



State of Play

Human Rights in the
Political Economy of States:
Avenues for Application



Institute for
Human Rights and Business

Shaping Policy ■ Advancing Practice ■ Strengthening Accountability

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Acknowledgments

The Report was written by John Morrison, Haley St. Dennis and several staff of IHRB. It was researched and drafted between August 2013 and January 2014 and reflects information updated through January 2014. It draws on a range of interviews, literature review and discussions.

IHRB wishes to thank the Ministry for Foreign Affairs of the Government of Finland for its financial support for this Report. The views expressed are those of IHRB.

ISBN: 978-1-908405-17-3

Report Design: Ethical Sector / www.ethicalsector.com

Cover Design: JHGD & Associates / jhgassociates.co.uk

Printing: Forward Print / forward-print.co.uk

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FOREWORD

As a member of the United Nations, Organisation for Economic Cooperation and Development, and the European Union, the Government of Finland promotes actively the implementation of the UN Guiding Principles on Business and Human Rights. We too are currently evaluating how to best align our own policies. The focus on business and human rights is one of the new frontiers for wider State policy coherence.

We hope that this Report will inspire States around the world to consider further opportunities for advancing the protection of human rights in relation to business activities. The “state of play” approach used in the Report will hopefully inspire all States to show that this is the art of the possible. This Report looks at areas such as legislation, adjudication and enforcement, international trade and investment regimes, the State as an economic actor within export credit, public procurement, and as a provider of goods and services. These issues are identified as areas in which States can clarify their business and human rights expectations. It is indeed gratifying to see that so many States already have innovative examples of practice relating to business and human rights, including labour rights, although no State on the planet has yet fully implemented their approach to this complex but important cross-cutting area of policy.

The Government of Finland has long supported international cooperation on human rights, as well as a firmer mainstreaming of human rights into issues such as security, development and trade. The Report also highlights ideas highly relevant to current discussions about cooperation relating to the 2015 UN Development Goals landscape. Partnerships amongst States and with other actors including business need to be founded on human rights principles. Gender mainstreaming, transparency and public accountability are considered to be strengths of our country and to our view of particular importance in furthering human rights in the activities of the State.

In this regard we hope you enjoy this independent report by the Institute for Human Rights and Business and find value in some of the ideas it reflects – expanding your knowledge of current and future practices of the State.

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EXECUTIVE SUMMARY

The term “political economy” has a number of definitions, but in this report (the Report) it is used to describe the nexus between the political and economic interests of the State. The focus of analysis is on the relationship between the at times competing social and economic goals of the State, and the motivations, opportunities and risks involved. While the economic and human rights activities of States are still largely distinct from one another, it is becoming increasingly apparent that these two agendas are heavily interdependent and both involve the private sector as a significant actor. Their interplay is a source of increasing global concern as well as interest.

The UN Guiding Principles on Business and Human Rights¹ provide the international baseline on the State duty to protect against human rights abuses involving business. As such, it is important to understand how States are already applying their duty to protect human rights in relation to the activities of business, as well as in relation to their own economic activities, and where opportunities for greater State-to-State cooperation exist. This “state of play” Report provides examples from over 70 countries of recent action within States’ economic and human rights agendas. It finds that enhanced cooperation within States is needed if the promotion and regulation of more socially and environmentally sustainable business practices is to lead to better human rights outcomes.

By presenting this overview, the Institute for Human Rights and Business (IHRB) seeks to prompt further dialogue within and between States, and with other actors, about the challenges in achieving greater coherence within State policies and practices governing business and their implications for human rights. Numerous motivations, incentives and disincentives can complicate or reinforce the relationship between business and human rights for States. It is hoped that through candid conversations and assessments, Government officials will identify their own priorities for national action as well as seek out greater opportunities for multi-lateral collaboration. The ultimate aim is to ensure that all such action prompts, and as necessary requires, more responsible practices ensuring respect for human rights.

Part I of this Report begins with an analysis of *why* States and businesses should act on the business and human rights agenda. It summarises some of these existing incentives and disincentives for States and businesses to adopt and implement more responsible economic policies and practices that are consistent with human rights standards.

1) Incentives and Disincentives for States to Act

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

¹ Report of the UN Special Representative on Business and Human Rights, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, A/HRC/17/31, (21 March 2011). Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

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.

