
The Business and Human Rights Review

Autumn 2012 | Issue 1

Banking on Human Rights:

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Foreword

*Andrew Denny, Partner, Allen & Overy LLP
(Chair of Allen & Overy LLP's Human Rights Working Group)*



Welcome to the inaugural issue of the *The Business and Human Rights Review*. Why has the interaction between human rights and business become so important? Businesses are coming under ever-greater scrutiny by the media and non-governmental organisations (NGOs) on human rights issues, particularly when their activities involve jurisdictions where the rule of law is weak.

Claims that major companies have infringed human rights are now often headline news. Whether the allegations turn out to be true or not, they can cause serious reputational damage and a loss of business, harm employee morale, and pose operational risks. Significantly, businesses also increasingly face potential legal and financial liabilities for human rights failures. Meanwhile, the spotlight on the human rights impacts of business activities has in turn fuelled a pronounced growth in shareholder activism on corporate responsibility matters.

Yet, the human rights arena also presents businesses with an opportunity for innovation. This opportunity arises from voluntary initiatives such as the UN Global Compact and the UN Guiding Principles on Business and Human Rights (the **Guiding Principles**), which were developed by Professor John Ruggie, the former UN Special

Representative on the issue of human rights and transnational corporations and other business enterprises, and endorsed unanimously by the UN Human Rights Council last year. Those initiatives and others, such as the OECD Guidelines for Multinational Enterprises, are gaining traction as benchmarks against which conduct will be measured. They also allow business to develop their own human rights policies which best suit their culture.

The Business and Human Rights Review, published by Allen & Overy LLP's Human Rights Working Group, seeks to respond to this opportunity by providing a forum for debate between business, academia, private practice lawyers, NGOs and international bodies. The inaugural issue includes interviews with Mark Harding (Barclays), Pam Jestico (HSBC), Shami Chakrabarti (Liberty) and Clare Algar (Reprise) as well as articles by Professor Conor Gearty and Dr Jonathan Bonnitcha (both of the London School of Economics), Allen & Overy LLP lawyers and representatives of the Office of the United Nations High Commission for Refugees, on topics ranging from the influence of human rights on investment treaty arbitration to the role of women on corporate boards.

We hope you find it interesting and informative. We look forward to receiving your feedback on it and, of course, any future contributions to it.

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Cover Story

*Banking on human rights:
an interview with Mark Harding,
General Counsel of Barclays*



Banking on Human Rights

Mark Harding



General Counsel of Barclays, Mark Harding, speaks with us about how Barclays and the banking sector address human rights issues. Interview by Sarah Macrory and Belinda Richards of Allen & Overy LLP.

Barclays was among the first financial institutions to adopt a statement on human rights and did so prior to the publication of the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (the Guiding Principles). What motivated the publication of the Barclays Group Statement on Human Rights and why did Barclays consider it important?

Barclays developed our Statement on Human Rights in 2004. We were receiving questions from customers, investors and external stakeholders, such as ethical rating agencies, on our approach to this agenda. We understood that our geographical representation and history were relevant to human rights and considered that, as a responsible organisation, we should take steps to understand and address the issues raised. We focused on three areas of impact: our role as an employer, as a purchaser of goods and services, and as a provider of financial services to

clients. We found that many of our policies and practices already took account of human rights issues without explicitly referencing human rights. We had sound policies and requirements covering aspects such as discrimination, diversity, bullying and harassment, health and safety, and a range of other human rights-relevant issues. Our sourcing policy and process, for example, included a review of labour relations issues in our supply chain. The Barclays Group Statement on Human Rights provided an overview of our approach in the three areas of primary impact, signposted existing policies and outlined the basic principles which continue to underpin our approach.

In your capacity as Group General Counsel at one of the world's biggest banks, how, if at all, do human rights issues affect your role day-to-day?

Banks, however automated our systems become, are essentially relationship organisations. We deal with people – over 140,000 people work for us, we have millions of client relationships and operate in around 40 countries with differing regulatory

and cultural environments.

We consequently encounter human rights issues on a daily basis although, again, they may not be 'branded' as human rights. From my perspective as General Counsel, this manifests itself in areas such as ensuring we are compliant with relevant international standards and our own employment, financial crime prevention and 'know your customer' policies and that they remain fit for purpose in a constantly changing global and national political and regulatory climate.

You have reportedly said of yourself that you are "seen much more as a manager of legal risk than as a legal adviser". What risks do human rights pose to the business of Barclays and how do you manage them?

We are seeing a gradual hardening of soft law and voluntary practice in the area of human rights, and some moves towards extraterritoriality. The UK Bribery Act is a topical example in respect of corruption prevention and, although a voluntary instrument, the recently updated OECD Guidelines for Multinational Enterprises is another. The OECD Guidelines now have a specific

“We are not responsible for the actions of our clients and are not surrogate regulators, but we do need to ensure we uphold both standards and principles to which we are committed and internationally accepted good practice.”

