if it has any hope to drive meaningful social change.

References

- Barnett, Clive; Cafaro, Philip and Terry Newholm. (2005) "Philosophy and Ethical Consumption". In *The Ethical Consumer*, edited by Rob Harrison, Terry Newholm and Deirdre Shaw, 11-24. London, SAGE Publications.
- Basu, Arnab K. and Robert L. Hicks. (2008) "Label performance and the willingness to pay for Fair Trade coffee: a cross-national perspective". *International Consumer Studies* 32: 470-478.
- Clouder, Scott and Rob Harrison. (2005) "The Effectiveness of Ethical Consumer Behaviour". In *The Ethical Consumer*, edited by Rob Harrison, Terry Newholm and Deirdre Shaw, 89-104. London, SAGE Publications.
- Dickinson, Roger A. and Mary L. Carsky. (2005) "The Consumer as Economic Voter". In *The Ethical Consumer*, edited by Rob Harrison, Terry Newholm and Deirdre Shaw, 25-36. London, SAGE Publications.
- Elkington, J. (2018) "25 Years Ago I Coined the Phrase "Triple Bottom Line." Here's Why It's Time to Rethink It". *Harvard Business Review* (25 June 2018).
- Hansen, Ursula and Ulf Schrader. (1997) "A Modern Model of Consumption for a Sustainable Society". *Journal of Consumer Policy* 20, no.4 (December 1997): 443-468.
- Harrison, Rob. (2005) "Pressure Groups, Campaigns and Consumers". In *The Ethical Consumer*, edited by Rob Harrison, Terry Newholm and Deirdre Shaw, 55-67. London, SAGE Publications.
- Harrison, Rob; Newholm, Terry and Deirdre Shaw. (2005) "Introduction". In *The Ethical Consumer*, edited by Rob Harrison, Terry Newholm and Deirdre Shaw, 1-8. London, SAGE Publications.
- Jaffee, Daniel. (2007) *Brewing Justice: Fair Trade Coffee, Sustainability, and Survival*. Berkeley, Los Angeles: University of California Press.
- Jaffee, Daniel and Howard, Philip H. (2016) "Who's the fairest of them all? The fractured landscape of U.S. fair trade certification". *Agriculture and Human Values* 33, issue 4 (December 2016): 813-826.
- Laffont JJ. (1989) "Externalities". In *Allocation, Information and Markets* edited by Eatwell J., Milgate M., Newman P, 112-113. London, Palgrave MacMillan.
- Low, William and Eileen Davenport. (2007) "To boldly go...exploring ethical spaces to re-politicise ethical consumption and fair trade". *Journal of Consumer Behaviour* 6: 336-348.
- Mayo, Ed. (2005) "Foreword". In *The Ethical Consumer*, edited by Rob Harrison, Terry Newholm and Deirdre Shaw, xvii-xviii. London, SAGE Publications.
- Newholm, Terry and Deirdre Shaw. (2007) "Editorial – Studying the ethical consumer: A review of Research". *Journal of Consumer Behaviour* 6 (2007): 253-270.
- Robbins, Peter. (2003) *Stolen Fruit: The Tropical Commodities Disaster*. London, Zed Books.
- Streek, Wolfgang. (2012) "Citizens as Customers: Considerations on the New Politics of Consumption". *New Left Review*, no 76, (July/August 2012): 27-47.
- Valiente-Riedl, Elisabeth. (2016) "To Be Free And Fair? Debating Fair Trade's Shifting Response To Global Inequality". *Journal of Australian Political Economy* 78: 159-185.
- Samuel Beckett, *Worstward Ho* (New York: Grove Press Inc., 1983).
- E.g. the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights devised by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) ("UN Draft Norms") were not advanced by the then UN Human Rights Commission.
- Or, in other words, GXG thrives best in the "'Goldilocks Zone' – where the balance between too much and too little agreement, like the temperature of Goldilocks' porridge, is 'just right'": de Búrca, Keohane and Sabel 2014: 484.
- Such a group includes, amongst others, 21 member states of the European Union; Japan, South Korea, Indonesia, Thailand, Malaysia, Argentina, Mexico, Chile, Peru and Colombia: DIHR 2018.
- For example, the International Organisation of Employers and the Investor Alliance for Human Rights.



A New Era of Accountability: Towards a BHR Treaty?

Chapter Synopses: A new era of accountability: towards a BHR treaty?

“Impasse threatens.” Dr. Claire Methven O’Brien highlights the persisting stalemate over a binding international treaty on business and human rights before proposing a viable way forward. Drawing on broader scholarly analyses of the conditions under which human rights treaties succeed in driving change, she argues that a framework convention – “a treaty based on broad principles, to be supplemented by more detailed standards on particular topics devised over time” offers a feasible and perhaps even optimal way forward. If the preconditions for a conventional BHR treaty to succeed are not in place, the current landscape, she argues, is apt for an experimentalist regime. For example, governments generally agree on basic principles, embodied in the UNGPs, and a mass of diverse stakeholders are poised to participate in regulatory efforts. However, because the “BHR agenda penetrates almost every area of public and corporate law and policy, from food to finance, corporate governance to court procedure” a fully comprehensive international instrument on BHR is untenable. This scenario, Methven O’Brien argues, presents an opportunity for a “BHR framework convention based on the UNGPs and NAPs to flourish.” To this end, the chapter calls for further work to define the contours of a framework convention, making a number of concrete recommendations to this end.

Dr. Humberto Cantú Rivera explores the nuances of the extraterritorial obligations (ETOs) of state in the BHR context. Cantú Rivera deconstructs the application of both prescriptive (regulatory) and adjudicative (remedial) jurisdiction over conduct taking place abroad by looking at ETOs in the work of the UN Treaty Bodies and in the context of BHR treaty negotiations. The Human Rights Committee and Committee on Economic, Social and Cultural Rights offer interpretations clarifying that while states may not exercise effective “control” over business enterprises abroad, they do exercise “influence” providing a basis for ETOs:

“... the obligations of States do not stop at their territorial borders. To the contrary, as part of its hermeneutic function, both treaty bodies have contributed

to delineate that a duty to protect human rights necessarily involves both a preventive function (as suggested supra, via legislation imposing obligations on corporate actors vis-à-vis their global or transnational operations) and a redressive function (by providing access to remedies to victims of business-related human rights abuses), with the latter being subject only to a reasonableness exception framed by the existence of a causal or other link between its courts, the claimants and the facts of a given case.”

However, the rather definitive view of ETOs that has come through the work of treaty bodies is contrasted by ETO discussions underway around BHR treaty negotiations where participants are witness to “specific doubts regarding the applicability and convenience of establishing such a general jurisdictional rule.” The lack of continuity and clarity on ETOs is a principle challenge in the field that, Cantú Rivera concludes, requires an honest accounting of variable perspectives.

The collection concludes with an interview with Professor Surya Deva. Responding to four key questions, Deva conveys a sentiment of determination that engages inconvenient realities head on. Speaking to the fate of the BHR field, Deva cites both cause for optimism and concern: “[M]y concern is that while more and more states and corporations are now constantly talking about BHR issues, most of them are not doing enough to subject profit maximisation to human rights norms.” Deva has worked to bring more attention to access to effective remedies as a pillar of the UNGPs and the BHR agenda. To this end, “access to remedy has become a dedicated work stream of the Working Group” and Deva had the opportunity to present a report to the UN General Assembly in October 2017 which “articulated a transformative idea of remedies which keep rights holders central to the entire process.” Progress is underway on advancing effective remedies as an area of focus and Deva intends to take this work further through a number of avenues. When asked about the open response written to Professor

John Ruggie regarding some points of disagreement or dialogue around Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Ed. Deva and Bilchitz), Deva highlighted the utility and embrace of different roles in the BHR field:

No regulatory initiative could be perfect, and it should be the responsibility of human rights scholars to expose limitations of evolving regulatory initiatives to pave way for continuous improvement. My past academic critique of the UNGPs should be seen in this context. It is for others to judge the value of that critique: in my view, it questioned an uncritical “cult-like” acceptance of the UNGPs and stressed that while the UNGPs provide a useful framework, binding regulations at national, regional and international levels would also be needed to ensure business respect for human rights.

In my role as a member of the Working Group, rather than critiquing the UNGPs from the outside, I am trying to strengthen them from the inside. The 2017 access to remedy report is a case in point, as it highlights what an effective remedy under the UNGPs should mean in practice. The June 2019 report (A/HRC/41/43) to the Human Rights Council provides another example of this: it develop a gender framework and guidance for the UNGPs and offers concrete guidance to both states and businesses on how to integrate a gender perspective in implementing the UNGPs.

To a final question about the zero-draft and the prospect of legally binding BHR instrument, Deva reiterates a long-held position:

My consistent position has been that (transnational) corporations are difficult regulatory targets and that multiple regulatory initiatives – both voluntary and obligatory and at different levels – should be employed in tandem to achieve an acceptable level of regulatory efficacy. The proposed treaty should build on the UNGPs to operate as a complementary instrument. There is, therefore, no contradiction in states implementing the UNGPs and supporting the process to negotiate a BHR treaty.

And in a concluding message, Deva reminds that the treaty is neither a fix all nor an end in itself:

[A]ll stakeholders should also understand that although a legally binding international instrument is needed, this will not be a panacea to fix all exiting regulatory gaps in the BHR field. This will only be one small step in building a new global order which accords human rights the importance that they deserve.

Experimentalist Global Governance and the case for a Framework Convention based on the UN Guiding Principles on Business and Human Rights

Dr. Claire Methven O'Brien

Claire Methven O'Brien, LL.M, PhD, is Chief Adviser, Business and Human Rights at the Danish Institute for Human Rights and Honorary Lecture at the School of Management of the University of St. Andrews. Email: cob@humanrights.dk.