2) Incentives and Disincentives for Businesses to Act

For business, the concept of "human rights due diligence" is central to preventing human rights impacts and implementing the corporate responsibility to respect human rights as set out in the UN Guiding Principles. However, the scope and extent of the due diligence expected depends on numerous factors, not least of which is operating context. While expectations to conduct due diligence are clear, the scope and extent of such processes often are not. In the past, companies have not been incentivised by States or investors to acquire such knowledge and in fact many have often preferred to remain uninformed about risks and abuses. An obvious consequence is that companies often refrained from undertaking rigorous human rights due diligence precisely in locations where it was and is most necessary. The development of the UN Guiding Principles have flipped that approach on its head, affirming the international expectation today is that all companies should be aware of their own actions, and those of their business relationships, that may lead to negative human rights impacts.

The vast majority of the world's companies are still unfamiliar with the UN Guiding Principles however. States can put in place a number of economic incentives and disincentives to raise companies' awareness of their human rights responsibilities and guide company behaviour. Some States are beginning to experiment with economic levers they already possess, such as export credit and public procurement, to influence corporate behaviour with regard to human rights. There is room for much greater alignment between market-based mechanisms, as well as State licencing and oversight, which would serve to make human rights a commercially-relevant issue for all companies concerned. States are only beginning to think about far deeper structural reorientations, to redesign incentives and disincentives to move from rewarding short-term performance to longer-term outcomes, which are far more aligned with sustainability goals, including around human rights.

Part II of the Report then focuses on *how* States can act on the business and human rights agenda. It considers five core Government functions as "avenues for application" through which the State can act on a strategy to bring more coherence between its economic and human rights approaches. These avenues for application are laid out in sections covering the roles of States in: *creating an accountable marketplace; reinforcing human rights within trade and investment; enforcing and adjudicating* to ensure legal accountability; as *economic actors* in their own right; and as *partners in development*. Part II highlights the progress being made around the world across all five functions, but progress could be faster – it is a matter of political will and important choices.

3) Creating an Accountable Marketplace

States are demonstrating an increasing willingness to legislate to make marketplaces more accountable – in particular, in mandating an explicit focus on and responsibility for social and human rights impacts by company directors and requiring explicit human rights content within formal corporate reporting. These are important initial steps across a number of jurisdictions that need to be built upon globally. The increasingly explicit State expectations for human rights awareness and disclosure by business represent a change in attitude that has not yet fully been understood or implemented by company executives and officers, including corporate legal counsels. For the time being at least, many companies are proceeding with caution. As such it is not yet clear whether greater transparency itself will enable convergence on what might be “adequate and appropriate” due diligence, driven by third party scrutiny, or whether States will also provide more specific directives about the required contours of due diligence (as has been the case on conflict minerals, trafficking and forced labour, and new US investments into Myanmar/Burma).

States need to do more to create a level playing field for business, providing more clarity around how much “knowledge” can reasonably be expected of business in proactively understanding their human rights risks and actual or potential impacts. Many of the existing requirements are cast in very general terms, permitting the needed flexibility, especially in the early days of application, to respond to widely varied contexts. As regulators, businesses and civil society become more experienced with the issues and applying and reporting on their actions however, further clarity – especially around prevention requirements – will be needed to ensure that current marketplace approaches fully reach their potential to improve human rights outcomes.

There is an opportunity for States to fill the gap where their national stock exchanges do not yet include ESG indexes, and create such indices within their own national exchanges – incentivising a race to the top for companies in this area. This would support States efforts to encourage responsible investment and the continuous improvement of environmental, social and governance (ESG) standards, including with respect to human rights.

4) Enforcing and Adjudicating

In one of his first reports to the UN, the Special Representative on Business and Human Rights pointed to the governance gap between the global expansion of business and the ability of Governments to effectively regulate them. Yet even today the conditions for and enforcement of corporate liability for human rights harm have not evolved along with the global expansion of modern business. States have the tools to provide for appropriate and measured responses to human rights abuses involving business. Administrative law, civil law and criminal law, and sometimes a combination of the three are legal avenues States may pursue to ensure that businesses take preventative measures to avoid harm to people and are held accountable for human rights harms in which they are involved. Prevention and remedy are two fundamental legal functions – and yet, many States are failing on both counts. They are failing to provide sufficiently clear messages – regulatory or otherwise – of what is expected of business, and failing to take action where those expectations are not met. Even for gross violations of human rights, where the theoretical possibility of sanctions may exist, the current system of remedies in the vast majority of States, and internationally, is very often unpredictable and ineffective.