Mark Harding, General Counsel of Barclays

chapter on human rights and national governments, including the UK, have strengthened the process around handling complaints about alleged breaches by companies. The risk to businesses from actual or perceived poor practice in respect of such standards may be material in terms of reputational damage and, in the case of legal instruments such as the Bribery Act, punitive fines.

The most difficult risk to manage from a bank perspective is the indirect risk arising from association with the activities of clients. As a universal bank, we support clients across the spectrum of industrial sectors, each of which may be associated with specific human rights issues of their own. We have risk management policies and practices that focus on environmental and social risks, including human rights, and have guidance for our lending management on specific sector risks. Banks are not responsible for the actions of their clients but we, and other banks, take steps to ensure that material risk of any kind is identified and taken into account during the evaluation and sanctioning process.

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

are guidelines from governments addressed to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business in a variety of areas, including human rights.

UNEP FI

is a global partnership between the United Nations Environment Programme (UNEP) and the financial sector. UNEP FI works with signatories to the UNEP FI Statements to promote links between sustainability and financial performance. It encourages the adoption of best environmental and sustainability practice through peer-to-peer networks, research, training and policy-making fora. UNEP FI has over 200 members from 40 countries across the global banking, insurance and investment sectors.

EQUATOR PRINCIPLES

are a risk management framework for determining, assessing and managing environmental and social risks in project finance transactions. Financial institutions adopt them voluntarily and they apply when total project capital exceeds US\$10 million. Over 70% of international project finance debt in emerging markets is governed by the Equator Principles.

How do you think a bank can strike an appropriate balance between managing human rights impacts and continuing to do business?

Similar to other areas of risk management, the approach taken has to be practical, timely and efficient, supported by a sound knowledge base. We have to be competent to identify, evaluate and mitigate risk and have a clear, objective and rapid escalation process for consideration of material impacts. Dealing with issues raised early in the sanctioning process is key: it is damaging to us and our client relationships to raise issues at the last minute. It is not possible to do thorough human rights due diligence on every relationship, transaction and operational decision regardless of materiality. Issues and impacts have to be prioritised depending on their significance. It is important that the business gains confidence in making the necessary value judgements and shares experience so that risk appetite is informed and consistent.

One of the principles in the Barclays Group Statement on Human Rights is to avoid complicity “either directly or indirectly in the condoning of human rights violations”. What systems does Barclays have in place to integrate human rights concerns into lending and financing decisions?

Barclays has a long-standing focus on environmental and social risk management in lending decisions. Human rights are integrated into our Environmental and Social Impact Assessment Policy, which includes application of the Equator Principles (social and environmental criteria applicable to project finance). Examples of the range of issues covered are labour conditions, security provision, resettlement arrangements including compensation and impact on cultural heritage sites. We contributed to the development of a human rights risk management toolkit for lenders through our membership of the UN Environment Programme Finance Initiative (UNEP FI) and this is shared with our lending managers globally via our intranet. In commissioning impact assessment reviews our terms of reference for consultants includes a broad range of human rights-related information requirements.

Barclays has a panel of legal advisers. You have shown a commitment to diversity by requesting that law firms provide statistics on the gender and ethnic composition of their staff. Is a human rights policy and practice something you expect of your panel law firms and why?

We have historically taken a pragmatic approach to requirements of suppliers in terms of human rights policy.

We know that companies deal with human rights in a variety of ways and that simply having a policy (although a strong indicator of commitment) is not necessarily proof of good practice. Ideally, human rights should be embedded across a range of policies and practices and we seek to evidence this in supplier relationships we judge to have material human rights risk potential. Legal firms have taken a high profile in publicising and commenting upon the new Guiding Principles, so I would expect them to be similarly proactive in adopting good practice in this area. Our panel process is key to establishing business-to-business relationships with firms who share our values and operating standards.

According to the Barclays Group Statement on Human Rights, Barclays aims to “take appropriate action in mitigation” where it discovers it is “associated with violations of human rights”. Is there an example of when Barclays did so? If so, what mitigating action did Barclays take?

A good example occurred when we moved to our new HQ in Canary Wharf in 2004. There was a campaign under way at the time in support of a living wage for cleaning staff working in the area, most of whom were paid the minimum wage. We met the local community campaigners and thought that the case they presented around the financial hardship suffered by cleaners was compelling, given the high living and transport costs in London. Therefore we went out to tender for cleaning services with the proviso that terms and conditions for

front-line cleaners would be a factor in our decision. The commercial contract that we eventually agreed with the supplier delivered cleaners a higher hourly rate, sick pay, increased holiday entitlement, access to a pension, training and bonus provision. The business benefit has been reflected in retention of staff which continues to be over 90% annually, compared with an industry average of around 35%. We remain strong supporters of the London Living Wage and have applied similar principles nationally. I use this example as it reflects that human rights issues can occur anywhere in a business's operations, in the developed as well as developing world.

