

Business and Human Rights: summary proceedings of the debate

facilitated by the
European Investment Bank

Disclaimer

This report is a summary of the proceedings of the seminars on business and human rights that were facilitated by the European Investment Bank (EIB). This report does not necessarily reflect opinions of the EIB. Whilst every effort has been made to ensure that the accuracy of the information contained in this report is correct, the EIB assumes no responsibility for any inaccuracies or mis-statements covered by this report.

Background to the Report

The European Investment Bank ('EIB'), the long-term financing institution of European Union, decided to organise a few seminars on business and human rights in order to facilitate exchange of best practise and dialogue between a range of actors, from business, civil society, and intergovernmental organisations (such as the United Nations, European Union or OECD). The London seminar was hosted by the EIB on 4 June 2010 and was attended by over 80 representatives responsible for human rights, mostly from business, civil society, trade unions, international organisations and academia. This was followed up by a second seminar in Johannesburg on 20 July 2010 with a further 40 stakeholders, mainly from African countries. Finally, a roundtable between representatives of the EIB and the European Commission was held in Brussels on 15 October 2010.

The United Nations framework on business and human rights ('Protect, Respect, Remedy') and the work of the Special Representative of the UN Secretary General, Professor John Ruggie, was central to the discussion. The London seminar was opened by Philippe Maystadt, President of the EIB, and the keynote speech was provided by Professor Ruggie. Important contributions were made by the panellists and participants at the seminars. This report provides you with an overall summary of the proceedings and cannot be considered as a position of the EIB. The aim of the seminars was to stimulate a debate between stakeholders, ahead of the discussion and proposed adoption of the 'Protect, Respect, Remedy' framework.

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1. Executive Summary

Clarifying the nature of the human rights responsibilities of non-state actors, such as business, has been an unresolved challenge since the enactment of the 1948 Universal Declaration of Human Rights, and through the decades that followed. Within the context of the United Nations, there has now emerged a significant amount of consensus about how the human rights duties of states and the responsibilities of business might be best understood. The clearest manifestation of this, in human rights terms, is the 2008 'Protect, Respect, Remedy' framework for business and human rights which has been consistently endorsed by all the member states of the UN Human Rights Council every year since. The July-December 2009 Swedish Presidency of the European Union began the dialogue about how best to incorporate the UN Framework into the workings of the European Union and its member states.

This report represents a contribution to this discussion facilitated by the European Investment Bank. It reviews the emerging policy context and reports on the expectations of businesses and civil society as expressed during the seminars, both within the European Union and outside. The report shows broad support for the '**Protect, Respect, Remedy**' framework and looks at some of the practical challenges associated with its implementation.

The '**state duty to protect human rights**' in relation to the activities of business' is an existing state obligation and one in which there is significant incoherence between the human rights commitments made by states through international treaties and their other policies associated with trade, investment, export credit, corporate law, public procurement and so on. Professor John Ruggie, the UN Special Representative on Business and Human Rights, has been very vocal on this point and a number of EU member states have already started to take steps towards greater alignment at the national level. The need for greater policy coherence between the various domains of states and their duties to protect human rights has been stressed on several occasions in the reports of the UN Special Representative.

The '**corporate responsibility to respect human rights**' was first introduced to the business world in 2008 and since then a growing number of companies have engaged in the human rights integration process, including some of the largest European business enterprises. As no company, anywhere in the world, has yet fully emerged from the integration process there is much room for business-business collaboration and for multi-stakeholder dialogue in the development of appropriate methodologies. There has been significant work to best align public reporting frameworks, such as the Global Reporting Initiative or ISO 26,000, with the UN Framework to allow for greater transparency in relation to human rights impacts in the years to come.

The UN Framework recommends a due diligence approach, commencing with human rights policy statements, through to methods of assessing risks and impacts, to integration processes and then on to tracking performance and reporting. A significant number of multinational companies are now leading this process but they still represent a small percentage of global corporations and [the far more vast number of small and medium-sized enterprises]. A critical challenge for 2011 is to identify mechanisms through which a 'tipping point' of corporate human rights integration activity can be reached, which will require both greater clarity in terms of the expectations of the international community itself and a much greater capacity for engaging with small and medium-sized enterprises through business associations, trade unions and other mechanisms.

The third component of the UN Framework relates directly to the issue of accountability; through **access to remedy via grievance mechanisms** in companies themselves but also

through judicial and non-judicial mechanisms provided for by the state. A set of rights-based principles was provided by the UN Special Representative in 2008 to enable such mechanisms to be evaluated.