“Try again. Fail again. Fail better.”¹¹³

Introduction

The state duty to protect against business-related human rights abuses, the corporate responsibility to respect human rights and the right of victims of business-related abuses to an effective remedy, embodied in the UN Framework and further elaborated by the UN Guiding Principles on Business and Human Rights (“UNGPs”; UNHRC 2008, 2011) are now supported by significant consensus. Yet opinion remains divided on how they may best be realised in practice.

In the wake of the UNGPs states, businesses and other actors across world regions have launched implementation initiatives and specialised standards to prevent and redress business-related human rights abuses in different sectors, value chains and geographies, yielding a diversified and dynamic regulatory matrix, encompassing incentive- and penalty-based, and “hard” and “soft” legal regimes. One element in this regulatory space, National Action Plans (NAPs) have been adopted, at time of writing, by 21 states, representing 53% of global foreign direct investment and 46% of global GDP in 2017 (DIHR 2018).

On the other hand, supporters of a “binding” international treaty on business and human rights (BHR) question the value of the UNGPs and their regulatory sequelae, maintaining the need for more detailed universal minimum standards and international “enforcement” mechanisms. Yet attempts to devise such standards in the past have failed.¹¹⁴ Meanwhile commentaries by states to the “Zero Draft” of the “Legally Binding Instrument to Regulate, in International Human

Rights Law, the Activities of Transnational Corporations and Other Business Enterprises” presented by the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG) reveal the persistence of past controversies, as well as new ones, across a gamut of issues (UNWebTV 2017 and 2018).

Impasse threatens. Yet there may be light on the horizon. Significant players have acknowledged a framework convention on business and human rights (“BHR”), that is, a treaty based on broad principles, to be supplemented by more detailed standards on particular topics devised over time, as a possible point of convergence (e.g. Gallegos 2018).

Building on earlier work (Methven O'Brien 2007, 2009, 2011, 2015, 2016; Ford and Methven O'Brien 2017) here I further develop one argument for a BHR framework convention based on the UNGPs and BHR national action plans (“NAPs”). Specifically, I contend that support for a framework convention can be found in the theoretical-normative concept of “global experimentalist governance” (“GXG”; de Búrca, Keohane, and Sabel, 2014). Section 2 outlines the concept of GXG and its application to human rights treaty regimes. Section 3 argues that four preconditions for an effective experimentalist regime, as described by scholars, might be satisfied for a BHR framework convention based on the UNGPs and NAPs. Section 4 sketches some elements a BHR framework convention could include, consistently with GXG precepts. Section 5 concludes.

Experimentalist global human rights governance: the thesis outlined

Most advocates of human rights treaties assume they have a positive influence on enjoyment of human rights

“on the ground”. But whether treaties are effective in influencing state conduct and, if so, to what extent, why and how, are questions keenly debated by scholars (e.g. Hathaway 2002, Simmons 2009, Posner 2014). Some have denied, for instance, that treaties drive states’ substantive compliance with obligations arising under them. Correlations between treaty ratifications and levels of human rights violations across states, they claim, indicate that treaties may fail to improve states’ human rights performance (e.g. Hathaway 2002, 2007; Hafner-Burton and Tsutsui 2005, Hafner-Burton and Tsutsui 2007; Hafner-Burton, Tsutsui and Meyer 2008).

One reason for this may be that ratification is viewed by external actors as demonstrating state compliance with treaty obligations, shielding governments from pressure to undertake substantive reforms (Hathaway 2002). Participation by state representatives in formal reporting procedures can also become “decoupled” from realities at the domestic level and divert attention from local challenges and non-state actors’ attempts to address them (Jamali 2015, Hafner-Burton and Tsutsui 2005).

Hence, some suggest, treaty regimes expose human rights to the critique of allowing states to clothe themselves in the mantle of ‘doing something’ while the sustained efforts needed to strengthen legislative and policy frameworks, institutions and capacity remain lacking at home (Evans and Hancock 1998). It should not be assumed, then, that violations will be resolved by the existence of treaties per se (Hafner-Burton and Tsutsui 2005).

On the other hand, constructivist analyses (e.g. Chayes and Chayes 1993; Koh 1999) and studies of transnational human rights advocacy networks and the “norm cascade” reveal that human rights treaties can have positive impacts, when embedded in specific constellations of actors, processes and institutions (Keck and Sikkink 1998; Risse, Ropp, and Sikkink 1999; Simmons 2009; see further Neumeyer 2005), for instance, via ongoing processes of “socialization” (Goodman and Jinks 2013).

Echoing such insights, experimentalist human rights governance (de Búrca 2016) is an idea that applies the

broader concept of GXG to human rights treaties. The latter refers to,

“an institutionalised process of participatory and multi-level collective problem-solving, in which problems (and the means of addressing them) are framed in an open-ended way, and subjected to periodic revision by various forms of peer review in the light of locally generated knowledge” (de Búrca, Keohane and Sabel 2014: 477)

Like polycentrism, reflexive and multi-level governance theories, the GXG thesis takes point of departure in the complex, differentiated character of increasingly integrated, technologically-driven and functionally-specialised societies that are at the same time criss-crossed by plethora of national, transnational, international and thematic regulatory regimes intended to manage collective action problems, risk and externalities (Methven O’Brien 2009).

In this environment, top-down, centralised rule-making can generate standards that become quickly obsolete; fail to accommodate local diversity; and equally miss opportunities to leverage implementation and monitoring capacities dispersed across society on the transnational as well as national plane. As a result, GXG proponents encourage, as more effective and legitimate, the adoption of “provisional rules or frameworks that are elaborated over time through the practice of those affected by and in a position to help implement them, and routinely monitored and revised through a form of peer review” (de Búrca 2017), particularly where regulatory goals are complex and contested, making “centrally imposed solutions...unworkable” (de Búrca, Keohane, and Sabel 2014: 478, citing Ostrom 1990).

In idealised form, a GXG regime comprises a five-step cyclical process: 1) reflection and discussion amongst stakeholders of a common problem; 2) articulation of a framework understanding with open-ended goals; 3) implementation of these goals by contextually-situated actors with knowledge of local conditions and discretion to adapt the framework norms to different contexts; 4) continuous feedback, allowing for reporting and monitoring, with outcomes subject to peer review; 5) periodic re-evaluation and revision of the defined at

step 2) in light of findings generated by peer review (de Búrca, Keohane, and Sabel 2014).

A more specific formulation of the GXG thesis, “Experimentalist Human Rights Governance,” suggests that human rights treaty regimes can partly embody these five steps. Satisfying respectively the first, second and third of the 5 GXG criteria mentioned above, such treaties may be adopted following wide deliberation; they express goals (that is, overarching principles and rights) that are “open-ended,” evolutive and (within limits) responsive to local contexts, rather than static over time, closed and specific; and they permit governments a broad margin of discretion in determining their manner of implementation. Where human rights treaties succeed in driving change, this is often because an active domestic civil society promotes progressive interpretations of international standards contextualised to domestic circumstances, while also providing close local knowledge and feedback to transnational actors and international institutions that can help hold the government to account, thus explaining the finding that an active domestic civil society engaged with the system is a precondition of human rights treaties’ positive compliance effects (de Búrca 2017).

Conditions of effective experimentalist global governance regimes

Experimentalist regimes, according to their theorists, can be more effective and legitimate than other global governance approaches, but only under certain circumstances. This section considers whether each of four conditions identified by GXG scholars in this context could be satisfied by a BHR framework convention based on the UNGPs and NAPs.

Governments agree on basic principles

Its proponents contend that GXG may be appropriate where there is a “thin consensus” amongst governments over basic principles that leaves open “important questions of implementation and the implications of initial commitments”.¹¹⁵

The UNGPs can be seen to be backed by such a “thin” global consensus. Though high-level and open-ended

in their formulation, over 30 countries have developed or are developing UNGPs NAPs: 20 in Europe, 6 in the Americas, 4 in Asia and 2 in Africa (DIHR 2018). The UNGPs have also drawn explicit support at European level (European Commission 2011, Council of Europe 2016) while the African Union is preparing to adopt a UNGPs-aligned BHR policy (African Union 2017). The OECD, and a wide range of other economic and governance actors as well as many businesses have introduced references to UNGPs in relevant policies (Methven O’Brien and Martin-Ortega 2019, Business and Human Rights Resource Centre 2018). An impressive implementation effort since 2011 that ranks favourably by comparison with any human rights treaties historically, this likewise suggests cross-government agreement on “basic principles”.

By contrast, in the context of the IGWG process, states presently are not and seem less likely in the future to be in agreement, even on basic principles. For now, for instance, they remain divided on the class of businesses that might be held legally responsible for human rights abuses, with some maintaining that a treaty should address only transnational corporations, while others suggest it should refer to the broader class of all business enterprises already relied on by the UNGPs (UNWebTV 2017, 2018). A further area of divergence is whether the scope of “human rights” should be defined with reference to all internationally recognised rights or “all” human rights including those recognised by domestic legal orders (UNWebTV 2018).

Besides, the ambition to create direct corporate human rights obligations seems ever fated to flounder on international human rights law’s constitutive commitment to the role of the state as primary duty bearer. The wide-ranging legal, institutional and operational measures states are required to implement in order to respect, protect and fulfil all human rights, economic and social, as well as civil and political, are an ill fit with corporations, given their narrowly-defined legal purposes, profit-making function and lack of democratic credentials or governmental mandate (UNWebTV 2018; cf. Černič 2015, Bilchitz 2016). Likewise, the notion of extraterritorial duties of home states to control transnational corporations’ foreign subsidiaries meets with the apparently immovable objects of state sovereignty

and the still primarily territorial nature of jurisdiction under human rights treaties (Methven O'Brien 2018; UNWebTV 2018).

Comprehensive rules cannot be formulated or overseen

Where states agree on narrowly expressed rules capable of predictable application, traditional hierarchical governance systems focused on centralised oversight and enforcement typically prevail. A second condition of experimentalist regimes, by contrast, is that "governments are unable to formulate a comprehensive set of [international] rules and effectively monitor compliance with them" (de Búrca, Keohane and Sabel 2014: 483).