Barclays Capital scored 100% in the Human Rights Campaign's 2011 Corporate Equality Index, which adds credence to the commitment of Barclays to being a “positive corporate role model” (Barclays Group Statement on Human Rights). Is there any achievement of Barclays in the human rights arena of which you are particularly proud?

I think our contribution to the debate both within our sector and cross-sectorally over the last eight years, as founder members of the Business Leaders' Initiative on Human Rights, chaired by Mary Robinson, chair of the UNEP FI human rights work stream, regular participants in the consultation conducted by John Ruggie during his six-year UN mandate, and currently as members of a group of banks looking at implementation of the Guiding Principles. No government or business can say that they have a perfect approach to managing human rights. It is important that the debate

“Simply having a policy (although a strong indicator of commitment) is not necessarily proof of good practice.”

Mark Harding, General Counsel of Barclays

continues, good practice is shared and lessons learned from experience.

The banking and financial sector has been one of the sectors engaged at an early stage in the business and human rights discussion and continues to be so. Where does the appetite in the financial sector to address human rights concerns come from?

Interest stems from awareness that we are associated with business clients in every sector and with personal, business and government clients in many countries. This association can result in the human rights risks attached to those relationships impacting on the financiers. Banks are sometimes regarded as a gateway to effecting change in other sectors and as a surrogate for government in regions where laws are lax or non-existent. It is important that we are able to manage expectations around this while continuing to fulfil our responsibilities as good corporate citizens. We are not responsible for the actions of our clients and are not surrogate regulators, but we do need to ensure we uphold both the standards and principles to which we are committed and internationally accepted good practice.

Barclays is a member of the Thun Group of banks, which has endorsed the Guiding Principles. Please tell us about the Thun Group, why it was formed and what it hopes to achieve.

The Thun Group was formed as a discussion forum to examine the implications for banks of the Guiding Principles, in particular the due diligence requirements – how they differ from current practice and may apply to different products and services. Planned output is a guidance note for banks which will further debate on the subject.

What do you consider the top five human rights issues currently affecting the financial sector?

- (1) Operating responsibly and consistently in high-risk environments;
- (2) Support for inclusive economic development in emerging and recovering markets and, linked to this:
- (3) Access to banking;
- (4) Corruption prevention; and
- (5) Gender diversity within the workforce.

What are the biggest challenges to financial institutions integrating human rights concerns into their business?

- (1) Colleague understanding and buy-in at all levels: identification and mitigation of risk at front-line level is the most effective/efficient approach;
- (2) Tone from the top is important to drive change through the business;
- (3) Ensuring consistency of standards across global organisations while being cognisant of cultural and regulatory differences; and

- (4) Transparency of approach while fulfilling commitment to client confidentiality.

What advice would you give to other financial institutions who are considering instituting a human rights policy?

Many already have well-developed approaches to human rights so look around, learn from others and ensure that the culture is consistent.

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

are the product of six years of work by the former UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Harvard Professor, John Ruggie. The Guiding Principles were adopted by the UN Human Rights Council in June 2011.

The aim of the Guiding Principles is to establish a common global standard for preventing and addressing the adverse human rights impacts of business activity. They build upon Ruggie’s “Protect, Respect and Remedy” framework, which considers that States have a duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication, whereas business enterprises have a duty to respect human rights and there is a need for greater access to remedy for victims of business-related human rights infringement, both judicial and non-judicial. Among other things, the Guiding Principles outline how business enterprises should discharge their responsibility to respect human rights, including by conducting human rights due diligence.

For more information, please see Dr Jonathan Bonnitcha’s article on page 14.

Human rights and business:
a burgeoning relationship



Not much to be scared of: the relationship between business and human rights

Professor Conor Gearty



Conor Gearty, Professor of Human Rights Law at the London School of Economics and founding member of Matrix Chambers, explores the intellectual heritage of human rights and suggests that businesses should embrace them.

Contemporary political posturing should not be allowed to distract from a core fact about human rights: here is an idea that is fundamentally sympathetic to business. The notion of human rights began to take its current shape in the 17th century.¹ This was when the English philosopher Thomas Hobbes first articulated the idea of liberty as being the freedom that each of us enjoys to do whatever we want; in other words, that we all have the natural right to do whatever is judged necessary to preserve ourselves. Of course, to some extent this idea has fallen by the wayside in the face of the obvious need to regulate conduct, one that Hobbes himself saw, hence his solution of empowering the State to decide everything on our behalf, his famous Leviathan. But Hobbes has left an important legacy in the form of the working assumption that governs our law, to the effect that we are free to do anything unless the law says otherwise. This residual approach to freedom was popularised by the influential Oxford lawyer Albert Venn Dicey in the late 19th century² and today we would think of it as libertarianism.