At the level of company-based mechanisms there has been some significant pilot activity undertaken by companies in a number of regions, the results of which will be made available in 2011. At the level of state-based accountability, there have been some limitations in terms of the will and capacity of some states to hold business to account. National Human Rights Institutions might increasingly be seen as playing an important role here. A significant gap arises when international or extra-territorial mechanisms are considered – in particular due to alleged abuses of a number of companies in certain parts of the world - and the challenges posed in holding the companies to account through either criminal or civil law mechanisms. There are very few true extra-territorial mechanisms at present except when corporate representatives fall foul of existing international criminal or humanitarian law. However, some national mechanisms have extra-territorial effect and recent studies by the Dutch Government and the European Commission have started to clarify legal possibilities. The future development of the OECD Guidelines for Multinational Enterprises, and the role of National Contact Points, is an important non-legal corollary to this.

The Guiding Principles for States and Businesses, an integral part of the UN Special Representative's final report in 2011, will provide a key milestone for fuller integration of human rights into international corporate activity.

2. Policy Developments

United Nations

The business and human rights baseline rests on a policy framework that was first proposed to the United Nations Human Rights Council in 2008¹ and which has been endorsed unanimously by member states. The framework rests on three pillars: the state duty to protect against human rights abuses through appropriate policies, regulation and adjudication; corporate responsibility to respect human rights through due diligence to avoid infringing rights of others and to address adverse impacts that may occur; and access by victims to effective remedy through judicial and non-judicial mechanisms.

The corporate responsibility to respect human rights means to avoid infringing the human rights of others and addressing the adverse impacts that may occur during business operations. The responsibility to respect rights exists independently of a state's obligation to protect human rights. This is specific to corporations irrespective of what the state does and doesn't do. This framework is also widely supported by states, civil society, trade unions and the business community, the latter including a number of statements from the International Chamber of Commerce, the International Organisation of Employers and the Business and Industry Advisory Committee to the OECD.

Should more be expected from business than just respecting rights? It is important to stress that the corporate responsibility to respect is the baseline responsibility for all businesses in every context around the world. If a business was truly able to demonstrate that it was indeed meeting this standard in all its operations, then it would be doing very well indeed.

The concept of impact is critical when defining the scope of the corporate responsibility to respect human rights. If the responsibility to respect means not to infringe upon the rights of others and to address adverse impacts, how then is the scope of this responsibility defined? There has been a long-standing discussion about the concept of 'spheres of influence': where the degree of responsibility a business has to various stakeholder groups decreases the further from the workplace the analysis moves. This spatial basis for defining degrees of responsibility has been superseded by one that focuses less on geography and more on the nature of the relationships and their impacts. In other words, the scope of a company's responsibility to respect is defined by the actual and potential human rights impacts of its own activities and its relationships with third parties.

There is also an issue about the range of human rights that are relevant. The Special Representative conducted a study of 400 public allegations against companies regarding human rights abuses. His team discovered that there is not a single human right that some company had not been accused of violating somewhere in the world. The only sensible conclusion from the perspective of the Special Representative was not to create a sub-set of rights only relevant to business, but to recognize them all. There are thirty internationally recognized human rights and all are relevant to a business on a prima facie basis. If a business is going to respect all these rights it needs to consider its activities and relationships in relation to all these rights. However, not all rights are going to be equally relevant in every situation. A mine is a very different proposition from a shoe factory. There are certain situations when land rights and security operations will be more important than they are for someone purchasing sports shoes.

¹ *United Nations (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; Geneva: 7 April 2008.*

Companies are expected to use 'human rights due diligence' as their way of 'knowing and showing' that they respect these rights in their operations. Every company knows what due diligence means. The traditional understanding of due diligence was as a transactional concept. Before you acquire an entity that you invest in, you find out what the hidden liabilities are. Starting in the 1990s, the whole notion of enterprise risk management expanded and the definition of due diligence became broader to include having adequate policies for non-discrimination, for the avoidance of criminal conduct by staff and officers in companies, and so forth. In essence, human rights due diligence and public reporting of human rights impacts changes the game from 'naming and shaming' to 'knowing and showing'.