Turning first to comprehensiveness, the BHR agenda penetrates almost every area of public and corporate law and policy, from food to finance, corporate governance to court procedure. Treaties, as legal agreements between states, must be of discrete focus and finite length and, given the complex and resource-intensive process of treaty negotiation, are difficult to amend once concluded, even via additional protocols. In principle, then, it is hard to see how a conventional BHR treaty could manage to address all its relevant subject matter. Moreover, defining detailed prescriptive rules for all states in the areas of substantive and procedural criminal and civil law is rendered difficult, if not impossible, by the diversity of national legal systems (e.g. Russian Federation 2018).

As regards monitoring and compliance, the almost boundless scope of BHR principles across multiple policy domains just noted renders problematic the notion of centralised enforcement. To start, this would stretch any enforcement body in terms both of expertise and resources. Moreover, domestic rules in areas including product and food safety, data protection and privacy, employment protection, civil remedies and criminal procedure, corporate governance and environmental protection often embody balances carefully struck by national authorities between competing interests and arguments, as well as individual countries' legal, institutional, historical and political contexts, which international rules and institutions may be ill-suited to overturn, in the absence of specifically-termed international treaty commitments. Even across regional blocs,

securing agreement amongst states on common legal standards in any single one of the above areas is typically a painful and protracted process, as demonstrated by experiences in the EU of negotiating Directives on public procurement and non-financial reporting, for example, suggesting that global binding rules on such issues may be a vanishing prospect.

Treaties, as legal agreements between states, must be of discrete focus and finite length and, given the complex and resource-intensive process of treaty negotiation, are difficult to amend once concluded, even via additional protocols. In principle, then, it is hard to see how a conventional BHR treaty could manage to address all its relevant subject matter.

Stakeholder participation

In the context of GXG regimes "the cooperation of... civil society actors either as agenda setters or problems solvers (and sometimes both)" is indispensable (de Búrca, Keohane and Sabel 2014: 484). Thousands of NGOs, multi-stakeholder initiatives, self-organised grassroots communities, business and labour organisations, academics and media actors are already organised and engaged around BHR issues, the UNGPs and specialised UNGPs-based efforts specifically. This can be seen, for instance, at global level in the UN Forum on Business and Human rights, attended by thousands of participants annually and via contributions hosted by platforms such as the Business and Human Rights Resource Centre; in regional level networks and gatherings; at national level, in UN Global Compact Networks and similar endeavours; civil society and business participation in the development of NAPs and related exercises (DIHR 2017); and transnationally in the form of specialised professional, thematic and value-chain based institutions and networks.

Critical mass

Finally, if experimentalist governance regimes are to be effective, key actors must be willing to cooperate. This further entails, GXG scholars suggest, that there should be a risk for states that “an alternative, less attractive regime that none of them favors” will be imposed in the event of their default.

Without more work to sketch the contours of a framework convention, it remains hard to assess whether such an instrument would secure the support of sufficient states, and enough significant economies amongst them, to guarantee its influence and viability. Still, there would seem a good prospect of engagement by states that have already invested political capital in the UNGPs, including those that have initiated national or regional implementation measures and, in particular, those that have published NAPs or which will do so soon.¹¹⁶ This would also seem to apply to a range of influential employer and investor groupings.¹¹⁷

For many such actors, for different reasons, the prospect of a new BHR treaty on non-UNGPs lines seems unappealing. Admittedly, given prevailing power constellations, it appears unlikely that the “imposition” of a BHR treaty via the IGWG process constitutes a real “threat”, in the sense that GXG scholars convey. A framework convention might be exposed, then, to some risk of obstructionism: in the absence of a convincing “penalty for default”, states who sign it might later try to stymie its effectiveness. On the other hand, this risk affects other human rights treaties, and a framework convention affected by this weakness would still seem to offer better prospects of promoting implementation and compliance than a comprehensive single treaty that failed to enter into effect, for lack of ratifications, or to reach the point of signature at all.

Sketching a BHR framework convention

Drawing on the 5-step cycle described above, and the World Health Organisation’s Framework Convention on Tobacco Control (“WHO Framework Convention”, WHO 2005), this section sketches elements that a framework convention built on the UNGPs and NAPs might incorporate.

Part II of the WHO Framework Convention sets out its “Objective”, “guiding principles” and “general obligations” of states parties arising under it. Mirroring this structure and approach, a framework convention might include the following elements.

i Statement of overall objective

“To promote the effective implementation of the state duty to protect, the corporate responsibility to respect and the right to effective remedy with regard to business activities, by providing a framework of measures to be implemented progressively by the Parties at the national, regional and international levels”

ii Statement of Guiding Principles

“To achieve the objective of this Convention and to implement its provisions, the Parties shall be guided by and promote the UN Guiding Principles on Business and Human Rights, set out below...”

Given the novelty of the BHR field, knowledge about which regulatory approaches “work” best in the BHR sphere – the elusive “smart mix” (Ruggie 2013: xxiii; cf. Kinderman 2016) - is still emergent and sparse, and a firm evidence-base on which to compare the strengths and weaknesses of different approaches is still lacking. Accordingly, diverse national experiences represent invaluable “raw data” that can inform the gradual definition, over time, of universal norms and goals. Rather than imposing, now, a single model of BHR regulation, a framework convention, to which additional thematic protocols can be later appended, would allow continuing policy innovation, in line with new issues, risks and technologies, as they develop.

At the same time, NAPs and a structured review process based on them would render more visible countries’ different domestic implementation efforts, their respective shortcomings and virtues, promoting and accelerating convergence around those capable of delivering the best results. Thus, a Framework Convention might contain the following clauses:

iii Statement of states parties' general obligations

- a. Each Party shall develop, implement, periodically update and review comprehensive multi-sectoral national action plans on business and human rights, in accordance with this Convention and the protocols to which it is a Party.
- b. Towards this end, each Party shall, in accordance with its capabilities:

Establish or reinforce and finance a national coordinating mechanism or focal points on business and human rights

Adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing, and enhancing effective access to remedy in relation to, business-related human rights abuses

- c. The Parties shall cooperate in the formulation of proposed measures, procedures and guidelines for the implementation of the Convention and the protocols to which they are parties
- d. The Parties shall cooperate, as appropriate, with competent international and regional intergovernmental organisations and other bodies to achieve the objectives of the Convention and the protocols to which they are Parties
- e. The Parties shall, within means and resources at their disposal, cooperate to raise financial resources for effective implementation of the Convention through bilateral and multilateral funding mechanisms.

iv Substantive elements

The WHO Framework Convention next contains clauses on substantive measures, for instance, to address the supply and demand for tobacco, environmental protection and liability. Like the UNGPs, these clauses are in qualified terms, and encourage states to adopt

measures in certain functional areas, rather than expressing obligations to implement specific measures. Thus, for instance, Article 8 addresses Protection from exposure to tobacco smoke and provides:

(2) Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

For a BHR framework convention based on the UNGPs, substantive clauses could be grouped in sections addressing each of the three pillars of the UN Framework, and phrased in similar terms. Thus as a tentative example, one clause addressing UNGP 1 might provide that:

(2) Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, promoting the undertaking of effective human rights due diligence by business enterprises within its territory and/or jurisdiction.

v Development of the Convention

Additional protocols might be adopted, as under the WHO Framework Convention, addressing guidance to states parties on such diverse matters as judicial and non-judicial remedies, non-financial reporting, state-owned enterprises, public procurement, corporate human rights reporting, and so on, in line with new challenges and insights on effective practices as these emerge.

vi Clause on relationship between the Convention and other agreements and legal instruments

Finally, to facilitate progressive development of BHR norms and practices at international level, and to ensure that international norms are a floor, rather than a ceiling, a saving clause might read:

“In order to promote implementation of UN Framework on Business and Human Rights, Parties are encouraged to implement measures beyond those required by this Convention and its Protocols, and nothing in this instrument shall prevent a party from imposing stricter requirements that are consistent with their provisions and are in accordance with international law”.

Conclusion

Making human rights standards effective in the sphere of business activities, if possible at all, will require continuing deep economic, political and institutional transformation, as well as commitment, resources and sustained efforts of a myriad of actors. Unfortunately, while many continue to work with the UNGPs, unproductive debate in the IGWG may unintentionally jeopardise further progress through a form of “planning blight”. If it were eventually to emerge, on the other hand, a new treaty lacking anchorage in the UNGPs could undermine implementation and institutionalisation efforts that, albeit incremental, have taken years of activism, dialogue, education and analysis to achieve. A BHR framework convention, besides its potential merits as highlighted by the GXG thesis as analysed above, might also then have the virtue of avoiding that these precious investments, by civil society, governments and businesses, are squandered. Given the political parting of clouds, in the context of the IGWG process, that might allow a BHR framework convention based on the UNGPs and NAPs to flourish, and the urgency of securing improved protection of human rights and remediation of abuses in the business context, further work by scholars and activists is now warranted to further explore the strengths, weaknesses, opportunities and risks, associated with this approach.