This approach suits business because it assumes State non-interference to be the norm and demands that all invasions of liberty be justified. But non-interference with what? The ‘state of nature’ in which Hobbes imagined individuals existing pre-Leviathan is one of constant competition and jousting for survival.³ The deep structure of at least Anglo-American human rights assumes a model of the person of this sort, in other words one that is deeply egoist and highly individualist – and so fits well with capitalist assumptions about the essence of the person. This is why Karl Marx hated human rights and socialists everywhere have been so suspicious of them: they take a particular (individualist) version of the person and turn it into truth.⁴ Two further developments in human rights increase even further its support for capital. First, there is the remarkable way in which the subject has extended its protection to the legal as well as the human person. The effect of this – rarely questioned in human rights circles and certainly

difficult to prevent even if the desire was there to eliminate it – is that all the rights enjoyed by persons under human rights law are available also to corporations. Thus, the guarantee of due process can be used not only as a shield against aggressive State action in the criminal sphere but also as a sword with which to counter regulatory decisions (on planning and licensing for example) to which a business objects. Another example is the right to freedom of expression which in almost all jurisdictions subscribing to it has extended to commercial speech as well, including but going beyond advertising, as in the successful case against Italy decided in mid-June 2012, on the allocation of frequencies to television companies.⁵ In the U.S. (admittedly an extreme example) it is the Supreme Court’s version of what free speech entails (uncontrolled election expenditure) that gives economic power such a grip over that country’s democracy.⁶

“Human rights are a friend to well-run businesses rather than their enemy.”

Professor Conor Gearty, London School of Economics and Matrix Chambers

The second supportive development is in relation to the right to property. The state of nature about which Hobbes speculated belonged to a mythic (albeit for his theory, necessary) past – no such state of nature had ever existed. What were definitely to be found everywhere, however, were pre-existing power relationships which reflected the inevitably unequal distribution of any given society’s resources that had developed over time. The effect of the turn to human rights is invariably to protect such prior (‘unfair’) arrangements by the deployment of a right to property that supports rather than questions the status quo. Landowners can use human rights to protect themselves from expropriation, just as industrialists can resist nationalisation by relying on their property entitlements. Now it is true that in most human rights charters there are qualifications to all of these rights, and in particular some State expropriation is permitted. But as the Former King of Greece found to his pleasure when he took Greece to the European Court of Human Rights for having taken his land, the world of human rights does not exclude even kings from its compassionate largesse.⁷ If the UK Human Rights Act had been around in 1649, Charles I would easily have secured a retrial.

And what of the UK Human Rights Act, passed in 1998 and fully in force from October 2000? It follows in many ways the usual path for such legal versions of this underlying idea, combining classic guarantees against terrible human behaviour (torture; enslavement; forced labour) with broader entitlements as open to the rich as to the poor, to the corporate as well as the real. In a major study to be published later this year in the *Lloyds Maritime and Commercial Law Quarterly*, my colleague John Phillips (Professor of English Law at King’s College London) and I have subjected the Act to close scrutiny from a business point of view. Our main finding is that the measure is broadly neutral so far as business is concerned. While the Act might cause a little damage here or there (as with the emerging right to privacy in the sphere of print journalism for example⁸), it also gives occasional space to business to challenge government (as with a recent High Court decision allowing an award of damages to a commercial operator for an infringement of its broadly defined property rights⁹). Mainly, however, it does very little. There is no ground for business interests to consider the measure inimical to their commercial activities; if anything it is (slightly) the other way round.

The content of human rights is not exhausted in local legislation. The value of the term lies in the

way it spills over into the regional (in the shape of both the European Convention on Human Rights and the EU charter) and the international (the Universal Declaration on Human Rights and the very many other treaties and conventions that have since emerged). Even beyond this ‘soft law’, there are the ethical obligations that a commitment to human rights is thought to entail, of the sort discussed elsewhere in this *Review*.

None of this should be anything to be scared of from a business perspective either. Certainly as envisaged by Professor John Ruggie – the former UN Secretary-General’s Special Representative on the issue of human rights and transnational corporations and other business enterprises – human rights are a friend to well-run businesses rather than (as socialism might have been, for example) their enemy. In these times of capitalist hegemony, business should welcome human rights as the kind of sparring partner it would much prefer to have, certainly as compared with the much stronger critiques of the past. And if we are, as the current UK prime minister has infamously said, truly “*all in this together*”, then business would be well advised to judge human rights a price well worth paying for the freedom of manoeuvre societies everywhere now accord to capitalist endeavour.

1 See Conor Gearty, *Liberty and Security* (Polity Press 2013 forthcoming) for further details, especially chapter 2.

2 Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (first published in 1885).

3 Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge University Press 2008).

4 For Marx’s viewpoint, see Jeremy Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987).

5 *Centro Europa 7 S r.l. v Italy* App no 38433/09 (ECHR, 7 June 2012).