"Some companies will look at these thirty rights and complain that integrating them represents a high degree of complexity. The response is that if some companies operate in up to two hundred countries, and have mastered two hundred different tax codes, surely then they can manage thirty different human rights?"²

Grievance mechanisms are also extremely important, especially for large-footprint companies that have extensive impact on communities within which they operate. Obviously, state-based judicial and non-judicial sources of mechanisms of remedy should form the foundation of the system of remedy for corporate human rights abuse. A fair amount of time has been spent analyzing what are the obstacles to access to justice in various countries and how one might overcome them. But in addition to the traditional judicial mechanisms, company level grievance mechanisms in certain instances can provide extremely useful solutions to the company and communities.

The final report from Professor Ruggie to the United Nations Human Rights Council, due in June 2011, is expected to contain sets of guiding principles: both for states in relation to their duty to protect human rights and businesses in their responsibility to respect these rights. This was specifically requested by states in their responses to the 2010 report. States also need to decide the nature of the process that should follow the current mandate when it expires next year.

OECD

The OECD Guidelines on Multinational Enterprises were presented as an example of an external accountability mechanism in the arena of business and human rights. It was noted that as the Guidelines were currently being reviewed, the timing was opportune for feedback about their effectiveness and the role of national contact points within participating governments.

Regional and National Approaches

Business and human rights needs also to be understood within the context of regional and national processes. Some examples are given here based on the findings from the London and Johannesburg events hosted by the EIB during 2010.

In Africa, human rights need to be understood partly in terms of poverty eradication as well as improving both state and corporate governance. The New Partnership for Africa's Development (NEPAD) and its Africa Peer Review Mechanism (APRM) include significant provisions regarding business and social and environmental issues including human rights in the corporate governance thematic area. The African Charter on Human and Peoples' Rights

² Quote from EIB's London meeting.

has also been interpreted in relation to the activities of companies, such as the ruling with regard to oil companies during the 1990s in Nigeria.

Within South Africa itself, the post-apartheid constitution is one of the world's most progressive in human rights terms, including all internationally recognized civil, political, economic, social and cultural rights – and also some yet to be universally recognized such as non-discrimination on grounds of sexual orientation³. Also important is the process of Broad-Based Black Economic Empowerment to redress the under-representation of non-whites and females in the ownership and management of business. The South African Human Rights Commission has also played an increasingly prominent role commenting on the activities of companies, as shown in its 2008 report on resettlements by Anglo Platinum in the Limpopo Province.⁴

It was reflected that in the South African context, the problem is not the lack of legislation and policies on the issue of business and human rights, but rather the lack of effective implementation. In some parts of Africa, in particular those associated with weak governance or conflict, the problem is often both: the lack of governmental commitments as well as the lack of will or capacity to implement.

In the European context, the Swedish Presidency of the European Union in 2009 saw the beginning of discussions about what the 'Protect, Respect and Remedy' framework might mean in a European Context. A joint statement was made by both the Swedish and Spanish governments at a Presidency conference in November 2009, endorsing the integration of the framework into the European Union. In December 2009, the Council of Foreign Ministers of the Union recognized the report of this conference and since then the European Commission has been reviewing some of the possible implications of such implementation.

A number of common issues arose at the London and Johannesburg meetings including the fundamental need for better reporting, transparency and accountability. "What is measured gets done" was one comment, with the request that international financial institutions report on the human rights aspects of their investment projects and in particular on new approaches or commitments made by the client as a result of such interaction. The need for cultural change in business was a related theme. In the South African context, the 'King Reports' on Corporate Governance are seen as cornerstone of how companies understand their responsibilities and also reporting obligations.⁵ The commercial banking sector clearly had its own responsibilities in light of the recent international financial crisis. One example was the opportunity presented by, as well as the limitations of, the 'Equator Principles' - to which many OECD based commercial banks are now party - which do not yet explicitly set out the full range of human rights and also only apply to projects above \$10 million.

Another key issue, in both Africa and Europe, is that of extra-territorial jurisdiction. At the moment there are very few ways by which a European government can hold a European business to account for possible human rights violations outside of the continent – as the recent 'Trafigura' case in the Netherlands⁶ has shown in relation to Cote d'Ivoire. Likewise, there are few if any guidelines or requirements for South African companies to report on their activities elsewhere on the African continent.

³ Another example was the 'right to water and sanitation', but this has been universally recognized as a human right by the United Nations in 2010.

⁴ South African Human Rights Commission (2008) *Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo*.

⁵ Judge Mervyn King has now issued three reports on corporate governance in South Africa, in 1994, 2002 and 2009; they are seen as a fundamental benchmark for South African business.

⁶ <http://www.bbc.co.uk/news/world-africa-10735255>

3. Business perspectives relating to the ‘Protect, Respect, Remedy’ framework

Businesses and business associations in both the London and Johannesburg events spoke in favour of the ‘Protect, Respect and Remedy’ framework.

