

**Keynote speech by John Morrison at  
Global Compact Network UK event on  
The UN Guiding Principles: Realising the third pillar**

**Clifford Chance, London, 11 March 2015**

Thank you to the UK Global Compact Network for the invitation to join your discussions today. It is indeed true that the business and human rights agenda in 2015 is focused very much on issues relating to access to effective remedies. It is well over time that we address the subject head on and it is clear we have a lot of work ahead of us.

Two weeks ago I was in Myanmar with the team from our Myanmar Centre for Responsible Business. During the visit we travelled to the southern end of the country to the town of Dawei, alongside the Thai border. After a two-hour bumpy van journey through the Tenasserim Hills, we met villagers who showed us where their homes used to be before a metre-deep toxic sludge washed down the valley from the Heinda Tin Mine. When the wall of a tailings dam burst, their wells were poisoned as were the coconut trees surrounding them. Although the Myanmar authorities criticized the Thai-owned mine, nothing has happened in the three years since the disaster. No justice, no compensation, no remedy. The mining company seems to be operating with impunity. Registered in Thailand, its legal presence in Myanmar seems opaque – the corporate veil is firmly in place.

There are many such stories from around the world. The third pillar of the UN Guiding Principles is a welcome conceptual tool but it will remain just that if actions aren't taken by governments and companies to make its remedy provisions a reality in practice. As the commentary to UN Guiding Principle 25 suggests, remedies may take a range of substantive forms including:

- Restitution - Appropriate compensation or rehabilitation for the harm caused to the victim;
- Punishment - An appropriate sanction for the perpetrator;
- Non-repetition – Preventive measures taken to minimise the risk of similar harm occurring in the future.

As we approach the second anniversary of the Rana Plaza disaster in Bangladesh, we might ask ourselves if any such remedies have been met for the families of the over 1,100 dead and whether the chance of repetition in Dhaka or elsewhere has been sufficiently reduced.

A recent report by the European Coalition on Corporate Justice and the Frank Bold law office in Brussels finds that over half of the companies listed on the major UK, German or French stock exchanges have been subject to claims of negative human rights impacts on individuals and communities between 2005 and 2011.

Actually – it depends how you look at the figures. If we are to include employment related claims or tribunals, as well as health and safety concerns or the claims of consumers, then the number is surely closer to 100% for the majority of the 32,000 large companies registered in EU member states.

Of course, unlike 40 years ago, regulation on health and safety and work-place discrimination is now in place in most European countries, so we don't talk about related remedies in these areas so much these days. What we do talk about are those abuses of human rights that share one or more of the following characteristics:

- (1) There are significant obstacles, legal or otherwise, to a victim's ability to access and secure an adequate remedy;
- (2) There continues to be a powerful sense of impunity - the perpetrator has "got away with it" or "the punishment does not fit the crime" or other negative impacts;
- (3) There remains a real chance of repetition – i.e. nothing much has changed or has not changed enough.

I want to dig into these three aspects a little more as I think they underpin today's discussion and the many others on how to best ensure effective remedies for corporate related rights abuses that we will likely all be involved in over the months and years ahead.

### **(1) Access to remedies**

To the first point – the significant obstacles to adequate remedies that are all too common - let's start with the legal aspects. There is clearly a problem – in part the lack of capacity of victims to take forward civil claims, or the political will of states to advance criminal cases, or

the lack of sufficient legal mechanisms in countries around the world. We often talk about the lack of extra-territorial mechanisms at such times, well-illustrated by the Trafigura case, the Mexican state-owned oil company (Pemex) dumping toxic waste on the municipal rubbish dumps of Abidjan, Ivory Coast and the claims of associated deaths and sickness. This is one important aspect, but the legal gaps are likely to be even more widespread at the state level. The current work led by the UN Office of the High Commissioner for Human Rights, based on Jennifer Zerk's original report, is looking at six legal aspects (domestic law and corporate liability, roles and responsibilities of states, overcoming financial obstacles to legal claims, criminal sanctions, civil law remedies and domestic prosecution bodies) and across 20 jurisdictions: UK, USA, France, Germany, Australia, Russia, Azerbaijan, Brazil, Colombia, Argentina, Japan, China, Singapore, Thailand, India, Qatar, South Africa, Cote d'Ivoire, Tunisia and Zambia. It should make for some very interesting reading.

Of course, legal mechanisms are fundamental but clearly not the only type of remedy we should be considering. For example, much work has been dedicated to developing site-level grievance mechanisms within companies themselves since 2008. This work is important and perhaps we are beginning to see where well-functioning mechanisms fit into the broader remedy ecosystem. Having recently returned from Colombia, where we have just launched another one of our regional centres, it is worth citing the Cerrejon mine grievance mechanism as it has been much discussed over recent years.

The mechanism has enabled local populations, in particular the Wajuu indigenous peoples, to lodge claims and concerns with the company – both in relation to the opencast coal mine itself (the largest in the world) and also the railway line to the coast. If anyone doubts its effectiveness, and the transparency it also enables, then a comparison just has to be made to the coal mine in neighbouring Cesar state, operated by a private company based in the US state of Alabama. Last year, large-scale spillage greatly increased acidification of the local water supply. The incident was only reported as a journalist happened to be visiting, which then compelled the government to close the mine for three months. No site-level grievance mechanism is in place there, at least not yet.