6 Most notably *Citizens United v Federal Election Commission* 558 US 50, 130 S Ct 876 (2010).

7 *Former King of Greece v Greece* (2000) 33 EHRR 516. The former King of Greece was awarded EUR 12 million: *Former King of Greece v Greece* (no 2) App no 25701/94 (ECHR, 28 November 2002).

8 *Campbell v MGN Ltd.* [2004] UKHL 22; [2004] 2 AC 457.

9 *R. (Infinis Plc and Infinis Re-Gen Ltd) v The Gas and Electricity Markets Authority* [2011] EWHC 1873 (Admin).

Beyond the Guiding Principles: corporate compliance and human rights-based legal exposure for business

Charles E. Borden
and Schan Duff*



Allen & Overy LLP's Washington-based Banking Regulatory Group partner, Charles E. Borden, and senior counsel, Schan Duff, highlight the current top five human rights issues for businesses.

Since the adoption of the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (the **Guiding Principles**) by the UN Human Rights Council in June 2011, multinational corporations, industry consortia and non-governmental organisations from around the world have grappled with the issue of how and to what extent corporate actors should integrate human rights principles into corporate compliance. Although most of the discussion has focused on the moral or reputational considerations that might prompt a corporate actor to implement a human rights compliance programme, a number of recent developments – such as the rise of private litigation against corporate actors for human rights violations under the U.S. Alien Tort Statute (**ATS**) and other domestic legal regimes, the development of self-regulatory mechanisms that tie human rights compliance to eligibility for substantial business opportunities

and the growth of human rights-focused shareholder activism – make it clear that human rights is an increasingly significant source of legal and financial exposure for corporate entities. While potential liability will vary by jurisdiction, sector, business activity and corporate organisation, there are several emerging areas of legal risk that all corporate actors should keep in mind when implementing their human rights compliance programmes.

Legal regimes with extraterritorial reach

The single largest source of human rights-related legal risk for corporations remains the U.S. Alien Tort Statute. The ATS is a jurisdictional statute which allows foreign plaintiffs to bring suit in the United States against defendants, wherever they are located, for violations of the law of nations. Over the past 25 years, more than 120 lawsuits have been brought in U.S. courts against 59 corporations,

the vast majority of which allege that the corporate defendant aided and abetted human rights abuses committed by foreign governments. Most corporate ATS cases have settled or been dismissed, but there have been damages awards as high as USD80m. The U.S. Supreme Court is scheduled to hear a major ATS case this autumn, *Kiobel v Royal Dutch Petroleum*, in which it will consider key questions regarding the application of the ATS to corporations. For now, however, U.S. courts remain open even to foreign plaintiffs seeking relief from foreign or domestic corporations for their participation in human rights abuses, wherever such abuses may occur.

In addition, although not comparable in scope to the ATS, the 1968 Brussels Convention (Brussels I Regulation) enables a defendant domiciled in an EU Member State to be sued in that Member State even if the courts of a non-EU State would be a more appropriate forum.

“Over the past 25 years, more than 120 lawsuits have been brought under the U.S. Alien Torts Act against 59 corporations, the vast majority of which allege that the corporate defendant aided and abetted human rights abuses committed by foreign governments.”

Charles E. Borden and Schan Duff, Allen & Overy LLP

TOP 5 HUMAN RIGHTS ISSUES FOR BUSINESSES

- (1) Legal regimes with extraterritorial reach
- (2) Potential liability under domestic tort law
- (3) Loss of business opportunities through human rights disqualification
- (4) Parent company liability for human rights violations
- (5) Corporate governance risks

Potential liability under domestic tort law

In recent years, courts have begun to allow suits under domestic tort law against corporate actors for decisions they have taken in their home jurisdictions that implicate human rights abuses in foreign jurisdictions. For example, U.S. courts recently allowed tort claims to proceed against ExxonMobil and Chevron Texaco on the theory that the defendants acted negligently in the United States by engaging and subsequently supervising local government security forces that allegedly engaged in human rights abuses. The scope of this risk may be tied to the growing adoption of the Guiding Principles among corporate actors – in common law jurisdictions, industry custom is often relevant to assessing the duty

of care in negligence cases. Accordingly, as acceptance of the Guiding Principles grows, they may begin to operate hydraulically to ensconce human rights due diligence programmes as the applicable standard of care for multinational entities.