References

- African Union. (2017) "Draft African Union Policy on Business and Human Rights." (on file with author).
- Bilchitz, David. (2016) "The Necessity for a Business and Human Rights Treaty," *Business and Human Rights Journal* 1, Issue 2: 203-227.
- Business and Human Rights Resource Centre (BHRRRC). (2017) "Company policy statements on human rights." Accessed November 14, 2017. <https://www.business-humanrights.org/en/company-policy-statements-on-human-rights>.
- Černič, Jernej Letnar. (2015) "An elephant in a room of porcelain: Establishing Corporate Responsibility for Human Rights." In *Human Rights and Business: Direct Corporate Accountability for Human Rights* edited by Jernej Letnar Černič and Tara Van Ho, 131-158. Oisterwijk: Wolf Legal Publishers.
- Chayes, Abram and Antonia Handler Chayes. (1993) "On Compliance," *International Organization* 47, No.2: 175-205.
- Council of Europe, Recommendation CM/Rec. (2016) 3 of the Committee of Ministers to member States on human rights and business, Adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies.
- Danish Institute for Human Rights (C. Methven O'Brien). (2010) "Business and human rights: Scoping post-mandate scenarios. Part II: Preliminary Identification of Follow-up Options." Confidential paper for Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Prof. John Ruggie, October 2010 (on file with author).
- Danish Institute for Human Rights. (2017) "National Action Plans on Business and Human Rights." Accessed November 14, 2017. <https://globalnaps.org/>.
- Danish Institute for Human Rights. (2017) Toolkit on National Action Plans for Business and Human Rights. Copenhagen: DIHR.
- de Búrca, Gráinne. (2017) "Global Experimentalist Governance and Human Rights," *ESIL Reflection* 6, Issue 8. Accessed 9 November 2018. <http://esil-sedi.eu/?p=1844>.
- de Búrca, Gráinne. (2016) "Human Rights Experimentalism," *American Journal of International Law* 111, Issue 2 (2016): 277-316.
- de Búrca, Gráinne, Robert O. Keohane and Charles Sabel. (2014) "Global Experimentalist Governance," *British Journal of Political Science* 44, Issue 3: 477-486.
- European Commission. (2011) A Renewed EU Strategy 2011–14 for Corporate Social Responsibility, COM. 681 final (25 October 2011).
- Evans, Tony and Jan Hancock. (1998) "Doing Something without Doing Anything: International Law and the Challenge of Globalisation," *International Journal of Human Rights* 2, No. 3: 1-21.
- Ford, Jolyon and Claire Methven O'Brien. (2017) "Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty," *UNSW Law Journal, Special Issue Business and Human Rights: The Limits of the Law* 40, Issue 3 (2017): 1223-1248.
- Goodman, Ryan and Derek Jinks. (2013) *Socializing States: Promoting Human Rights through International Law*. Oxford: Oxford University Press, 2013.
- Hafner-Burton, Emilie M. and Kiyoteru Tsutsui. (2005) "Human Rights in a Globalising World: The Paradox of Empty Promises," *American Journal of Sociology* 110, No.5:1373-1411.
- Hafner-Burton and Kiyoteru Tsutsui. (2007) "Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most," *Journal of Peace Research* 44, No.4: 407-425.
- Hafner-Burton, Emilie M., Kiyoteru Tsutsui and John W. Meyer. (2008) "International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties," *International Sociology* 23, No.1: 115-141.
- Hathaway, Oona. (2002) "Do Human Rights Treaties Make a Difference?" *Yale Law Journal* 111, No. 8: 1935-2042.
- Hathaway, Oona A. (2007) "Why Do Countries Commit to Human Rights Treaties?" *Journal of Conflict Resolution* 51, No.4: 588-621.
- Jamali, Dima. (2010) "MNCs and International Accountability Standards through an Institutional Lens: Evidence of Symbolic Conformity or Decoupling," *Journal of Business Ethics* 95, No.4 (September 2010): 617-640.
- Keck, Margaret E. and Kathryn Sikkink. (1998) *Activists Beyond Borders. Advocacy Networks in International Politics*. Ithaca: Cornell University Press.

- Kinderman, Daniel. (2016) "Time for a reality check: Is business willing to support a smart mix of complementary regulation in private governance?" *Policy and Society* 35, No.1: 29-42.
- Koh, Harold H., (1999) "How Is International Human Rights Law Enforced?" *Indiana Law Journal* 74, Issue 4: 1397-1417.
- Methven O'Brien, Claire. (2007) "Transnational business and human rights: The case for a multi-level governance approach," unpublished paper, March 2007 (on file with author).
- Methven O'Brien, Claire. 2009. *Human rights and transnational corporations: For a multi-level governance approach*. (PhD thesis). Florence: European University Institute.
- Methven O'Brien, Claire, Amol Mehra, Sarah Blackwell and Cathrine Bloch Poulson Hansen. (2015) "National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool," *Business and Human Rights Journal* 1, Issue 1 (2015): 117-126.
- Methven O'Brien, Claire. (2018) Submission to UN Open Ended Inter-Governmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights: "For a business and human rights treaty based on progressive national implementation of the UNGPs and modelled after the WHO Framework Convention on Tobacco Control," 30 September 2016, accessed November 8, 2018, <https://www.business-humanrights.org/en/for-a-business-and-human-rights-treaty-based-on-progressive-national-implementation-of-the-ungps-and-modelled-after-the-who-framework-convention-on-tobacco-control-0>.
- Methven O'Brien, Claire. (2018) "The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal," *Business and Human Rights Journal* 3, Issue 1: 47-73.
- Methven O'Brien, Claire and Olga Martin-Ortega. (2019) "Discretion, divergence, paradox: Public and private supply chain standards on human rights," in *Discretion in EU Procurement Law* edited by Sanja Bogojevic, Xavier Groussot and Jürgen Hettne. Oxford: Hart, 2019 (forthcoming).
- Neumayer, Eric. (2005) "Do International Human Rights Treaties Improve Respect for Human Rights?" *Journal of Conflict Resolution* 49, No. 6 (2005): 925-953.
- Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG). 2018. "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises," July 16, 2018, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.
- Ostrom, Eleanor. (1990) *Governing the Commons*. New York: Cambridge University Press.
- Posner, Eric A. (2014) *The Twilight of Human Rights Law*. Oxford: Oxford University Press.
- Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink (editors). (1999) *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press.
- Ruggie, John Gerard. (2013) *Just business, multinational corporations and human rights*. New York: W. W. Norton.
- Russian Federation, Oral Statement. Opening of session - 1st Meeting, 4th Session of Open-ended Intergovernmental Working Group on Transnational Corporations, 15 October 2018, English translation, 1:36 et seq, accessed via UNWebTV, "Opening of session - 1st Meeting, 4th Session of Open-ended Intergovernmental Working Group on Transnational Corporations," filmed 15 October 2018 at UN, Geneva, video, <http://webtv.un.org/search/opening-of-session-1st-meeting-4th-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/5848938056001/?term=transnational&sort=date&page=3>: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>.
- Simmons, Beth A. (2009) *Mobilizing Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press.
- United Nations Human Rights Council (UNHRC). (2008) *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008.
- UNHRC. (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework'*, UN Doc. A/HRC/17/31, 21 March 2011, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- UNWebTV. (2017) "Opening of Session - 3rd Session of Open-ended Intergovernmental Working Group on Transnational Corporations," filmed 23 October 2017 at UN, Geneva, video, <http://webtv.un.org/search/opening-of-session-3rd-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/5622067547001/?term=Session>.

UNWebTV (2018) "Opening of session - 1st Meeting, 4th Session of Open-ended Intergovernmental Working Group on Transnational Corporations," filmed 15 October 2018 at UN, Geneva, video, <http://webtv.un.org/search/opening-of-session-1st-meeting-4th-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/5848938056001/?term=transnational&sort=date&page=3>.

UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights Version 1.0 December 2014, accessed November 9, 2018, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

World Health Organization, Framework Convention on Tobacco Control (Geneva: WHO, 2005), <http://www.who.int/fctc/en/>, accessed 9 November 2018.

Extraterritorial Obligations of States in the Business and Human Rights Context

Dr. Humberto Cantú Rivera

Professor, School of Law, University of Monterrey (Mexico); Ph.D., Université Panthéon-Assas Paris II. Executive Director of the Institute for Human Rights and Business of the University of Monterrey. Expert Advisor to the Delegation of Mexico before the Open-Ended Intergovernmental Working Group on human rights and transnational corporations and other business enterprises.

I. Introduction

The idea of extraterritorial obligations under international human rights law is an aspect that has become central to the business and human rights discussion. The commentary to the UN Guiding Principles on Business and Human Rights ('UNGPs') famously mentions that States are not generally prohibited from regulating the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction, provided there is a recognized jurisdictional basis. In this regard, extraterritorial obligations can take three forms (Ryngaert 2015), two of which are especially relevant for the business and human rights context: on the one hand, States may exercise prescriptive jurisdiction, which generally regulates conduct taking place abroad through domestic legislation. On the other hand, States may exercise adjudicative jurisdiction, which may allow domestic courts to hear cases regarding human rights violations having taken place outside of the territorial jurisdiction of the State. These different notions of jurisdiction also show clearly the distinction existing between public international law, in which jurisdiction is primarily territory-based (although with some exceptions, such as the nationality or effects doctrine), and private international law, in which courts have to determine whether they can issue a judgment over actions or persons having taken place outside of their territorial jurisdiction.

A recent trend and discussion to develop or solidify the extraterritorial obligations of States under international human rights law has found its roots in the business and human rights context, due to the constant transnational elements that frequently appear in cases involving groups of companies operating across jurisdic-

tions. In this regard, this short note will comment on the particular nuances that have appeared in two specific circles: on the one hand, in the work of UN Treaty Bodies, as 'guardians' of the international human rights treaties; and on the second hand, in the positions of States in the current negotiations on a business and human rights treaty. As it will be seen, the issue is far from defined, given the different approaches and considerations from different stakeholders, including the lack of open support by States regarding extraterritorial obligations under international human rights law.

II. Extraterritorial obligations in the work of UN Treaty Bodies

While the existence of extraterritorial obligations of States under international human rights law is no less than controversial—at least from the perspective of State practice—it is useful to take a look at the recent work undertaken by UN Treaty Bodies to analyze the level of development and argumentation that may suggest that such a duty currently exists. To that end, the following lines will look at the work undertaken by the "twin" treaty bodies, the Human Rights Committee (HRCttee) and the Committee on Economic, Social and Cultural Rights (CESCR), as those treaty bodies with a general mandate in relation to the promotion and protection of all human rights.