A recent survey by the South African UN Global Compact network looked at the levels of human rights awareness and compliance amongst the top 50 listed companies on the Johannesburg Stock Exchange. This survey reinforced that companies still see human rights predominantly as a ‘risk management’ issue, particularly (in the case of South Africa) in relation to three areas of operation:

- Business and land management and the right to participate in the cultural life of the community;
- The activities and management of private security companies;
- The broad area of supply chain management, particularly subsidiaries in weak governance zones.

Research in South Africa suggests that human rights are still not being given enough systemic attention in the Board Rooms and management systems of the top African companies. This must also be the case for the vastly more numerous small and medium-sized enterprises that represent the majority of the continent’s economy.

One human rights tool available to business in South Africa is the adaptation of the Danish Institute for Human Rights’ ‘Human Rights Compliance Assessment’ to the national context. The African Institute for Corporate Citizenship promotes the application of this tool (named ‘Masizibheke’ or ‘let us look after ourselves’) to South African business for fuller integration of human rights policy and practice into business management.

The perspective of a former leading CEO was given, who spoke on the need to maintain the ‘social license to operate’. The gaining of stakeholder trust can be seen as a two-step process from a business perspective:

- You must show that you are trustworthy before you ask people to trust in you. Take practical steps to change the way your business operates;
- Show outsiders that yours is the kind of business they can trust to uphold human rights in challenging situations.

Core elements that need to be in place for a human rights culture to succeed in a business environment were described to be:

- The need to address internal procedures within the corporation. Mechanisms must be put in place so that the ‘urgent’ does not put aside the ‘important’. Employees must be encouraged to flag up issues of concern without fear of retribution or being ignored.
- There must be dedicated personnel in the company whose job it is to act as point of contact for such issues. Maintaining awareness of human rights issues can be challenging. It requires strong and repeated messaging from senior managers with regular classes and workshops to explain the importance of respecting human rights in the company’s unique context.
- When operating abroad, it is good practice to recruit as much as possible from the local population. This builds local knowledge and understanding. In order to ensure human rights are part of Host-Government Agreements or Joint Ventures, it can be in a company’s interests to involve an International Financial Institution, even if they have a

small minority stake in the investment. Multilateral Financial Organisations can play an important role in ensuring that the 'Protect, Respect and Remedy' framework is applied in projects where several companies from several geographies are involved.

- There is a need to integrate as much transparency as possible into the process. For example, this can be done by setting up independent advisory panels led by trusted figures, reporting findings and recommendations in public. The success of these projects hinges on reassuring the business that it is appropriate to increase the transparency of the operations whilst demonstrating to local communities that the company is taking the responsibility to respect human rights seriously.
- It is important for business to work collaboratively with governments and NGOs to promote new rules governing human rights and in particular the work of the UN Special Representative. This might also include promoting multi-stakeholder initiatives such as the Voluntary Principles on Security and Human Rights or the Extractive Industry Transparency Initiative.

Business generally expressed the view that the 'Protect, Respect and Remedy' framework was an essential piece of international architecture but that the real challenges lay in its implementation. These challenges are seen to be most acute in areas of poor governance or those where local conditions run contrary to international standards. At the Johannesburg seminar, the example of the situation in the Democratic Republic of Congo was discussed at some length including the implications for mining companies making payments to local militia. A strict adherence to human rights can mean suspending operations in some circumstances and even considering divestment in others.

4. Perspectives from Civil Society

Civil society broadly supports the 'Respect, Protect and Remedy' framework; it represents real progress and has a potential that should not be underestimated. However, there are significant challenges remaining. As states, business and civil society move forward they must resist focusing only on the easier elements of the framework. Instead, all actors must lay solid foundations that will take longer to realize but are essential for sustainable change.

One of the key challenges is the issue of extra-territoriality. The 25-year anniversary of the very emblematic case of Bhopal in India reminds us of the accountability gaps that still exist. Many died and over 100,000 are still suffering health consequences today. Now, 25 years later, the factory has still not been de-contaminated and no one has been held accountable at the parent company in the USA. Making parent companies more accountable for the actions of their subsidiaries is one way to help bridge this governance gap.

The OECD Guidelines on Multinational Enterprises are a case in point. Compliance by business to the recommendations of state-based National Contact Points (NCPs) is currently very weak. If a company chooses not to cooperate with an NCP then there is little that can be done under existing arrangements in most cases. Even though statements (or determinations of responsibility) are welcome, they lead to no tangible outcomes for the victims on the ground.

