

1. DISINCENTIVES AND INCENTIVES FOR STATES TO ACT

The State duty to respect, protect and fulfil human rights is a fundamental obligation of all States under international law. However, in reality States have on occasion been unwilling, and at other times unable, to adequately meet these obligations.

In the context of business and human rights, interviews conducted for this Report revealed a number of commonly referenced disincentives and incentives that currently shape State performance around human rights and business. The following do not necessarily represent the perspective of IHRB, but provide an overview of some of the commonly held perceptions:

Disincentives for States to act on human rights issues relating to business:

- Lack of political will with little voter interest in the subject
- Measures around human rights are seen as an economic constraint and cost
- Conflicts of interest and short-termism
- Lack of policy coherence between Government ministries
- Allegations of protectionism

Incentives for States to act on human rights issues relating to business:

- Meeting international legal obligations to protect human rights
- Providing a more accountable trade–development nexus
- Providing greater clarity of expectations for business
- Providing greater clarity for the role of embassies and more effective foreign policy
- Competitive advantage within the political economy of the State

1.1 The Existing Disincentives

A number of disincentives exist that undermine the aim of ensuring that States act on their obligations to protect human rights in relation to the activities of business. States may fear the flight of business activity, capital and investment from highly regulated to other less regulated economies. Sometimes this fear is justified, but often it is less well founded when the evidence is reviewed. The so called “race to the bottom”, as seen for example in the constant shifting of apparel sector supply chains to the countries with the lowest wages and weak regulation, is again under question following factory fires and the death of over 1,100 workers in the Rana Plaza disaster in Bangladesh in 2013. Short-term rationale has again come under question, such as squeezing suppliers and workers to produce goods for the lowest possible price, a process which increases the cost pressure on the local manufacturer. With the local manufacturer unable or unwilling to absorb all costs fully and bear the burden, the true social cost – of lowered standards – is externalised and borne by the society. This contributes to deteriorating work conditions, unsafe buildings, poor supervision, and a work place that does not treat workers with dignity.

States can also be driven by short-term considerations when the immediate concerns of politicians and business owners coalesce in a pact of mutual self-interest. Opaque corporate lobbying can undermine the rights of the vulnerable. This risk is particularly heightened in cases where the Government departments and ministries being lobbied lack the internal expertise on business and human rights issues needed to understand and navigate the potential impacts on human rights contained within the matters in question.

While there are a growing number of companies around the world willing to speak openly about the need for greater human rights protection and for greater corporate responsibility, this is rarely reflected by national business associations and other business interest groups. The positions of these groups can influence politicians who wish to liberalise their markets and who cast the protection of human rights as simply a matter of reducing “red tape” to a minimum.

The problem is further compounded by Governments that believe that the problem lies elsewhere; that their own companies do not harm human rights. The reality is that international flows of capital, labour, information and raw materials respect few absolute boundaries. The forces that influence the global marketplace are systemic, meaning that the actions of businesses in any part of the world can impact customers, communities and workers within distant lands as well as locally.

Political leaders are often surprised when their own companies call for clearer and more effective legislation to ensure a more level playing field. States can at times assume that businesses are consistently anti-regulation, when what actually concerns them is uncertainty and unfair competition from companies that are not held accountable for their bad practices. Often perceptions differ between ministries within the same Government, and the challenge is also one of internal coherence and political will, as well as the need for transparent and consultative policy making to achieve a smart mix of regulatory and voluntary approaches. Real or perceived, the disincentives for States to advance the business and human rights agenda remain substantial. However, the consensus achieved between all member States of the UN Human Rights Council in 2011 in relation to the UN Guiding Principles on Business and Human Rights represented an unprecedented level of international consensus within the agendas of business and human rights – a consensus important to maintain and progress in the years ahead, as the next section seeks to illustrate.

1.2 How States are Incentivised

Since the 2011 consensus vote on the UN Guiding Principles at the Human Rights Council in Geneva, States have been incentivised to act in two ways: first, directly, in terms of their own international treaty obligations, and; secondly, indirectly, in terms of the expectations on Governments by businesses themselves.