The starting point for this analysis is General Comment 31 adopted by the HRCttee in 2004, on the general legal obligation imposed on State parties to the International Covenant on Civil and Political Rights. While the HRCttee did not mention explicitly the notion of extraterritoriality, it did refer to the issue of jurisdiction.

In that regard, the HRCttee mentioned that States Parties must respect and ensure the rights enshrined in the Covenant to all persons who may be within their territory or subject to their jurisdiction, explaining that the scope of the obligation was determined by “the power or effective control of that State Party, even if not situated within the territory of the State Party.”

The extraterritorial dimension of control has been widely studied in other contexts, especially in relation to international criminal justice (Cassese 2007: 661); but in terms of the duty to protect under international human rights law, and specifically within the context of business and human rights, the same standard identified in international criminal jurisprudence may not necessarily be applicable, since States do not necessarily exercise “control” over (private) business enterprises domiciled within their jurisdiction in the same way that they exercise “control” over military units or any range of public institutions. They may, in any case, exercise “influence” and “leverage”, which have different legal connotations and characteristics than “control”, the latter being a notion that would imply a direct link and power that could be exercised by the State over the private business enterprise.

This difference has been clearly identified in the UNGPs, which recognize the different nature of private business enterprises –which may be (more or less) influenced or leveraged by the State through legislation or regulation, as well as in cases of public procurement, as stated in pillar I– and State-owned enterprises, over which the State may actually exert effective control. This is so because State-owned enterprises, despite potentially having a separate legal personality, may be subject to a direct intervention or oversight by the State, which may impose upon them a certain type of regulatory obligation to foster the effective protection and respect of human rights, including through mandatory human rights due diligence, as underscored by the UN Working Group on Business and Human Rights in its 2016 report to the General Assembly.

The specific nuance about “influence” or “control” can be more easily identified and explained through a recent individual communication decided by the HRCttee. In *Yassin et al v. Canada* (Communication

2285/2013), several Palestinian claimants brought a complaint against Canada for the actions of two Canadian companies, who were involved in building a neighborhood and marketing its purchase by Israeli population over privately-owned territories that were expropriated by Israel.

According to the claimants, “it was Green Park International and Green Mount International that made the construction of the settlement possible and profited from it.” As a result of the impossibility of obtaining remedies before the Israeli judicial system, the claimants brought complaints against the two companies before the Canadian judicial system, for their alleged “aiding and abetting in the commission of the war crime of transferring, directly or indirectly, the population of the occupying Power to the occupied territories.” However, the case was first dismissed on account of *forum non conveniens*, confirmed on appeal, and finally dismissed by the Supreme Court of Canada, on the basis that “Canadian courts lacked jurisdiction over actions by Canadian corporations acting abroad.”

In its considerations over the case, the HRCttee noted that the fact that both companies were registered and domiciled in Canada made them subject to the State party’s territory and jurisdiction. Nevertheless, the Committee noted that the claimants had not sufficiently substantiated the link between Canada and the two companies operating in the Occupied Palestinian Territories, in order to analyze the extent to which Canada had fulfilled its obligations under the Covenant, especially over the alleged “failure to exercise reasonable due diligence over the relevant extraterritorial activities of the two corporations.” While the fact that the Canadian “residence” of both companies, even if only for tax purposes, could be considered sufficient to establish a duty of the State to effectively regulate their conduct in their overseas operations –at the end of the day, what element could be more critical or decisive to a company’s operations than the place where it pays its taxes? –, an interesting approach was introduced in the concurring opinion of Olivier de Frouville and Yadh Ben Achour.

The Committee members referred to one specific aspect: they considered that “if it can be determined that

the State has sufficient influence over a corporation, then the State exercises, even indirectly, power and effective control over persons who are affected by the activities of the corporation in another country.” This recognition that a State may exercise “influence”, rather than “control”, introduces an important difference when it comes to private business enterprises and the international responsibility of the State, since in most cases, the influence the State could have over a corporation would result from its legislative or regulatory action (Ryngaert 2013: 204-205).

In that regard, the scope of the extraterritorial obligation of the State would require it to adopt the necessary measures to influence the conduct of its corporate nationals abroad, as well as providing access to remedies to victims who may have been affected by their operations or activities (Ryngaert 2013: 203). In this regard, Professors de Frouville and Ben Achour suggest two criteria as to when a State may have extraterritorial obligations in relation to corporate nationals operating abroad: whenever the State has the capacity to regulate the activities of the businesses concerned (which, in this case, would result from the nationality link), or when the State knew and could foresee the potential consequences of those business activities and operations (in an exercise of effective regulation and oversight).

A similar approach has been followed by CESCR in its General Comment 24 of 2017, on the obligations of State parties in the context of business activities. While affirming the existence of extraterritorial obligations, partly as a result of the general silence of the Covenant in relation to the notions of territory or jurisdiction, the CESCR notes that “[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.”

The nuance pronounced by CESCR in relation to the notions of “influence” and “control” points to an important difference that is present in contexts where the

State does not necessarily exercise effective control over private persons, one that manifests itself in relation to the State duty to protect human rights, including in relation to third parties such as business enterprises. In this regard, the Committee clearly recognizes the State duty to adopt appropriate regulatory and legislative frameworks, including legislation to establish a corporate duty to respect human rights –inter alia through the adoption of human rights due diligence requirements for companies–, in addition to adequate judicial and non-judicial procedures that may ensure access to remedy and accountability for victims of business-related (extraterritorial) human rights abuses.

The interpretation by both treaty bodies in relation to the scope of obligations of State parties, although different in relation to the type of rights protected, has contributed importantly to clarify that, under international human rights law, the obligations of States do not stop at their territorial borders. To the contrary, as part of its hermeneutic function, both treaty bodies have contributed to delineate that a duty to protect human rights necessarily involves both a preventive function (as suggested supra, via legislation imposing obligations on corporate actors vis-à-vis their global or transnational operations) and a redressive function (by providing access to remedies to victims of business-related human rights abuses), with the latter being subject only to a reasonableness exception framed by the existence of a causal or other link between its courts, the claimants and the facts of a given case. Nevertheless, as part of a legal framework that is amply dominated by States, it is important to briefly analyze the level of acceptance of extraterritorial State obligations in the field of human rights; thus, the following section will share some brief comments on the business and human rights treaty negotiations and the general spirit of the discussions in relation to this point.

III. Extraterritorial obligations in the business and human rights treaty negotiations

Despite the important interpretive work carried out by several UN human rights treaty bodies, one of the most relevant indicators (if not still the most relevant one) for the crystallization of new international norms and

obligations is the conduct of States. In this regard, the current business and human rights treaty negotiations in Geneva may serve as a thermometer of the potential acceptance by States of extraterritorial obligations in the context of transnational business activities. To this end, this section will look shortly at the Elements paper introduced by the Chairperson-Rapporteur for the third session (2017) of the Intergovernmental Working Group ('IGWG'), as well as to the Zero Draft of the legally binding instrument introduced before the fourth session (2018), in addition to relevant comments by State delegations.

The Elements paper intended to capture the different aspects that were discussed during the 'brainstorming' sessions of the IGWG (Cantú Rivera 2017), and to that end, added several options that included notions of extraterritoriality. For example, in relation to State obligations, the Elements paper stipulated that State parties should take adequate measures to ensure that business enterprises respect human rights throughout their activities, a potential obligation that was refined in the section related to preventive measures, where it specified that such measures should be applied by businesses domiciled in their territory or jurisdiction with respect to related enterprises throughout their supply chains.

While these pronouncements in relation to prescriptive jurisdiction regarding conduct occurring overseas imply a general extraterritorial reach, the section on jurisdiction in the Elements paper made an explicit reference to adjudicative jurisdiction, which has remained largely elusive in business and human rights cases. Indeed, one of the potential options to be adopted by States in the treaty-making process pointed to the possibility that judiciaries consider claims relating to human rights abuses by businesses taking place outside their jurisdiction, a scenario that has found interesting examples in the courts and tribunals of home States to transnationally-operating corporations, especially Canada, the United Kingdom, France and the United States (Cantú Rivera 2018: 32-33), although not uniform ones.

Regarding the question of prevention, there was relative consensus on the need to adopt measures to identify, mitigate and redress negative human rights

impacts resulting from business operations, with only the Russian delegation questioning what the legal basis was to ensure observance of requirements in other territories or jurisdictions. Although not a recent decision, the judgment by the Permanent Court of International Justice in the 1927 Lotus case provides the specific interpretation regarding the existing presumption of permissibility vis-à-vis the extraterritorial effects of domestic laws:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

In relation to the question of jurisdiction, the discussion during the third session of the IGWG was framed mostly by questions and doubts, rather than express State positions, on the convenience of adopting an approach allowing a domestic court to exercise extraterritorial jurisdiction.

The Zero Draft of the legally binding instrument issued for the fourth session stated that a court shall have jurisdiction in two specific fora: in the forum loci delicti (where the acts or omissions occurred), or in the forum societatis, that is, where the natural or legal person is domiciled, a notion that is then reduced to the place where a company has its statutory seat, central administration, substantial business interest, or subsidiary,

agency or other similar offices. As it can be observed, the notion of extraterritorial jurisdiction has been circumscribed to the necessary existence of contact points with the home State of a company, in order for it to exercise its jurisdiction over situations taking place abroad, an aspect that is generally in line with other international or regional instruments, such as the Brussels I bis regulation. Nevertheless, State reactions to such a notion had a wide scope, going from general support, to specific doubts regarding the applicability and convenience of establishing such a general jurisdictional rule.

