Institute for
Human Rights and Business
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The Corporate Responsibility to Respect Human Rights

SOME CHALLENGES OF INTERPRETATION AND APPLICATION

Background

The *United Nations Guiding Principles on Business and Human Rights*, agreed by Governments in 2011, provides the foundations for how business should interpret its responsibilities under the "Protect, Respect, Remedy" Framework. The three pillars of the framework relate to:

- The duties of governments to protect all human rights in relation to the activities of others (i.e. businesses);
- The responsibilities of business itself to respect all human rights;
- The need for both governments and businesses to provide adequate remedies for the victims of related abuses of human rights.

This three-pillar approach is also reflected in the revised *OECD Guidelines for Multinational Enterprises* as well as a number of other codes, such as the ISO 26,000 standard. Given this alignment on how to interpret the corporate responsibility to respect human rights, it is important for business to understand what is expected of it. Firstly, there is a requirement to have a human rights policy statement in order to align internal thinking and to communicate to the wider world that the business is taking its responsibilities seriously. Beyond this, the responsibility to respect can been seen as one of Prevention (though human rights due diligence) and the corresponding need for Redress if things still go wrong for whatever reason. The relationship between Prevention and Redress can be seen as a symbiotic one: good due diligence systems can never be fully effective and remedies, whilst addressing the needs of individuals, can also help businesses understand how better to apply their due diligence in future.

Human rights due diligence costs time and money for any company: Governments and civil society can only expect what might be "reasonably" be expected as adequate due diligence. Companies need to prioritize: to focus on those risks and possible impacts that are most material not to the company itself, but to the human beings associated with the company's activities. However, if a company defines the thresholds of "reasonableness" on its own, without multi-stakeholder consultation, if risks not being seen as legitimate or sufficient when problems occur. There are, therefore, perhaps four fundamental questions that the UN and OECD frameworks ask of business (commonly known as "knowing and showing"):

- How much **knowledge** should a company seek to acquire through its due diligence processes?
- When it has this knowledge, how much **mitigation** should a company take to minimize risks and actual or potential negative impacts? How should a company seek to increase its **leverage**?
- How **transparent** should a company be of this knowledge and associated mitigations? What are the most effective methods of **disclosure**?

- What are the most effective **site-level grievance mechanisms**? How can the data about grievances help ensure better "knowing and showing" moving forward?

Six of the most frequent challenging areas of application for business

1) Scope

There are a number of questions of scope that businesses ask. Which human rights are most material to the business and how does any business move quickly from a theoretical interest in all human rights to a material interest in those most relevant to a specific operation? When should the prioritisation of specific rights be required through legislation (such as 'health and safety') or through multi-stakeholder approaches (such as the Voluntary Principles on Security and Human Rights)? When is scope more determined by high-risk environments specific to particular operations or specific procedural rights relating to particular groups (such as indigenous peoples)? If it is the risks and impacts on people that should prevail in the process of priorizartion over the likely impacts on the business itself, what happens if business interests are not aligned sufficiently?

2) Mitigation

How much should any business do to minimise risks and the potential of negative impacts, when an element of risk will always exist? When should businesses sit with their competitors in order to increase leverage, when should this be done with governments and when should civil society and communities be involved? A business could spend a good deal of time and energy attempting to increase leverage for diminishing returns.

3) Integration

Businesses are required to statements of human rights policy to comply with international norms, but this does not necessarily mean a new policy. So far there has been a very varied business response to this issue. Also, human rights due diligence requires an assessment of human rights impact but not necessarily a bespoke human rights impact assessment. The issue of methodology remains a question for many businesses. How does a business benchmark its existing approaches to environmental and social impact assessment against human rights? How does a business know when what it already has fit for purpose? A related issue is that of human rights language. When does it matter if any particular issue is labelled a 'human rights' issue or not? Does it matter if a business develops an internal language different from its external one?

4) Measuring and monitoring

Impacts on human rights are hard to measure, even more so if your focus is prevention: "it hard to measure the absence of a human rights abuse". Recording and setting targets of minimalizing injuries or fatalities in the workplace is one example, monitoring diversity to help fight discrimination is another, but agreeing objective criteria relating to impacts on local communities can be harder. Output indicators are harder but need to be included. Process-related indicators are often easier and map well onto due diligence processes, but it is certainly a mix of both that is required.

5) Transparency and disclosure

There are moves across the extractive and other sectors to much greater transparency, whether this relate to revenue payments (for example the Extractive Industries Transparency Initiative or

the Dodd Frank Act Section 1504 in the USA), taxation (see G8 or Kofi Annan Proposals), publishing contracts and tenders (for example the Natural Resource Charter) or mandatory human rights reporting (see US requirements for Conflict Minerals in Central Africa, Myanmar or current EU proposals for example). The question for specific business operations is how much disclosure is desirable in human rights terms? Annual sustainability reports by the company play a role but are unlikely to meet the expectations of local communities. Some operations operate "near real-time" disclosure of risks and incidents to both local and international stakeholders.

6) Adequate and appropriate remedies

Most companies and operations already have some form of grievance mechanism relating to employees, customers or local communities. The question is what needs to be developed or revisiting in light of the corporate responsibility to respect human rights? The United Nations have developed a series of seven effectiveness criteria for company-level grievance mechanisms, reiterated by the OECD, IFC and others, which help answer the question as to what is really new here. A number of companies have piloted these criteria in different parts of the world. A number of observations are: (i) an effective mechanism can build trust and help maintain a social licence to operate, (ii) mechanisms can achieve effective results for individuals and communities, (iii) grievances do provide valuable data about the company's impacts (a low number of complaints is not necessarily a positive performance indicator), and (iv) a operational grievance-mechanism can stop many issues escalating, but such mechanisms as not appropriate for major violations of human rights and should never replace national or international legal or non-legal mechanisms.