The failure to provide appropriately structured outlets for claims does not serve the interests of victims, States, or businesses. A national system that provides for stable and robust application of the rule of law is an attraction rather than deterrent for most businesses. Structured, efficient, and predictable processes for mediating disputes – judicial or non-judicial – serve all parties and can help avoid resorting to more desperate and extreme measures to seek justice. The unequal pace of addressing access to justice is already foreshadowing a schism in the carefully built coalition that led to the unanimous approval of the UN Guiding Principles in the Human Rights Council. 2014

promises to be an important year in deepening discussions on further necessary steps to enhance access to remedies.

5) Reinforcing Human Rights within Trade and Investment

States regulate and enable trade and investment in their territories. Respect for human rights can be catalysed within trade and investment agendas through integration of human rights awareness and due diligence expectations within States' national strategies and policies on trade and investment. Doing so would provide more uniformity when moving to the formal investment and trade agreement negotiation phase between two or more States. International trade and investment agreements offer important opportunities for States to safeguard human rights, as well as the chance for such safeguards to be incorporated into subsequent contracts between States and investing businesses. However, policy makers and practitioners have only recently begun to fully consider these opportunities, as well as the risks of failing to provide for sufficient policy and regulatory space within such agreements. As such, capacity building and further awareness raising throughout the investment and trade chain is key: for State negotiators and legal and financial advisers to international trade and investment agreements; the State and company negotiators and legal and financial advisers to individual investor-State contracts; and for the arbitrators mediating international investment and trade disputes. Greater contract transparency in a number of States can also offer important clarity about how human rights can be integrated in the investment process.

Export Credit Agencies and trade missions, as State services for business, offer a related opportunity to integrate awareness of business and human rights into State's frontline dealings with businesses. Requiring export credit agencies to undertake their own human rights due diligence before providing support to business (particularly SMEs) should be the goal, as should developing a common approach amongst States to providing information and expertise on human rights to businesses on trade missions around the world.

6) States as Economic Actors

States are powerful economic actors – they can use their ownership, buying and selling power to improve human rights protections within their own value chains and can offer a model to private actors as to how to behave. States have only recently started responding to the need for greater accountability for their economic activities, but also the diplomatic and commercial opportunity of better aligning their economic power with their international obligations, including human rights. Parliamentarians, business, investors and civil society should have high expectations of the State to make significant progress on this issue within the shorter term.

There have been increasing signs of positive trends toward transparency of State-owned enterprises (SOEs), and also their engaging in local human rights dialogues in countries where they operate. Some States have also shown willingness to explore ways that State-ownership can more explicitly be used as an area of diplomatic cooperation and a lever for improving social standards in third countries. While there may remain ambiguities under international law as to when businesses have "State-like" human rights duties, what is beyond doubt is that all SOEs, in their variety of forms, have a responsibility to respect human rights.

Within their public procurement processes, States can also incentivise companies to incorporate human rights considerations, including human rights due diligence, into their operations before they qualify for bidding for Government contracts. Few States currently do so, but indications are that some are actively looking at how best to use this leverage. For those States that have already begun integrating human rights considerations and processes into their public procurement, they have a compelling national interest in encouraging other States to do likewise in order to provide a more level playing field for their own companies when operating abroad.

Much less has been written about the role States can have as a provider of raw materials, goods or services to the private sector. In theory, it is a major unexplored area of leverage to improve human rights outcomes.

7) States as Partners in Development – Opportunities for Greater Cooperation

States demonstrated an unprecedented willingness to cooperate on business and human rights during the development of the UN Guiding Principles. They should continue in that spirit of cooperation today to innovate and work together in advancing implementation of the business and human rights agenda, avoiding making this a competitive topic only for the commercial sections of their trade departments.

Greater cooperation between States on business and human rights can take many forms. More partnerships between the UN and business, particularly in the emerging call for more public-private partnerships in the context of the post 2015 development agenda, are expected and would benefit from the perspective and experience of the UN Guiding Principles in developing much needed criteria around governance and accountability. Multistakeholder initiatives are an established method of cooperation amongst States, businesses, trade unions and civil society, but more focus on engagement with the global South is needed.

Though a key driver of accountability, public awareness of human rights and the responsibilities and impacts of business remains low across the populations of all States. Enabling an information society is a key avenue States can pursue in empowering the public to ensure their own rights are being respected.

It is the hope of the Institute for Human Rights and Business (IHRB) that this “state of play” Report has captured recent developments around the world in the key avenues through which States can advance human rights in business. IHRB welcomes receiving examples by email to info@ihrb.org of other approaches that may not have been included. We hope that a follow up to this Report in several years time will show increased progress and innovation in approaches prioritising human rights within the political economies of States.