The Fundamental Case

The fundamental case for Governments to act is simple. They have a fundamental legal obligation to respect, protect and fulfil human rights under international law. The UN Guiding Principles themselves reaffirm this fundamental obligation in the context of the State duty to protect against human rights abuses by business, stating in the first foundational principle:²

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

This long-standing core human rights duty has been contextualised in different ways regarding business impacts. The OECD frames it as the duty for States to create a level-playing field for all businesses when enforcing their commitments under international law, including human rights. A human rights chapter is now included in the revised 2011 version of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines).³ This reflects the view that the State duty to protect should not be a competitive issue, as noted in Section II of the Guidelines:

² Ibid.

³ OECD, “Guidelines for Multinational Enterprises” (2011). Available at: <http://mneguidelines.oecd.org/2011HumanRights.pdf>

*That adhering governments should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government treatment under their laws, regulations and administrative practices, consistent with international law and **no less favourable** [emphasis added] than that accorded in like situations to domestic enterprises.⁴*

Sometimes States will contextualise business and human rights within broader frameworks and policies. The **European Union's** position within its 2011 Communication on CSR mentions the need for States to use both legal and non-legal approaches to protection of human rights:

Public authorities should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability.⁵

It is an open question if this common European Union position incentivises or requires the EU's 28 Member States to act. A recent project launched to review the progress of Governments when developing national action plans on business and human rights (as invited in the 2011 CSR Communication) suggests moderate if somewhat uneven progress.⁶ However, on more specific issues taken in isolation, Member States are increasingly acting together on issues such as conflict minerals in the supply chain, non-financial disclosure and reporting, as well as including human rights in public procurement, bilateral trade negotiations and across Member State trade delegations.

The Indirect Case

The indirect case is demonstrated when Governments call for action not in terms of commitments to pre-existing international agreements, but to respond to the expectations of specific stakeholder groups. The **UK** national action plan on business and human rights, among the earliest national action plans published,⁷ makes this case, stating:

Companies have told us that they need Government policy coherence and clear and consistent policy messaging. They need certainty about the Government's expectations of them on human rights, and expect support in meeting those expectations.⁸

It is useful to note the observation that in some cases business would like better and more coherent Government action. In some of the more complex areas of human rights, it is not regulation that businesses often fear (so long as it well crafted) but rather the uncertainty that often exists about what is really expected of them in human rights terms. In some contexts businesses themselves are calling for improved policy coherence on the part of States.

⁴ Section II(1) of the OECD Guidelines for Multinational Enterprises (revised in 2011). Available at: <http://www.oecd.org/corporate/mne/>

⁵ European Commission, "A renewed EU strategy 2011-14 for Corporate Social Responsibility", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, (25 October 2011). Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>

⁶ See the joint project of the Danish Institute for Human Rights and International Corporate Accountability Roundtable. Available at: <http://accountabilityroundtable.org/analysis/upcoming-african-civil-society-dialogue-and-consultation-with-nanhri-members-on-the-national-action-plans-naps-project/>

⁷ Catalysed by the invitation to create such action plans contained with the EU CSR Communication in 2011.

⁸ Government of the United Kingdom, "Good Business: Implementing the UN Guiding Principles on Business and Human Rights", (September 2013). Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf

1.3 National Debates Driving State Action

Whilst States have the obligation to respect, protect and fulfil all human rights, the way they do so in practice – and the priority given – can depend also on domestic factors. In some cases, national debates drive action and politicians respond to what they see as a growing public sentiment. A good example is the effort to tackle the worst forms of child labour – a very tangible issue for consumers, albeit a complex one in reality. Modern-day slavery, trafficking and forced labour represent another area where the media and NGOs help create public awareness, which in turn drives action by Governments. The same can be said for issues such as conflict minerals and the role of private security companies in conflict areas. Issues such as health and safety can also become the focus of greater attention in response to specific incidents, such as when a mine, oil platform or factory collapses or burns down, galvanising national and international public sentiment.