Loss of business opportunities through human rights disqualification

Both the Guiding Principles and the UN Global Compact emphasise the responsibility of corporations for the human rights performance of entities beyond their legal control, including business partners, vendors, suppliers and customers. Some jurisdictions have recently formalised these obligations with specific global supply chain reporting requirements. For example, California recently enacted the Transparency in Supply Chains Act which requires any retail seller or manufacturer that does business in California and has worldwide gross receipts in excess of USD\$100m to identify the extent to which they have audited their suppliers for compliance with company standards on slavery and human trafficking.¹ Similarly, the Dodd-Frank Act requires covered

entities to audit their conflict mineral supply chain to determine whether any such minerals originated from the Democratic Republic of Congo in order to avoid “*directly or indirectly finance[ing] or benefit[ing] armed groups*” operating within the country.² And the OECD recently issued similar guidance for due diligence in connection with supply chains of minerals from conflict zones.³

Perhaps more importantly, however, increasing self-regulatory efforts by various parties to monitor human rights activities within their ‘sphere of influence’, including through the promulgation of ‘supplier codes of conduct’, create a real possibility that corporate actors will be disqualified from business opportunities by partners or customers who may be unwilling or unable to vouch for their human rights compliance. Recently, for example, global retail giant Wal-Mart terminated one of its major seafood suppliers following reports of poor working conditions at its processing facilities. Put simply, the risk of lost business from a human rights-related default may be just as likely to come from close corporate partners as it does from NGOs or private litigants and may be more substantial.

“Common law courts may be more receptive to arguments that parent companies should be held liable for acts of their agents more now than in the past.”

Charles E. Borden and Schan Duff, Allen & Overy LLP

Parent company liability for human rights violations

Most litigation against major multinational entities for alleged corporate human rights abuses involves efforts to attribute acts committed by foreign subsidiaries or contractors to the parent entity. Such attempts are typically unsuccessful – absent effective control by the parent company, principles of separate legal personality have provided a substantial obstacle for human rights litigants asserting claims based on alleged violations by third-country subsidiaries and contractors. But in recent years human rights advocates increasingly have pressed for the adoption of a robust conception of ‘enterprise liability’, which would ‘pierce the corporate veil’ in the area of human rights and effectively hold corporate

groups responsible for human rights violations wherever they may occur within the corporate legal structure. And, although no court has yet embraced this approach to corporate liability, common law courts may be more receptive to arguments that parent companies should be held liable for the acts of their agents more now than in the past. For example, the UK Court of Appeal recently found a UK company had assumed a duty of responsibility for the health and safety conditions of its subsidiary’s employees, in part based on its state of knowledge of the relevant working conditions and its failure to advise on related precautionary measures.

Corporate governance risks

There has been a pronounced growth over the past few years in shareholder activism on social responsibility and

sustainability issues. These efforts increasingly include shareholder resolutions directing corporate actors to adopt policies and programmes that help detect, mitigate and avoid human rights abuses. For example, during the 2011 proxy season, companies such as Chevron, Halliburton and Boeing faced shareholder resolutions seeking third-party monitoring of their supply chains to verify human rights compliance. Support for shareholder resolutions of this sort has been growing, with Ernst & Young reporting that human rights-focused shareholder resolutions received in excess of 15% support in 2011.

* The views in this paper are personal and do not necessarily reflect the views of Allen & Overy LLP or its clients.

1 California Civ Code § 1714.43.

2 Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502.

3 OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas of the Organization for Economic Cooperation and Development* (2011), available at <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf>

The UN Guiding Principles on Business and Human Rights: the implications for enterprises and their lawyers

Dr Jonathan Bonnitcha



Dr Jonathan Bonnitcha, ESRC Postdoctoral Fellow in International Investment Law at the London School of Economics, examines the detail of the UN Guiding Principles on Business and Human Rights and considers why businesses should comply with them, what the challenges of compliance are and what role lawyers have in their implementation.

In June 2011 the United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (the **Guiding Principles**). The Guiding Principles were the culmination of six years’ work by Professor John Ruggie, who had been appointed as Special Representative of the UN Secretary-General with a mandate to clarify the responsibilities of business relating to human rights. The Guiding Principles succeeded in this task. They provide a clear statement of business enterprises’¹ responsibilities with respect to human rights, which has now been accepted by governments, the business community, international organisations and non-governmental organisations (NGOs). This article explores the implications of the Guiding Principles for enterprises, and for the lawyers who advise them.

Some brief background

Prior to Ruggie’s mandate, most initiatives in the field of business and human rights focused on specific issues – for example, labour standards in the garment industry, the relocation of indigenous populations or enterprises’ relationships with security forces. There were certain advantages to this piecemeal approach, notably in that successful initiatives were able to establish clear standards for business so far as a particular issue was concerned. However, the proliferation of initiatives also gave rise to the notion that business’s responsibility to observe human rights was reactive – as calls for business to act consistently with ‘human rights’ arose only *after* a particular problem had come to public attention – and unprincipled – as there was little coherence between different initiatives that invoked human rights. A single, coherent statement of enterprises’ responsibilities was needed.

Ruggie’s mandate was not the first attempt to provide a coherent statement of the human rights responsibilities of business enterprises. An earlier UN initiative – the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights – was abandoned after governments and the business community objected that it purported to establish legal obligations for enterprises that were analogous to the legal obligations of States under international human rights law. Ruggie’s success was in clearly distinguishing the legal obligations of States from expectations about the appropriate conduct of business.