For example, the Russian delegation considered that the notion of “substantial business interest” was loose enough as to have any use in the context of jurisdiction, and argued that a broad definition of domicile may lead to arbitrary and unjustified cases; the Chinese delegation, on the other hand, pointed out that the definition of domicile for the purpose of jurisdiction needs to have a reasonable scope; that the attribution of legal presence is unclear; and that extraterritorial jurisdiction poses important concerns. Brazil argued that there was concern over the broad range of jurisdiction proposed in the Zero draft, suggesting the deletion of the notion of ‘substantial business interest’, a notion that was supported by Switzerland. India, on the other hand, suggested harmonizing the diverse aspects on domicile to be harmonious with corporate law –a situation that could lead to diverse results, given the differences in domestic legal systems. Other States, however, were more open to the proposals presented by the Chairperson-Rapporteur: South Africa, for example, considered that the text should include references to breaches to the duty of care of parent companies, while Ecuador mentioned that a contact point should be considered in terms of private international law –meaning that there should be a minimal contact, connection or relation between the forum State and the victims, defendants or facts at stake, in order for it to exercise jurisdiction.

On the other hand, numerous questions were raised in relation to the preventive measures proposed in the Zero Draft, although practically none of them made reference explicitly to the scope of corporate human rights due diligence across supply chains, that is, with extraterritorial effect. Thus, as it can be succinctly

observed from these comments, the current context of negotiations in relation to extraterritorial obligations in the business and human rights treaty process may not necessarily converge with the views adopted by the different UN human rights treaty bodies, at least as a matter of foreign policy of States, a situation that brings into light the relative disparity in the approaches of potentially more conservative Executive branches (in this case reflected in the positions expressed by States in international negotiations and before international bodies) vis-à-vis some sporadic examples of judicial adventure (that is, in those cases in which a court has to determine the law in a conflict involving allegations of business-related human rights abuses, in which they may advance or contribute to the development of international law).

A divide between the public international law-based position of States to assert that jurisdiction is primarily territory-based, is confronted to the private international law-focused attempts to hold business enterprises accountable in their countries of origin –or potentially in other fora, under legal figures such as forum necessitatis (forum by necessity, a forum that may exercise its jurisdiction when victims may face a denial of justice for lack of access to justice in other jurisdictions)– for activities or conduct having taken place outside of their jurisdiction.

IV. Final thoughts

The emergence of extraterritorial obligations in the field of international human rights law poses important challenges to States, the first of which is acceptance. As it has already been mentioned, a divide between the public international law-based position of States

to assert that jurisdiction is primarily territory-based, is confronted to the private international law-focused attempts to hold business enterprises accountable in their countries of origin –or potentially in other fora, under legal figures such as forum necessitatis (forum by necessity, a forum that may exercise its jurisdiction when victims may face a denial of justice for lack of access to justice in other jurisdictions)– for activities or conduct having taken place outside of their jurisdiction. In this regard, it is necessary to ensure that both perspectives are jointly taken into account when analyzing the potential of expanding conventional human rights law in that direction, in order to ensure that evidence supports the idea that is pushed forward in academic and diplomatic spheres, in a way that can provide more effective access to remedies for victims of business-related human rights abuses.

References

Cantú Rivera, Humberto. (2017) "Negotiating a Business and Human Rights Treaty: The Early Stages", *UNSW Law Journal*, Vol. 40(3).

Cantú Rivera, Humberto. (2018) "Some Remarks on the Third Session of the Business and Human Rights Treaty Process and the 'Zero Draft'", *Revista de Direito Internacional*, Vol. 15(2).

Cassese, Antonio. (2007) "The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", *European Journal of International Law*, Vol. 18(4), 649-668.

Ryngaert, Cedric. (2013) "Jurisdiction: Towards a Reasonableness Test" in Langford, Malcolm et al (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, Cambridge, Cambridge University Press.

Ryngaert, Cedric. (2015) *Jurisdiction in International Law*, 2nd edition, Oxford, Oxford University Press.

An Interview with Prof Surya Deva

Associate Professor, School of Law, City University of Hong Kong; Editor-in-Chief, Business and Human Rights Journal.

The views expressed in this interview are personal opinion of the author expressed as an academic.

When forecasting the future of business and human rights, what makes you hopeful? And what concerns you most about the fate of the field?

In 2001 when I started working on issues which are now seen as part of the business and human rights (BHR) field, there were not many scholars, lawyers, civil society organisations or business leaders focusing on the nature and extent of human rights responsibilities of corporations. The situation is very different in 2019: there are thousands of dedicated scholars, lawyers, consultants and companies engaged with a range of BHR issues. Consumers, investors, stock exchanges, business associations, sports bodies, trade unions, educational institutions, international organisations and the media are grappling with the intersection of human rights with business on a daily basis. A small group of companies have also started taking a public stand for certain human rights issues. This growing engagement of a full range of stakeholders with the BHR agenda gives some hope that corporations are not merely profit-maximising entities.

At the same time, exploitation of workers, gender discrimination, forced dislocation of indigenous peoples, environmental pollution and victimisation of human rights defenders remains a norm rather than an exception, and corporate accountability for human rights abuses remains rare. Therefore, my concern is that while more and more states and corporations are now constantly talking about BHR issues, most of them are not doing enough to subject profit maximisation to human rights norms.

The project of ensuring that all business enterprises all over the world respect all human rights requires transformative changes – not just minor tweaks here and there – in the current neoliberal global order. However, I do not see much appetite for bringing those changes

on the parts of states, international organisations or corporations. States generally remain a mute spectator to individuals and communities suffering from corporate human rights abuses, while corporations are starting to control the human rights narrative to serve their goals.

As part of the Working Group you have brought attention to access to justice and effective remedy. What developments are you most proud of in your efforts to advance this agenda?

Access to effective remedies is a key component of the UN Guiding Principles on Business and Human Rights (UNGPs), though this did not get adequate attention in initial years. The UN Working Group, tasked to promote the dissemination and implementation of the UNGPs, has an explicit mandate to “continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas”. So, when I joined the Working Group in May 2016, I identified access to remedy as one of the areas in which the Working Group could and should do more work. Since then, access to remedy has become a dedicated work stream of the Working Group.

It was quite satisfying to interact with affected individuals and communities in the process of writing a report (A/72/162) that unpacked what an effective remedy means under the UNGPs. The report, which I had the honour to present to the UN General Assembly in October 2017, articulated several key elements integral to effective remedy, e.g., remedial mechanisms and remedies should be responsive to the diverse experiences and expectations of rights holders; remedies should be accessible, affordable, adequate and timely; the affected rights holders should have no fear of victimization

in the process of seeking remedies; and a “bouquet of remedies” should be available to rights holders affected by business-related human rights abuses. In short, the report articulated a transformative idea of remedies which keep rights holders central to the entire process.

I am currently leading the Working Group’s project on exploring the role of national human rights institutions (NHRIs) in facilitating access to remedy for business-related human rights abuses. In July 2018, the Human Rights Council (A/HRC/38/L.18) requested the Working Group to inform the Council by its forty-fourth session about this project. I am quite excited about this project as well, because NHRIs can facilitate access to remedy both directly (e.g., by handling complaints concerning human rights abuses by companies) and indirectly (e.g., by raising awareness, building capacity, assisting affected rights holders and recommending legal reforms).

If time allows, I have a few other ideas on which I would like to work in future. For example, how to remove barriers to access to remedy posed by the corporate law principle of separate legal personality, and how international investment agreements could be harnessed to hold investors accountable for human rights abuses linked to their projects.

In your 2013 co-edited book, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, and subsequent open response to Prof John Ruggie, you raise concern about an over-emphasis on consensus building, the infusion of business-friendly terminology and benchmarks and a number of other dynamics. How have your concerns/critiques around the UNGPs evolved since joining the UN Working Group?

As a human rights scholar, my commitment is to promote human rights. Different human rights instruments are merely a means to achieve that end. No regulatory initiative could be perfect, and it should be the responsibility of human rights scholars to expose limitations of evolving regulatory initiatives to pave way for continuous improvement. My past academic critique of the UNGPs should be seen in this context. It is for others to judge the value of that critique: in my view, it

questioned an uncritical “cult-like” acceptance of the UNGPs and stressed that while the UNGPs provide a useful framework, binding regulations at national, regional and international levels would also be needed to ensure business respect for human rights.

In my role as a member of the Working Group, rather than critiquing the UNGPs from the outside, I am trying to strengthen them from the inside. The 2017 access to remedy report is a case in point, as it highlights what an effective remedy under the UNGPs should mean in practice. The June 2019 report (A/HRC/41/43) to the Human Rights Council provides another example of this: it develops a gender framework and guidance for the UNGPs and offers concrete guidance to both states and businesses on how to integrate a gender perspective in implementing the UNGPs.

What do stakeholders need to understand and consider when looking at the zero draft and prospective legally binding instrument on business and human rights?

In a co-edited book published in 2017, *Building a Treaty on Business and Human Rights: Context and Contours*, Prof David Bilchitz and I brought together several leading BHR scholars to describe what the proposed BHR treaty should look like. I offered my initial reflections on the zero draft of the treaty in a two-part blog (Part I and Part II) for the Business and Human Rights Resource Centre. My consistent position has been that (transnational) corporations are difficult regulatory targets and that multiple regulatory initiatives – both voluntary and obligatory and at different levels – should be employed in tandem to achieve an acceptable level of regulatory efficacy. The proposed treaty should build on the UNGPs to operate as a complementary instrument. There is, therefore, no contradiction in states implementing the UNGPs and supporting the process to negotiate a BHR treaty. All states and corporations which support the UNGPs should also support the treaty process. Similarly, states supporting the proposed treaty should implement the UNGPs.

Significant differences amongst states remain about the desirability and the content of the proposed legally binding international instrument. These differences

could, however, be overcome if states show political will and a collective commitment to promote business respect for human rights. At the same time, all stakeholders should also understand that although a legally binding international instrument is needed, this will not be a panacea to fix all existing regulatory gaps in the BHR field. This will only be one small step in building a new global order which accords human rights the importance that they deserve.