There are a growing number of examples where public interest forces political action in the form of legislation relating to high-risk environments in particular parts of the world. In some instances, it strengthens national legislation to address particular human rights issues, especially international crimes. For example, the **US** Government has made reporting on conflict minerals in a company's supply chain a requirement⁹ as part of comprehensive legislation to reform the financial sector. Similarly, supply chain transparency legislation was adopted in **California** to deal with slavery, forced labour and trafficking.¹⁰ **Denmark** is the only State to use primary legislation to reform its OECD National Contact Point. Similarly, in **Brazil** the so-called "dirty list" of companies deemed by the Federal Government to have been complicit in the use of slavery has received a significant amount of parliamentary and press attention. Fundamental health and safety challenges in the mining industry in countries such as **Chile, South Africa, and China** or with respect to factories in **Bangladesh** or **Pakistan** have all received scrutiny in recent years. Recent disasters, such as the Rana Plaza tragedy in Bangladesh, have forced Governments and businesses to consider more effective ways to prevent and respond to such crises and have become part of national debate in many countries, particularly those that source from Bangladesh. It is too soon to determine if robust national dialogues of this kind act as a sufficient incentive for lasting Government action, but they make such action more likely. Sometimes the response is more cross-cutting and proactive, such as the preparing of National Action Plans on business and human rights or including human rights in national reporting requirements for companies.

Unfair though it might seem to high-profile branded companies, the fact remains that consumers and politicians pay most attention to the conduct of such companies. This is not always in proportion to the actual human rights impacts of their operations, when compared with, for example, less well known companies that operate in the business-to-business sphere, or SMEs operating in high-risk countries or sectors, or companies operating in the more hidden, but still influential, sectors of the economy. For example, the activities of investment banking – in particular the more technical aspects – received little or no public or political scrutiny until the financial crisis of recent years was already underway.

Whilst the UN Guiding Principles apply universally and to every State and company, the trigger for public, political and media interest does not, at least not yet. It is here that civil society and campaigning NGOs play their crucial role, not just to maintain campaigns against bad practice in more traditional and better known industries, but to seek out more opaque sectors and companies which are more likely to have adverse impact, and bring them to wider attention. Governments can facilitate the capacity of civil society in this regard by increasing transparency and reporting requirements for all companies registered within their jurisdiction.

⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 §§1502-04, 15 U.S.C. §78a et seq. (2013). Available at: <http://www.sec.gov/spotlight/dodd-frank.shtml>

¹⁰ California Transparency in the Supply Chain Act (2012). Available at: <http://www.state.gov/documents/organization/164934.pdf>

1.4 States Incentivising Each Other

Strengthening the accountability of States, both for their human rights performance at home as well as on the global stage, continues to be a critical concern for civil society, the UN system and other actors – including the private sector. Inadequate State accountability is often associated with factors including lack of political will, ineffective checks and balances on power and inadequate capacities to implement commitments made, as well as limited domestic policy coherence and decentralization of service delivery without necessary resources or oversight. Efforts to pressure States to take responsibility for their decisions, actions and omissions, and be subject to enforceable sanctions if their conduct results in human rights violations, are not new. However, enhancing States' accountability in the context of protecting against human rights abuses by business, has taken a more prominent place in international policy debates in recent years.

State Reporting Requirements

Under State reporting requirements for UN human rights treaties to which States are party, expert committees established by each treaty are increasingly including in their recommendations and comments specific points concerning the need for State action with respect to private sector involvement in human rights abuses.¹¹ The UN's treaty monitoring committees are also beginning to provide more guidance for States regarding their obligations with respect to business activities. For example, in April 2013 the UN Committee on the Rights of the Child adopted a General Comment on State obligations regarding the impact of the business sector on children's rights.¹² This General Comment will guide future examination by the Committee of State reporting with respect to the private sector under the UN Convention on the Rights of the Child. Similarly, the UN Committee on the Elimination of Discrimination Against Women recently issued General Recommendation 30.¹³ In it is the recommendation for States to engage non-state actors including business to prevent abuses regarding their activities in conflict-affected areas, particularly regarding all forms of gender-based violence, provide adequate assistance to businesses to assess and address the heightened risk of abuse in conflict-affected areas, and establish effective accountability mechanisms.