Enterprises’ responsibilities under the Guiding Principles

The Guiding Principles begin with a core statement of principle – business enterprises have a responsibility to

respect all internationally recognised human rights.² This means that they should:

(a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and

(b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.³

Three key points emerge from this statement of principle. The first is that enterprises must take responsibility for any adverse *impacts* (or potential impacts) on individuals' human rights that they cause or with which they may be involved. The Guiding Principles do not relate to corporate philanthropy, nor do they require business enterprises to assume the human rights obligations of the States in which they operate.

The second key point is that the primary human rights responsibility of businesses is preventive – enterprises should take active steps to ensure that their activities and operations do not cause or contribute to adverse human rights impacts. If an enterprise fails to discharge its primary responsibility, then a secondary responsibility arises to provide a remedy to the individuals whose rights have been infringed.

The third key point concerns the distinction between an enterprise's own human rights impacts (or potential impacts) and the human rights impacts of third parties with which the enterprise is linked. An enterprise has an unqualified responsibility not to cause or contribute to adverse human rights impacts. The situation regarding third parties is more complex. Enterprises have a responsibility to

'seek to prevent' any adverse human rights impacts of third parties with which they have business relationships. To discharge this responsibility, an enterprise must seek to acquire and exercise 'leverage' over such third parties. Discharging this responsibility inevitably requires an enterprise to take active steps in assessing and monitoring the activities of its business partners, suppliers, vendors and clients.⁴ However, there are, in principle, limits on the extent to which an enterprise may be held responsible for the conduct of third parties.⁵

The relevance of the Guiding Principles: why should business comply with principles that are not legally binding?

The Guiding Principles do not purport to create new legal obligations for business. Rather, Ruggie describes them as constituting:

“a global standard of expected conduct for all business enterprises wherever they operate ... [that] exists over and above compliance with national laws and regulations protecting human rights”.

Given that the Guiding Principles are not legally binding, the question arises as to why business should comply with them. The short answer is that enterprises should seek to comply because respecting human rights is 'the right thing to do'. Most enterprises and business people would agree that conduct that has adverse impacts on individuals' human rights – for example, using forced labour, dispossessing local communities without paying compensation or implementing discriminatory hiring and promotions policies – is ethically unacceptable, regardless of whether it is legally permissible.

There are, however, additional pragmatic reasons for business to comply with the Guiding Principles. First, the Guiding Principles have already been incorporated in various soft-law instruments. Over the past year, for example, the Organization for Economic Cooperation and Development's (OECD) Guidelines for Multinational Enterprises have been updated to reflect the Guiding Principles. While the OECD Guidelines are not formally binding, they establish an investigatory procedure that allows the 'National Contact Points' in OECD countries to investigate allegations that companies have breached the Guidelines. Enterprises face a risk of public censure and the potential of follow-on litigation under other applicable laws as a result of adverse findings by an NCP.

Secondly, the Guiding Principles are likely to influence the development of 'hard' laws and regulations that govern business. The European Commission is already considering ways in which business should be encouraged to comply with the Guiding Principles, including mandatory human rights reporting obligations. It is also possible that the Guiding Principles – as an internationally agreed standard of conduct – could be used by judges to clarify concepts such as 'proximity' and 'reasonable precaution' when human rights claims are litigated under domestic tort law.⁶

Thirdly, enterprises will increasingly be confronted with demands from banks, institutional investors and contractual counterparties to show that they respect human rights in all aspects of their business activities. This process has already begun with the updating of the International Finance Corporation's Sustainability

Framework to reflect the Guiding Principles. Compliance with the IFC's Sustainability Framework is a condition of financing by the IFC. National export credit agencies and the 70 private sector banks that subscribe to the Equator Principles also require compliance with the IFC's Sustainability Framework as a condition of funding. As such, compliance with the Guiding Principles is already a prerequisite for doing business in many industries.

Finally, there are the potential reputational benefits from respecting human rights and the risk of reputational costs for failing to respect human rights. The extent of reputational risk varies considerably among enterprises, but the widespread acceptance of the Guiding Principles means that they will increasingly serve as the standard by which enterprises are judged. The combination of pressure from external stakeholders and reputational benefits from being seen to 'do the right thing' will create financial incentives for enterprises to implement the Guiding Principles.

Implementing the Guiding Principles: the challenge of compliance

To implement their responsibility to respect human rights enterprises require:

- “(a) a policy commitment to ... respect human rights;
- (b) a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and
- (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute”.⁷

The Guiding Principles include several further 'operational principles', which

contain advice on how enterprises should implement these policies and processes in practice.

An enterprise's publicly stated human rights policy can be a simple commitment to respect human rights. But designing and implementing human rights due diligence processes is likely to pose practical challenges for all enterprises. Guiding Principle 16 requires that an enterprise's public commitment to respect human rights be approved at 'the most senior level'. This reflects an important insight from practitioners – that embedding respect for human rights within an enterprise is difficult without clear and consistent support from senior management. In addition, embedding respect for human rights within an organisation requires more detailed internal policies, dealing with issues such as lines of accountability, procedures for raising concerns, the monitoring of human rights impacts and relationships with third parties. These policies should be developed in tandem with human rights due diligence processes.