Moving forward beyond 2011, civil society would like to see greater focus on what states themselves will do to comply with their duty to protect human rights with regards to the activities of business. This might mean more law, and will certainly mean better enforcement of existing laws. The main limitation of human rights due diligence is that it is a 'tool for the willing' and it does not speak to those companies uninterested in respecting human rights. Law itself is also not enough to protect human rights, it is the enforcement of law that is essential. Powerful companies in weak states can influence the shape of legal and regulatory frameworks governing their own operations, and therefore international scrutiny over how states implement their duty to respect is essential.

Greater transparency is essential, and companies and states can undermine the rights of local communities purely by restricting their right to information. A lack of information can create a climate of suspicion and distrust between communities and companies that can be very hard to reverse. Selective reporting is unlikely to meet civil society expectations, given that businesses will tend to ignore the trickier issues. What is needed is the routine disclosure of information that includes the impacts of business activities such as lobbying or impact assessments relating to all major projects and investments.

In the African context, civil society was particularly concerned about the lack of effective sanctions against companies that transgress human rights regulations. Two specific examples were given. First, the recent controversy regarding the level of corporate complicity in the price fixing of basic commodities such as bread and the lack of adequate punishment for those involved. Another example was the criticism of the level of compensation paid to workers suffering asbestos related diseases in the mining sector.

In conclusion, the message from civil society seems to be one of expectation. An expectation that the 'Protect, Respect, Remedy' framework will indeed be integrated by both states and businesses and that this represents the beginning and not the end of a move towards greater accountability and transparency.

5. Implications of applying human rights practice in business

At both the London and Johannesburg meetings, businesses raised a number of crosscutting observations about some of the challenges of integrating the corporate responsibility to respect human rights into business operations. These included:

- Given the centrality of ‘impact’ in the ‘Protect, Respect and Remedy’ framework, how does this relate to the Global Compact concept of ‘sphere of influence’? The consensus in both London and Johannesburg was that it was more cogent to use ‘impact’ when understanding responsibility – but the concept of ‘influence’ might also remain useful when companies consider how they might be expected to respond to these responsibilities.
- With regard to ‘knowing and showing’ – how much knowledge should a company be expected to have? One comment was that companies are able to gather intelligence on competitor’s products in any marketplace and that the same rigor should be expected of human rights due diligence.
- What is the added value of a ‘human rights impact assessment’ when compared to existing environmental or social approaches? This was seen as largely depending on how companies conducted their existing assessments and whether these approaches were ‘fit for purpose’ from a human rights perspective.

The application of the responsibility to respect human rights into business practice was seen by the businesses at the meeting very much as ‘work in progress’. An overview of some of the specific points raised follows under each of the steps set out in the ‘Respect’ part of the UN ‘Protect, Respect, Remedy’ framework.

Step One: Policies

Corporate activities can impact any of the internationally recognized human rights and therefore business overall responsibility to respect human rights encompasses the entire spectrum of these rights. Clearly, some rights will be more relevant than others in particular industries and circumstances, and therefore should continue to be the focus of heightened attention. But any attempt to limit the scope is likely to provide misleading guidance to enterprises. The main body of internationally recognized rights can be found in the United Nations Universal Declaration of Human Rights and ILO labour standards conventions.

There is no singular approach to generating a human rights policy. Some businesses take a business ethics approach, whilst others drive the approach from a value chain perspective, human resources or public affairs. Some companies have generated stand-alone human rights policies, whilst others issue shorter human rights policy statements which then sign-post existing policies relating to specific functional areas such as health and safety, non-discrimination or anti-corruption.

Business tends to believe that it should be up to a company as to how it communicates its policy intentions in the field of human rights, provided it does so transparently and is holistic in its reference to all human rights. Business also needs to demonstrate the accountability mechanisms that ensure policies will be implemented, including those relating to leadership at executive and board levels.

Step Two: Assessing Impact

The focus on ‘impact’ as the main organising principle for determining corporate responsibility in the area of human rights, as opposed to the concept of ‘sphere of influence’, was seen to make both intuitive as well as substantive sense. What matters fundamentally (in both a legal and moral sense) is the effect that business operations may have on the victims and potential victims of human rights abuses: all other paradigms are ancillary to this. While ‘influence’ is one of the ways in which a business might understand its leverage on other actors, it should not be the primary way in which we define the responsibility of a corporation in the realm of human rights.