Endnotes

- 1 'Value chain' is a term used to describe the process or activities by which a company adds value to a product, including production, marketing, and the provision of after-sales service. It also includes supply chain activities.
- 2 Here Carrol is quoting Morrel Heald (1970) who gives the famous example of the Pullman community, set up by George Pullman for his workers in the 1880s.
- 3 Bernaz is quoting a Ruggie speech from a YouTube video, so it could be argued the comment is off-the-cuff. Further, Bernaz is cautious claiming events of centuries ago are human rights violations and rather positioning her analysis as a "human rights reading" for a better understanding of the present.
- 4 While there are businesses in East Asia dating back over a thousand years, they differ from the modern company or corporation in that they were mainly family businesses, inns, or restaurants. The modern business are those that arise from the mercantile period in the 1600s. The first companies were private entities based on national laws, the most well-known of which were the colonial companies such as the Dutch East Indies Company, or the Hudson Bay Company.
- 5 Here this paper is using the arguments of Samuel Moyné (2010), in particular *The Last Utopia*, which argues that human rights as we understand it today (that is a universal right not limited within a State) is a phenomena of the 1970s. While this point is open to debate (and this paper sees an active human rights international community in the 1960s), the purpose here is to distinguish the novel feature of universality in human rights protection. While business and rights at the domestic level are long established and accepted, part of the reason why current human rights responses to business are novel is their universality: they work across borders, challenging the territorial jurisdiction of most labour and environmental laws, and propose that business should not be operating under domestic laws (and thus be able to race to the bottom in order to find its most profitable and least protectionist location), but be compliant with an international standard.
- 6 The eight core conventions, even though the earliest dates from 1930, were only elevated to the category of a fundamental (and universal) in 1988. See Alston (1995).
- 7 Indeed, the first draft of the UDHR was constructed by combining rights in many national constitutions at the time, an action undertaken by John Humphrey from Canada.
- 8 Much has been written on the violence within the indentured labour system, especially by the Subaltern Studies Group. For other accounts, see Gupta (1981)
- 9 See Lawrence Glickman (2009) for a history of consumer activism.
- 10 An exception are the industrialists who supported the Nazi regime during WWII, and later were tried at Nuremberg. The Trial is explored by Bernaz (2017).
- 11 See especially Glickman's history (2008), which charts the rise of the National Consumer League advocating for children's and women's rights in the early 1900s through consumer activism.
- 12 Though business studies date back to the early 1900s, business ethics as a course first regularly appears in universities in the 1960s and 1970s.
- 13 For a sketch of this debate see Glendon (2004): 6-9.
- 14 It may be relevant to also include Art 29 here, which notes everyone's duty to rights. The wording of 'everyone' does not directly identify the private sector, though an argument can be made that it does.

- 15 In the accounts of the drafting mention is made of the debate around the role of the private sector in reference to the Cold War economic debates (of capitalism versus communism), but not to the duties of business. See especially Glendon (2004), Eide (1999): 600, and Morsink (1999).
- 16 It should be noted that protests against business was not a major part of the US anti-war movement. However, there were groups such as NARMIC (National Action/Research on the Military-Industrial Complex), and criticisms of Dow Chemicals and the manufacturers of Agent Orange (Seldman 2017).
- 17 Here see especially the work of Stephen Jensen (2016), which much of this section is based upon.
- 18 As an example, the first point of the Declaration coming out of the Bandung conference in 1955, which was to establish the NAM, was on human rights.
- 19 Also around this time there was a movement in academic and NGO circles for business to have human rights accountability. Influential articles, such by Deborah Spar (1998) were early to connected human rights to business practice (Spar 1998). The Amnesty International report by Chris Avery in 2000 was one of the first to state the necessity for human rights accountability in business (Avery 2000).
- 20 This paper uses the terms First (capitalist west) World, Second (Communist) World, and Third (developing, non aligned, and poor) world. Though it may not be accurate, it does capture better the political alliances active at the UN at the time, which is the focus of this section.
- 21 Of the numerous articles, see Carasco (2010), Ruggie (2007), Feeney (2009) and Addo (2014)
- 22 See commentaries on the Zero draft by Surya Deva (2018) and Nadia Bernaz (2018).
- 23 There are CSR programs in which their main goal is to move the needle on a certain issue, make a real impact. This desire to make an impact on say economic progress in local communities can be more effective if they look inward as well. This would be an example of a potential point of leverage for a cultural shift.
- 24 This is an important to consider the battles that some of our CSR colleagues fight behind closed doors in their companies to allocate more resources toward supporting activities that make an impact. These are the people to work with as human rights practitioners. People willing to advocate internally.
- 25 Die-ins (like a “sit in”) are a powerful kind of protest used by activists from many issue areas where they simulate death, often in large numbers.
- 26 There are CSR initiatives that have used a bottom-up approach to identify salient issues, within the scope of the company’s role.
- 27 This is essentially a question of value alignment.
- 28 Note that evidence requires evaluation. Rapid response evaluations are sometimes beneficial in these cases where ongoing decisions need to be made.
- 29 This conceptualization is the result of extensive field work of both authors on business and human rights in global value chains in China, Bangladesh and Myanmar. Also compare Scheper, 2015;2019; Zajak et al., 2017; Zajak and Scheper, 2019.
- 30 See in this context e.g. the ‘Transparency Pledge’ by transnational NGO networks: <https://cleanclothes.org/transparency/transparency-pledge>.

- 31 For a Foucauldian perspective on global production networks and the function of controlling distant factories through health and safety targets see e.g. Raj-Reichert 2013.
- 32 Names and positions are redacted from this chapter when respondents requested anonymity during the course of this research.
- 33 The Brundtland Report defined “sustainable development” as efforts to “meet the needs and aspirations of the present without compromising the ability to meet those of the future.” In doing so, the report called for a more holistic approach to address the “interlocking crises” of environment, social, and economic development.
- 34 Interview with a member of an international organization.
- 35 From a BHR workshop hosted by international organization.
- 36 From the BHR Workshop hosted by international organization.
- 37 Interview with a member of an international organization.
- 38 Interview with an academic scholar.
- 39 Interview with an academic scholar.
- 40 Interview with a member of a community organization.
- 41 Interview with a community organization member.
- 42 Interview with a member from an international organization.
- 43 Interview with a member from an international organization.
- 44 Interview with an academic scholar.
- 45 Interview with a manager of a private investment company.
- 46 Interview with a member of an international organization.
- 47 Interview with a member of an international organization.
- 48 Interview with a member of an international organization.
- 49 Interview with a member of an international organization.
- 50 Interview with an academic scholar.
- 51 Interview with an academic scholar.
- 52 Website address for HRCA checklist tool <https://hrca2.humanrightsbusiness.org>

See Corporate Human Rights Benchmark www.corporatebenchmark.org; Measuring Business and Human Rights Indicators https://www.business-humanrights.org/sites/default/files/reports-and-materials/MB%26HR_List%20of%20initiatives%20featuring%20indicators_12%20Nov%202014.pdf; UNGPs Reporting Framework <https://www.ungpreporting.org>

- 53 See website for further details <http://hria.equalit.ie/en/>
- 54 See Human Rights Council Resolution of June 11, 2011, A/HRC/RES/17/4, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4. See the final report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, available at <https://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>. See the text of the UN Guiding Principles on Business and Human Rights, https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf
- 55 For example, the EU Non-Financial Reporting Directive; the California Transparency in Supply Chains Act, the UK Modern Slavery Act; the French Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre; the Dutch Banking Sector Agreement, and the very recent Australia and New South Wales Modern Slavery Acts, with more discussions in countries like Switzerland, Germany, Finland, Luxembourg, and Sweden.
- 56 "Human Rights Reporting: Are companies telling investors what they need to know?" Shift, New York, May 2017, available at <https://www.shiftproject.org/resources/publications/corporate-human-rights-reporting-maturity/>
- 57 For example: The Corporate Human Rights Benchmark, <https://www.corporatebenchmark.org/>; The Workforce Disclosure Initiative, <https://shareaction.org/wdi/>
- 58 About the Sustainable Development Goals, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>
- 59 "Human Rights Reporting: Are companies telling investors what they need to know?" Shift, New York, May 2017, available at <https://www.shiftproject.org/resources/publications/corporate-human-rights-reporting-maturity/>
- 60 See, for example, <https://www.shiftproject.org/resources/viewpoints/busting-myth-smes-corporate-responsibility-respect-human-rights/>
- 61 'Value chain' is a term used to describe the process or activities by which a company adds value to a product, including production, marketing, and the provision of after-sales service. It also includes supply chain activities.
- 62 See www.ungpreporting.org
- 63 "Model Guidance on Reporting ESG Information to Investors", Sustainable Stock Exchanges Initiative, <http://www.sseinitiative.org/wp-content/uploads/2015/09/SSE-Model-Guidance-on-Reporting-ESG.pdf>
- 64 https://www.world-exchanges.org/storage/app/media/research/Studies_Reports/WFE%20ESG%20Recommendation%20Guidance%20and%20Metrics%20Oct%202015.pdf
- 65 <http://businesscommission.org/our-work/business-human-rights-and-the-sdgs>
- 66 https://www.shiftproject.org/media/resources/docs/TheHumanRightsOpportunity_Shift-07-17-2918.pdf?utm_source=website&utm_medium=button-SDGs&utm_campaign=SDGs_Download-PDF
- 67 For example: the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011); General Comment 24 of the Committee on Economic, Social and Cultural Rights (2017) addresses state obligations in the context of business activities, including recognition of ETOs. The UN Human Rights Council is developing an international legally binding instrument on business and human rights; the zero draft includes explicit provisions relating to ETOs. In Southeast Asia, the Bangkok Declaration on Extraterritorial Human Rights Obligations (2014) produced by a roundtable of civil society, government representatives, and national human

rights institutions (NHRIs), articulates an urgent need to advance ETOs given the rapid pace of economic, political, and social integration in the region.