So it is very good that Cerrejon has a site-level grievance mechanism and that we can assess how it works over time, but all such mechanisms have their limits. There are wider questions

facing Colombia, as the Havana-based peace discussions progress, that company-based mechanisms cannot address. If, for example, a local indigenous community is concerned about water contamination or the diversion of rivers and wishes to assert its right to Free, Prior and Informed Consent concerning new or existing projects in the area, how is the company to respond if the state itself is ambiguous about enforcing this procedural right? Is a site-level mechanism, led by business, with no government involvement, ever the appropriate forum for such considerations and grievances?

So much is missing. We currently have a sandwich – with two very thin layers of bread (site-based grievance mechanisms and legal mechanisms internationally at either end) and not much in between them. How can all states ensure that adequate processes are in place to resolve society-business challenges and in which the state remains continuously involved? The absence of such mechanisms is not just a concern for countries such as Colombia. Look to the UK's own fracking debate for an example closer to home.

This is why I remain such a fan of National Contact Points within the OECD system and I am very pleased we will hear from the UK NCP today following its recent public determination relating to a UK-based surveillance exporter to Bahrain. How can we build on the NCP model so that there are real economic consequences for businesses that are unwilling either to follow international standards or to engage in such mediation? I note that the Canadian Government has announced it will cease offering consular support to companies unwilling to do so. Can we too make such stipulations in the revisions of the UK's National Action Plan on business and human rights? I know some human rights NGOs do not regard NCPs as remedial mechanisms, but most trade unions do, and I think they can be.

## **(2) Impunity**

The sense of impunity is a powerful motivation. It is perception of impunity following the recent financial crisis that remains the reason why British people find it so hard to trust some of the institutions surrounding us here. It is also why populist politicians can then go on and offer simple answers to complex problems all over Europe and why we have the possibility of an extremist President in France within the next two years.

No one trusts a remedy if there is a sense that the rich and powerful can somehow evade punishment. Why is tax avoidance, a serious crime, the only one where deals can be done between accountants and government officials and money can be repaid without any criminal sanction?

Now whatever you might think about the prospect of negotiations for a binding international treaty on corporate accountability within the next 10 years, and I certainly see a forest full of bear traps, much of the oxygen comes from the sense that powerful companies can move assets and liabilities across borders and evade national jurisdictions. If you doubt me, then just speak to the Government of Ecuador or their co-sponsors of the Human Rights Council resolution that has left us with a twin-track approach to business and human rights within the UN, which is in no-one's interests. I am hopeful these two tracks will converge as the years goes on, but it would be helped if leaders everywhere could be speaking up to end perceptions of impunity. The UK Government has led the world with the strongest extraterritorial anti-bribery legislation anyone has ever seen – a headache for us all in terms of compliance – but it sends a clear message on the issue of impunity. Let us send a similar message on the issue of corporate involvement in human rights abuses.

As for companies, could corporate legal counsels consider less aggressive approaches to legal proceedings when non-legal mechanisms have failed? The Kiobel case, which went to the US Supreme Court, as we all know, was argued in very reactionary terms by the lawyers representing the company involved. Companies spend huge amounts of money when doing so, which victims and their representatives can never match. This might protect the company's interests in the short-term but it does not help perceptions that companies are trying to close down legal remedies. I know it is a hard thing to ask the counsels of companies to consider as they are paid to protect the legal corporate entity, but damages to social license also have significant commercial implications.

### **(3) Non-repetition**

Finally, the issue of avoiding repetition of abuses. Or in other words, how do we learn from our mistakes?

Accepting that we made a mistake in the first place, not an easy thing for anyone to do, is where we should begin in my view. Businesses hate admitting to mistakes, corporate lawyers even less so. But it is not just businesses. It can sometimes take governments a very long time to apologize for abuses committed during colonial times, or even the persecution of war heroes such as Alan Turing. NGOs can also be very slow in admitting they made mistakes, and are very happy to bank the credit in the meantime. Just take Greenpeace winning the argument over Brent Spar, for example, despite being wrong about the facts.

So let's not assume that avoiding repetition of abuses is an easy thing to do. As we know, the UN Guiding Principles define corporate responsibility not just in terms of causality, but also contribution and linkage – how do we avoid repetition when we are not the main agent causing the abuse in the first place? This calls for collective action.

I am very pleased to be moderating an international conference in Dhaka next week reviewing where we are going two-years after the factory collapse. The conversation on non-repetition will not get very far if everyone involved remains at the level of finger pointing. We will get much further if collective responsibility is acknowledged and collective action maintained and strengthened.

Closer to home, we have the Modern Day Slavery Bill about to become law, we hope, before the election. So it is timely to finish on the thought of how we will learn from incidents of trafficking or forced labour to lower the possibility of future occurrences. It is easy to say, but harder to do, as everyone in this room knows. The vulnerability factors underpinning workplace exploitation can be subtle and multifarious. This is especially the case when third-party labour providers are involved in global supply chains. We need to work collectively on issues such as ending passport retention by employers, or stopping those insisting that employees pre-pay labour brokers and so on. Progress on these issues needs to be disclosed when companies report on their activities to avoid modern day slavery or else we will not act collectively and we will not be acting in the interests of future potential victims.

In conclusion then, after a speech of broad sweeping generalizations, I will now contradict myself – or at least encourage others not to stick with overarching statements in the way I have needed to in this opening speech. The access to remedy discussion is a complex one and it is

concerted action to unpick the complexities within small sub-sets of the problem that is required. We have to move beyond broad, sweeping generalizations. It shouldn't be a single focus (e.g. Treaty only) but a multifaceted one (e.g. Treaty and other approaches). It is likely to be important to try to get a broad consensus on some priorities.

I thank you for your attention and look forward to the rest of the afternoon.