Peer Review

In addition to reporting and expert reviews in the context of UN human rights treaties, the UN Human Rights Council is also mandated to carry out its own form of international accountability and peer review under its Universal Periodic Review Mechanism (UPR). The UPR is a State-driven process, which reviews the human rights record of each UN Member State every four years and provides recommendations which the State concerned may accept or reject. Given that the UPR process has only recently completed its first full cycle, it is too early to assess the potential effectiveness of this peer review approach. It is hoped that through its universal coverage, focus on dialogue, and assessments based on information from UN human rights monitoring mechanisms as well as civil society organisations, this ongoing process will over time lead to clarification of human rights expectations and positive changes in human rights implementation at national level. To date, UPR recommendations to countries under review have generally not emphasised issues relating to State duties with respect to business enterprises. However, there are a limited number of examples of recommendations to Governments under review that have addressed concerns in this area, focusing in particular on the need for States to address business activities which may undermine

¹¹ See for example the Reports of the mandate of UN Special Representative on Business and Human Rights on each of the main UN human rights treaty bodies available at: <http://business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Internationalorganizations/UNhumanrightsmechanisms>

¹² UN doc. CRC/C/GC/16 of 17 April 2013, available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>

¹³ CEDAW/C/GC 30, "General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations", 18 October 2013. Available at: <http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>

protection of labour rights as well as the rights of indigenous peoples and other vulnerable groups.¹⁴

It should also be noted that the UPR model is seen as being potentially useful in related policy domains such as international development cooperation. In the lead up to the 2015 deadline for implementation of the UN Millennium Development Goals and decisions concerning a new internationally agreed development framework for the future, some actors are calling for a new global peer review mechanism to monitor progress on implementation of agreed development targets. As the Office of the UN High Commissioner for Human Rights has stressed, any new post-2015 accountability mechanism of this kind should acknowledge the role of existing international human rights mechanisms, avoid unnecessary duplication, ensure rigorous independent review, effective civil society participation and high-level political accountability.¹⁵

Development Goals

In terms of private sector accountability in the context of the post-2015 development agenda, it should be noted that the UN Secretary-General's high level panel on this subject has called on Governments to "work with business to create a more coherent, transparent and equitable system for collecting corporate tax, to tighten the enforcement of rules that prohibit companies from bribing foreign officials, and to prompt their large multinational corporations to report on the social, environmental, and economic impact of their activities".¹⁶ The panel's report also highlights the potential for public-private partnerships to strengthen development results over the coming years. However, the report misses the opportunity to stress the need for State actions and corporate due diligence in line with the UN Guiding Principles on Business and Human Rights. It also gives inadequate attention to the need to guard against harmful human rights, social and environmental impacts associated with industry sectors often critical to economic and social development such as extractives, as well as related challenges with respect to corporate investments in land, water and natural resources which may lead to conflict with local communities over their rights and interfere with other long-term sustainable development strategies. The final section of this Report looks at areas for greater cooperation between States on development goals that fully integrates the business and human rights nexus.

1.5 National Human Rights Institutions and Other National Bodies

National Human Rights Institutions (NHRIs) play an increasingly proactive role in the arena of business and human rights, and often occupy a unique space from which to do so. Those with "Category A status" in relation to the Paris Principles¹⁷ are perhaps the best positioned, given their independent nature and political influence (greater in some cases than in others). NHRIs continue to deepen their work in this area, with training, capacity-building work with Government officials (as well as others) and, in some cases, the handling of business-related complaints.¹⁸ Some NHRIs

¹⁴ See for example the database of recommendations available on the website of UPR-info.org. See also UPR submissions by the Institute for Human Rights and Business on the following countries: **Colombia, Russia, the UK, India, South Africa, Thailand, Uganda, Liberia** and the **US**. Available at: http://www.ihrb.org/about/programmes/capacity_and_accountability.html

¹⁵ For more information on this subject see for example the OHCHR and Center for Economic and Social Rights publication, "Who Will Be Accountable? Human Rights and the post 2015-Development Agenda". Available at: http://cesr.org/downloads/who_will_be_accountable.pdf