- 68 In 2017, the number of International migrants was estimated at 258 million (UNDESA 2017:4). Likewise, the number of refugees has steadily increased and almost doubled from 9,877,703 in 2006 to 19,941,347 in 2017 (UNHCR 2018).
- 69 “Subsidiary protection” is granted to those people who are not eligible for refugee status but are not able to return to their country of origin for security and safety reasons. It is granted on a temporary basis.
- 70 TPS could be solicited for those already outside of the country of origin and unable to return to their own country, for instance, as result of environmental disasters.
- 71 Key international Human Rights instruments include the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and their respective Optional Protocols ; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) ; the Convention on the Rights of the Child (1989) ; the Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment (1984) and its Optional Protocol (2002). With regard to International labour standards and trafficking, the International Labour Organization (ILO) has adopted more than 180 Conventions and a equivalent number of non-binding Recommendations. Some of the most ratified and important ILO Conventions include Forced Labour Convention, No. 29 (1930), Abolition of Forced Labour Convention, No. 105 (1957) and ILO, Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers Convention No. 143 (1975). Key instruments against Child Labour include ILO, its Minimum Age Convention, No. 138 (1973) and Worst Forms of Child Labour Convention No. 182 (1999). In addition, core International criminal law instruments are Convention against Transnational Organized Crime (2000) as well as the International Framework for Action to Implement the Trafficking in Persons Protocol (2009) and the International Framework for Action to Implement the Smuggling of Migrants Protocol (2009).
- 72 In 2015, the number of migrant workers in the rural sector in Italy was estimated at 405,000. They were paid between 25 and 35 euros – depending on their nationality - for a 10 or 15 workday shift way below the legal minimum wage (Corrado 2017 : 4-6). They are very often recruited through illegal middlemen named caporali. Although the Italian Parliament voted and approved a bill against « Caporalato » in October 2016, migrant workers in Italy widely suffer from severe forms of exploitation, have no contractual protection and basic living and working conditions, and risk their life to work in the informal rural economy.
- 73 Such principles are based upon the “Universal Declaration of Human Rights, the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption” (United Nations Global Compact 2014: 11).
- 74 Italy is state party to international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and has ratified its Optional Protocol in 2014. As a consequence it has the obligation to « respect, protect, and fulfil the labour rights of all workers » including foreign nationals in its territory. Labour exploitation is clearly a violation of those international standards.
- 75 According to the International Covenant on Civil and Political Rights (ICCPR) which Italy respectively signed in 1967 and ratified in 1978, and other international instruments such as the European Convention on Human Rights (ECHR), both regular and irregular migrants victims of human rights abuses and violations should be able to access justice, claim their rights and file legal complains without feeling threatened to be deported or repatriated.
- 76 In 2013, the Committee on the Rights of the Child adopted General Comment 16 on State obligations regarding the impact of the business sector on children’s rights, to which countries should be held accountable for ensuring that children’s rights are protected in business activities (CRC/C/GC/16. Adopted by the Committee at its sixty-second session (14 January – 1 February 2013)).

- 77 Names have been changed.
- 78 The full name is the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.
- 79 Simon and Macklin (2014) argue that the NCPs do not necessarily meet the “effectiveness criteria” outlined in the Guiding Principles for non-judicial grievance mechanisms.
- 80 In October 2018, the ILO revised the International Classification of Status in Employment to include the new category of “dependent self-employed worker,” into which many homeworkers may fall.
- 81 These countries include the 36 OECD countries and Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Kazakhstan, Morocco, Peru, Romania, Tunisia, Ukraine, and the EU.
- 82 The OECD Guidelines were first signed in 1976.
- 83 The Delhi Declaration: <http://www.wiego.org/sites/default/files/resources/files/Declaration-Home-Based-Workers-2015.pdf>
- 84 See Maddox (2018).
- 85 See IoT Analytics (2018).
- 86 Particularly, the IoT relies on the expansion of mobile Internet networks, the diffusion and cost-reduction of wireless sensor technologies and nanotechnologies that may be included in virtually any manufactured device together with radio-frequency identification (RFID) tags. RFID is a radio tagging system that provides identification data for any tagged goods in order to make them easily traceable, without having to read bar code data for individual items. As pointed out by the ITU, “Depending on their construction, RFID tags can be less than a square millimetre in area and thinner than a sheet of paper. One of the most pivotal aspects of these electronic labels is that they allow for the accurate identification of objects and the forwarding of this information to a database stored on the internet or on a remote server. In this manner, data and information processing capabilities can be associated with any kind of object.” See ITU (2005).
- 87 See Rec. ITU-T Y.2060 (06/2012).
- 88 For an ample range of example of potential fundamental rights abuses determined by IoT systems, see <https://privacy-international.org/types-abuse/iot>
- 89 See Leswing (2016).
- 90 Big Data may be considered as “high-volume, high-velocity and high-variety information assets that demand cost-effective, innovative forms of information processing for enhanced insight and decision making.” See the “Big Data” entry of the Gartner IT glossary. <http://www.gartner.com/it-glossary/big-data>
- 91 The term “artificial intelligence” has very flexible boundaries and is very broad in scope. Andrew Moore, Dean of Computer Science at Carnegie Mellon University, “Artificial intelligence is the science and engineering of making computers behave in ways that, until recently, we thought required human intelligence.” See High (2018).
- 92 See e.g. GSMA (2015); Cisco (2016); IoT Analytics (2018).
- 93 A telling instance is the case of CloudPets, a series of connected teddy bears produced by Spiral toys, utilising voice recognition and a Bluetooth-connected app, which can be easily hacked, with potentially nefarious consequences for

the privacy of the children and parents interacting with the toys. Such consequences were exposed, in 2017, when hackers accessed CloudPets' database, sequestering information on more than 800,000 individuals, including email addresses, passwords, and children's voice recordings. See Ng (2018).

- 94 See Cisco (2016); IoT Analytics (2018).
- 95 See GSMA (2015).
- 96 A telling instance is provided by non-profit ProPublica's analysis on the functioning of the algorithmic tool calculate criminal scoring, utilised by several US public prosecutor offices to forecast who would re-offend. The analysis identified significant racial disparities stressing that the system "was particularly likely to falsely flag black defendants as future criminals, wrongly labelling them this way at almost twice the rate as white defendants. White defendants were mislabelled as low risk more often than black defendants." See Angwin et al. (2016).
- 97 See O'Neil (2016) and Pasquale (2015).
- 98 See e.g. European Commission (2013); Weber (2015).
- 99 For an illustrative selection of the privacy risks to which individuals are exposed when in contact with IoT systems, see <https://privacyinternational.org/types-abuse/iot>
- 100 See e.g. the example of London connected bins, illegally collecting phone identifiers, and São Paulo' metro stations' connected doors illegally collecting passengers images, related by Miller (2013) and Amigo (2018).
- 101 In this sense, Privacy International has reported the purchase of IMSI catchers by several British police forces. IMSI is the acronym of "International Mobile Subscriber Identity", a number unique to every SIM card, and an IMSI catcher is a "highly intrusive piece of technology that locates and tracks all mobile phones that are switched on and connected to a network in a given area. It does this by pretending to be a mobile phone tower, tricking your phone into connecting to it, and then revealing your personal data without your knowledge. Some IMSI catchers can even be used to monitor your calls and edit your messages without your knowledge. [...] Once your phone is tricked into connecting to an IMSI catcher, it reveals this number." See Privacy International (2019).
- 102 See Greenleaf (2018).
- 103 The situation of general unawareness regarding the range of IoT's data collection capabilities it tellingly exemplified by the recent announced by Google that its home security and alarm system Nest Secure would be updated, allowing users to enjoy Google's virtual-assistant technology, to the surprise of all Nest users that did not and could not know Nest Secure included a microphone. Indeed, prior to the update announcement, the existence of a microphone within Nest Secure components was never disclosed. See Bastone (2019).
- 104 As such, "televisions must report the channel they're set to [and] smart locks must keep the company apprised whether or not the front door bolt is engaged. This information may seem mundane compared with smartphone geolocation software that follows you around [but] even gadgets as simple as light bulbs could enable tech companies to fill in blanks about their customers and use the data for marketing purposes." See Day (2019).
- 105 For a review of authentication, confidentiality and access control mechanisms, see Sicari et al. (2015: 147-151).
- 106 This means that privacy and security considerations must be embedded in every step of the process, from conception, starting by performing privacy impact assessments through the design, development and quality assurance of the IoT system.

- 107 See Belli, De Filippi and Zingales (2015).
- 108 The fact that individuals are presented with complex and legalistic privacy notices to which they can either consent, in order to enjoy a given service, or refuse, thereby forfeiting the option to use the desired service shows the limits of the notice and consent approach as regards individual freedom. This binary all-or-nothing scenario highlights that the current model of consent is impractical and illusory, turning a tool that is supposed to empower individuals to make informed choices into a tool for submerging users in unread contractual terms, accepted as the de facto price of online services. See Belli, Schwartz and Louzada (2017).
- 109 See Belli, Schwartz and Louzada (2017).
- 110 See Idem.
- 111 This expression designate a format that can be easily processed by a computer.
- 112 See Weber (2015:621)
- 113 Samuel Beckett, *Worstward Ho* (New York: Grove Press Inc., 1983).
- 114 E.g. the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights devised by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) (“UN Draft Norms”) were not advanced by the then UN Human Rights Commission.
- 115 Or, in other words, GXG thrives best in the “‘Goldilocks Zone’ – where the balance between too much and too little agreement, like the temperature of Goldilocks’ porridge, is ‘just right’”: de Búrca, Keohane and Sabel 2014: 484.
- 116 Such a group includes, amongst others, 21 member states of the European Union; Japan, South Korea, Indonesia, Thailand, Malaysia, Argentina, Mexico, Chile, Peru and Colombia: DIHR 2018.
- 117 For example, the International Organisation of Employers and the Investor Alliance for Human Rights.



Human rights protect that which makes all of us human. Sovereignty over mind and body is a starting point. But, human rights are about protecting the species; protecting individuals and collectives from predatory propensities by constraining and confronting predatory or harmful conduct and ensuring that people can take action on their own behalf.