The potential clash between national laws and international human rights standards is an issue of concern not just for specific emerging or developing economies. Indeed, it is an issue that occurs universally and therefore should be anticipated routinely. It is true that there is continuing gender inequality in many parts of the world, resulting in women’s rights not being respected. Likewise, there are serious concerns over freedoms of expression, privacy and freedom of association in a number of countries, including rising global powers in Asia. But even within OECD countries there is a need for a level playing field in human rights terms. In North America, for example, domestic labour laws continue to offer less protection than some ILO Core Conventions.

The legal dilemmas faced by business in human rights terms are not restricted to specific geographies. Depending on their core business, companies should anticipate some of these dilemmas when they do their own due diligence. Obviously, they are required to follow local law – but experiences of companies suggest that parallel means can be developed in many cases to get as close to the spirit of international standards as possible. Multi-stakeholder initiatives play a key role in helping to define what such parallel approaches might mean in practice. International Financial Institutions should expect companies to anticipate some of these legal dilemmas, not hide behind the excuse of obeying local laws blindly and to the exclusion of any corrective or mitigating actions.

Investors might also have higher expectations of companies when they operate in so-called ‘weak governance zones’. Here, baseline due diligence – which is understood to cover adopting a human rights policy; assessing the company’s impacts on human rights; integrating human rights into management procedures; and tracking and reporting on performance - might not be enough. Investors might expect companies to engage in more rigorous due diligence in situations of weak or poor governance.

Businesses reported that they were still developing methodologies for how best to understand and measure their human rights impact and the range of tools different business managements will need. In most cases these approaches will need to be part of existing ways of assessing environmental and social impact and not new silos of activity. One of the companies also spoke specifically about the need to embed human rights into existing contracts – whether these be with key suppliers, customers or collective agreements.

Step Three: Integration

None of the companies that spoke reported that they had fully integrated human rights into their management systems. All agreed that risk management was the most persuasive paradigm for most of this integration but that it was also not enough in all cases. The issues of compliance frameworks and auditing were discussed, and the companies concerned reported that they tried to mainstream when integrating human rights – looking also to adapt the management systems themselves to avoid situations that might be conducive to the

abuse of human rights. One supply chain example was given from the agricultural sector, in which the company's own purchasing practices (i.e. short lead times, repeatedly changing the order specifications) might put stress on suppliers indirectly leading to the abuse of worker rights, such as those relating to overtime and working hours. Therefore, successful integration into business requires focus on business integrity and socially-aware business procedures and not integration driven only by compliance with codes of conduct.

Capacity building was stressed by all the business speakers, both for their own management through awareness, training and incentives but also with business partners and suppliers – sometimes through multi-stakeholder approaches such as the ILO Better Work Programme or the Fair Labour Association. Sometimes the approach is more business-led, such as through the Electronics Industry Code of Conduct, but does allow for shared human rights due diligence, risk assessment and collective action by the industry. Successful integration might also mean that a company also sees human rights as an intrinsic part of its value chain and contribution to the economic and social development of a country.

The issue of human rights language was also mentioned. Full integration requires demystifying some of the concepts and creating a human rights language for business.

Step Four: Tracking Performance

The 'know and show' mentality, promoted by Professor Ruggie, encourages companies to both monitor and report explicitly on human rights. It is premised by the opinion that it is in the interests of both the company and society at large that there is much greater awareness in companies about the precise nature of their impacts on human rights and that as much as possible about these potential and actual impacts is shared publicly.

Whilst there is no agreed template for human rights reporting, both the Global Reporting Initiative and ISO 26 000 were both referred to as emerging industry leaders. The Global Social Compliance Programme was also mentioned as an example of a collective approach to monitoring performance along a complex but also shared supply chain.

In general, the businesses present in the London and Johannesburg events communicated that the UN 'Protect, Respect, Remedy' framework was both feasible and desirable in policy terms. The bigger collective challenge was seen as being one of application and need for guidance and support in applying human rights methodology across functions and geographies. This will clearly not be a sudden process but one in which states, business and civil society will need to maintain very close dialogue and collective effort.

6. Accountability and grievance mechanisms

The rights-based principles issued by Professor Ruggie in 2008 in relation to access to effective remedies are relevant both to internal grievance mechanisms within companies as well as external accountability mechanisms. These principles cover:

- Legitimacy: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;
- Accessibility: a mechanism must be publicised to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;
- Predictability: a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;
- Equitability: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;
- Rights-compatibility: a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards;
- Transparency: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.