¹⁶ Available at: <http://www.post2015hlp.org/the-Report/>

¹⁷ See further: <http://www.ohchr.org/EN/NewsEvents/Pages/ParisPrinciples20yearsguidingtheworkofNHRI.aspx>

¹⁸ See further, the Edinburgh Declaration of NHRIs (2010), which calls for more national and international monitoring of businesses' compliance with human rights law, that advice should be given to companies, governments, campaigners and individuals about corporate responsibility, and that institutions themselves have an important role to play in supporting companies and victims of potential human rights violations. At: http://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf

have undertaken specific pieces of research on particular industries or companies, which have incentivised politicians to act.¹⁹

Beyond NHRIs, a whole range of national bodies, commissions and investigations have prompted political responses to significant business and human rights issues – albeit these are rarely labelled as such. Issues ranging from press freedoms and personal privacy to investigations after security incidents outside a major infrastructure project, to forced relocations or land grabs, are among a long list relating to specific industries and specific sites. Similarly, coordinated international action can be seen on a wide range of rights-relevant concerns including actions to combat worst forms of child labour, ban smoking, fight corruption, end trafficking and most recently to eliminate corporate tax loopholes. Such initiatives are rarely framed within the language of international human rights norms, but they can have powerful human rights impacts.

Another policy issue that has created international debate concerns the way States impose surveillance on their own citizens (for reasons of national security), or on citizens of other States. This subject will likely become an increasingly contentious policy and legal challenge for States and one in which an increasing number of companies are directly or indirectly involved. The management of big data, mass surveillance and dual-use technologies are amongst some of the emerging business and human rights issues in which national bodies, such as data protection authorities, will need to develop clear guidance and legal clarity based on international norms.²⁰ With the rapid development of new technologies the safeguarding of citizen privacy, as well as freedom of expression and the right to information, will be central to national agendas in most States for years to come.²¹

1.6 Summary Note

Fundamentally, States are obligated to act to protect against human rights impacts from the adverse activities of business due to their international legal obligations to respect, protect and fulfil human rights. Too often, however, such obligations are ignored or not implemented. While human rights are an issue of international law, international law itself constantly needs strengthening and its observance requires vigilance, peer pressure, accountability and capacity building between States. Given the complexity of forces at play, States need additional incentives and disincentives in order to prioritise human rights protections while also encouraging productive and profitable business activities. Intergovernmental organizations have a key role to play and it is encouraging that some have embraced the business and human rights agenda. Civil society and campaigning NGOs also play a crucial role in bringing sectors and companies more likely to cause adverse human rights impacts to wider attention and prompt Government action. Governments themselves also develop frameworks through which they incentivise each other, such as through State-to-State reporting obligations, peer review mechanisms, and development goals. National Human Rights Institutions and other national bodies can further prompt State responses to significant business and human rights dilemmas.

Companies can also play a constructive role by reassuring Governments that policy coherence is important for a stable business environment, and by demanding clarity about State expectations of them regarding human rights. Business leaders can highlight that robust and effective governance where respect for the rule of law is ensured is actually an incentive for responsible business behaviour rather than a disincentive.

¹⁹ For example the research of the **South African** Human Rights Commission relating to aluminum mining, **Kenya** National Human Rights Commission relating to flower farms, the **UK** Human Rights Commission in relation to meat-packing, the **Scottish** Human Rights Commission in relation to care homes for the elderly.

²⁰ See, for example, the statement by the **German** Human Rights Commissioner in relation to allegations of eavesdropping on the telephone conversations of the German Chancellor. Jevan Vasagar, “Germany ready to speak to Snowden over U.S. surveillance” *Financial Times* (1 November 2013). Available at: <http://www.ft.com/cms/s/0/92cce9ae-4303-11e3-9d3c-00144feabdc0.html#axzz2lqcDjtft>

²¹ See Fundamental Rights Agency Annual Report 2012, Chapter 3, on Information Society and Data Protection, Fundamental rights: challenges and achievements in 2012. Available at: <http://fra.europa.eu/en/publication/2013/fundamental-rights-challenges-and-achievements-2012>