The Johannesburg seminar gave particular attention to the issue of dealing with grievances effectively. One critical comment was that “it is important for companies to honour expediency”. It was felt that the principle of ‘timeliness’ could be added to the principles set out by Professor Ruggie in relation to grievances.

It is important to understand power dynamics within grievance procedures and how to create a level playing field. There are a number of factors that give rise to an uneven playing field regarding grievance mechanisms, such as: disempowerment, lack of resources (including access to information), legacy issues, technical issues which make it difficult for people to seek redress through grievance mechanisms. Cogent grievance mechanisms must start with communication structures and channels including structures that enable meetings between the parties to take place. It is also essential for people to be taught their rights.

There was some scepticism at the Johannesburg meeting about the extent to which grievance mechanisms will work through non-judicial means in parts of Africa for the same reasons of corruption and nepotism that make judicial remedies a challenge to realize. The aim might be a “progressive realization” of alternative methods of redress that will gradually lead to their legitimacy. One African commentator suggested that ‘legitimacy’ is not in fact a principle but something you earn after all the factors in Professor Ruggie’s principles are realized.

Progress with in-house grievance mechanisms

Some companies are in the process of putting in place group-wide grievance mechanisms and complaints processes for the following reasons:

- They do not hitherto have consistent review, aggregation processes;
- Clearly they are in business sectors that have impacts on people;

- Group wide grievance mechanisms and complaints processes will provide early warning signs;
- They are responding to external demands e.g. John Ruggie's reports;
- They want to ensure that these problems are addressed and accounted for at the local level;
- To ensure consistent group wide application of their complaints and grievance mechanisms.

Companies saw grievance mechanisms as an opportunity for them 'to know' and to find out if they were making mistakes. As well as providing some remedies for those making the complaints, the knowledge generated helped the companies in the following ways:

- The analysis of minor grievances, however small, can have a preventive effect: small grievances have a habit of becoming big grievances, if not addressed early. For example, a community's protestations with regard to the death of a single cow might present a deeper unease with their understanding about how the land was appropriated.
- The perception that a company is willing to listen and take remedial action with regard to the smallest of issues can dissuade communities from exaggerating claims against the company. An example was given of when a community claimed that a particular member was in danger of assassination, but the reality was that it was a way of getting the company's attention on broader issues of housing, education and health.
- Such mechanisms might be a basis for third-party mediation and a sustainable settlement that is acceptable to all parties.
- The mechanisms can generate a very important data set for the company – allowing it to better understand its own human rights related risks and impacts and to prioritize areas of policy and practice that need to be addressed.

The final point raised was that there is a need for different types of human rights grievance mechanisms for different stages of the project life cycle. Such remedies can only legitimately be designed with the direct input of the communities and individuals who might need to have recourse to it.

National accountability

Strong and effective national human rights legislation, and then an effective and accessible justice system are essential for accountability in the medium to long-term, even if these do not exist in all states now.

There is also a strong role for National Human Rights Institutions (NHRIs) in countries where they exist and have strong independence from government. Companies need to understand the different legs of the mandate of NHRIs: such as legal, research, advocacy, adjudicatory roles etc. In some states, such as Kenya, their decisions are to be confirmed by the High Court. Many of their complaints received include: infringement of rights, corruption and governance. The complexity of business related grievances may vary with regard to different historical injustices (for example land appropriation issues might involve a complexity of colonial, post-colonial, inter-community and inter-business issues that need to be untangled).

International accountability

The National Contact Point (NCP) in the UK was given as an example of one of the most active. There is now enough experience to highlight some of the common trends between the

complaints received and clarity about the process followed. It is important to build trust between the stakeholders involved and clarity about their respective expectations of the process and its outcomes. In some countries, the NCPs have acted as both a mediator and more occasionally as a decision-maker – making determinations about responsibility and then issuing public statements to that effect. Both these roles can be enhanced over the years ahead:

- The strong convening power of NCPs can help bring all parties to the table for effective mediation. Whilst the Governments can continue to undertake the fact-finding role in such cases, professional mediators might be hired to undertake the process itself.
- When mediation is not appropriate or not possible, the deciding role of NCPs could be enhanced. This means a process resulting in a public statement relating to the responsibility (or not) of the business or other actors involved. Although these public statements will have no direct legal effect, they might influence the actions governments take with regard to public investment in relation to the same company or the actions of third parties such as investors.
- In the case of the UK NCP, the effectiveness of the mediation role was also stressed from the perspective of a business.

In the European context there are a number of existing legal mechanisms potentially relevant to business and human rights with extra-territorial effect that have yet to be fully utilized, in particular through multi-lateral agreements, public procurement, bilateral trade and investment agreements and other corporate laws.⁷

In addition to the role of the OECD Guidelines, the need for more effective legal remedies was also put forward, in particular when there are clear breaches of international law. Whilst there are some extra-territorial legal possibilities in some countries, these are few. Even then, companies need to be encouraged not just to remedy particular violations of human rights but also to take more systemic action in terms of their management approaches in order to prevent similar violations occurring again. Examples were given from Colombia as to how such behavioural changes might occur, even after damages being paid in a particular case.

The issue of a supra-national court of human rights was discussed in Johannesburg – one where people can go for redress if not satisfied with their national governments and systems. There was a diversity of opinion on this issue with it already being seen as very complex as is the case of the International Criminal Court. It might work better to have some more regional redress mechanisms: for example, an African tribe in Kenya recently gained redress under the African Charter for Human and Peoples' Rights.

Overall the issue of accountability was seen as critical to the legitimacy of the business and human rights enterprise and one that was likely to remain highly complex for the foreseeable future. There was a realization that unresolved grievances don't go away even if the company does and can be transferred from one owner to another. How do you know about unresolved grievances when acquiring a company? What do you do with them? This again brings the analysis back to the need for good human rights due diligence in all business processes – including mergers and acquisitions.

⁷ *University of Edinburgh/ European Commission (2010) op.cit.*

7. Conclusion

The policy framework for Business in Human Rights matters is increasingly emerging, with a general consensus by governments, business and civil society alike, developing around the proposals of the UN Special Representative on Business and Human Rights, the 'Protect, Respect, Remedy' framework. Pending the finalisation of the framework, the European Union as a supranational governmental organisation and some national states around the world have already begun the dialogue on how best to incorporate the framework into their workings. Policy coherence is seen as essential for the success of the framework. Simultaneously, numerous multinational companies are leading the process on the business side, but remain a small percentage amongst the vast number of global trans-national corporations. Continued engagement by civil society, businesses and governments alike, together with the guiding principles of the final report of the UN special representative, foreseen for 2011, are expected to enable the fuller integration of human rights into international business activity.

Annex: List of represented organisations in the seminars:

- African Development Bank
- African Institute for Corporate Citizenship
- Amnesty International
- Anglo American Plc
- AngloGold Ashanti South Africa
- Asda
- Ashira Legal Advisors
- Bench Marks Foundation
- Business & Human Rights Resource Centre
- Business Unity South Africa
- Cadbury
- Cairn Energy
- Campagna per la Riforma della Banca Mondiale (CRBM)
- Centre for Social and Corporate Responsibility
- Centre for Sustainability in Mining and Industry
- Cerrejon
- ClientEarth
- Coffee Chain Tchibo
- Company Grievance Mechanisms Pilot Project
- Confederazione Generale Italiana del Lavoro (CGIL)
- Control Risks
- Council of Europe Development Bank
- Danish Institute for Human Rights
- Earthlife South Africa
- ENI SpA
- Ergon Associates
- European Bank for Reconstruction and Development (EBRD)
- European Peacebuilding Liaison Office
- Extractive Industries Transparency Initiative
- Foundation for Human Rights
- Freshfields Bruckhaus Derringer
- Global Business Initiative on Human Rights
- Hitachi
- International Alliance on Natural Resources Africa (IANRA)
- International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM)
- Industrial Development Corporation of South Africa
- Institute of Human Rights and Business
- International Business Leaders Forum
- International Federation for Human Rights
- International Labour Organisation
- Kenyan National Human Rights Commission
- KPMG
- Kraft/Cadbury
- Maplecroft
- National Business Initiative
- National Grid
- Niza / ActionAid
- Organisation for Economic Cooperation and Development (OECD)
- Philips

- Riverstone Holdings LLC
- Sasol Group Services
- Shell
- Siemens
- South African Human Rights Commission
- Statoil
- Stop the Traffik
- Swedish Export Credit Agency
- Synergy Global Consulting Ltd
- Syngenta
- TESCO Plc
- The Coca-Cola Company
- The Corner House
- Transparency International
- TÜV Rheinland Holding AG
- TwentyFifty Ltd.
- UK National Contact Point
- United Nations
- United Nations Global Compact Office
- United Nations Principles for Responsible Investment (UNPRI)
- Unilever