Most enterprises already have policies and processes in place to prevent and redress certain adverse human rights impacts (such as workplace discrimination). Enterprises in the information technology sector may have policies dealing with data security (right to privacy), while mining companies may already have policies and processes for engagement with local communities. The practical challenge for enterprises is in ensuring that these processes form part of the coherent approach to human rights due diligence that is needed to avoid adverse human rights impacts.

The Guiding Principles require that human rights due diligence processes should: identify actual and potential adverse human rights impacts;

integrate these findings into decision-making processes; monitor the steps taken to ensure adverse impacts are avoided; and communicate publicly about how adverse impacts have been addressed. This advice is necessarily framed in general terms. Individual enterprises will need to determine for themselves how they can best incorporate these functions into existing systems of internal control.

Perhaps the most important phase in this iterative process is the first – identifying human rights impacts. This cannot be a one-off exercise. For all enterprises this will necessitate a combination of stakeholder consultation, frank internal discussion and the use of external expertise. Larger enterprises should consider undertaking a formal human rights impact assessment as part of their human rights due diligence. The integration of the findings of human rights due diligence into organisational decision-making is likely to pose particular difficulties for large and functionally complex enterprises. Integration requires senior management to consider how different parts of the enterprise relate to one another. Human rights concerns must be taken into account in operational decisions, not 'siloed' in the corporate social responsibility (CSR) division of an enterprise.

The third element required to implement the responsibility to respect human rights is a process (or processes) to redress any adverse human rights impacts of the enterprise. The practical steps necessary to provide remediation are likely to vary between enterprises. Formalised grievance mechanisms are not necessarily required and enterprises should respect and cooperate with legitimate judicial

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Dr Jonathan Bonnitcha, London School of Economics

processes. The Guiding Principles envisage “*processes to enable remediation*” as something more akin to stakeholder consultation – a channel through which affected individuals can raise concerns with the enterprise and an internal policy that allows the enterprise to respond to such concerns. Instituting such processes is likely to be in the enterprises’ own interest. Anecdotal evidence suggests that it is better to address human rights-related grievances before they escalate.

The role of lawyers in implementing the Guiding Principles

Lawyers have an important role to play in advising enterprises on the implementation of the Guiding Principles. Senior managers within most enterprises are unlikely to be

familiar with the language of human rights. The first role of lawyers is to make the Guiding Principles more accessible by explaining the legal basis of international human rights and offering practical examples of how business can infringe individuals’ exercise of these rights.

Lawyers also have an important role to play in implementing the policies and processes required to ensure that an enterprise discharges its responsibility to respect human rights. Lawyers coming to the Guiding Principles – whether as in-house counsel or in private practice – are likely to have experience dealing with other systems of internal governance and control. Lawyers will be able to draw on their experience in advising on compliance with regulatory requirements in areas such as equalities

law and occupational health and safety. Experience in the design and implementation of “*adequate procedures*” under Section 7 of the UK Bribery Act is likely to be particularly relevant in the implementation of human rights due diligence.

Finally, lawyers have a role to play in building the ‘business case’ for compliance with the Guiding Principles. Senior management will rightly ask those advocating implementation of the Guiding Principles to justify why time and energy should be expended on compliance with principles that are not legally binding. Lawyers are likely to appreciate the way the law is evolving in this field, and the many other pragmatic justifications for compliance outlined above.

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- 1 The Guiding Principles refer to “business enterprises” rather than “companies”, emphasising that they apply to all businesses, regardless of their legal form.
 - 2 Including, as a minimum, the rights contained in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the ILO Declaration on Fundamental Rights at Work.
 - 3 Guiding Principle 13.
 - 4 This situation is discussed in greater detail in Guiding Principle 19. One important implication of enterprises’ responsibilities with respect to third parties is that a parent company cannot avoid responsibility for the conduct of a subsidiary.
 - 5 The Guiding Principles are best understood as requiring a business enterprise to satisfy a standard of due diligence in seeking to prevent third parties with which they have business relationships of having adverse human rights impacts. This is consistent with Ruggie’s view as articulated in: John Ruggie, ‘Clarifying the Concepts of “Sphere of influence” and “Complicity”’: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises’ (15 May 2008). Human Rights Council 8th Session UN Doc A/HRC/8/16 [23]-[25].
 - 6 Peter Muchlinski, ‘Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation’ 22(1) (2012) *Business Ethics Quarterly* 145, 161.
 - 7 Guiding Principle 15.
 - 8 Guiding Principle 17.
 - 9 The UN Global Compact has just published an excellent compendium of resources available to business, which is available online at http://www.unglobalcompact.org/issues/human_rights/tools_and_guidance_materials.html

Investment treaty arbitration: the human rights defence

Ignacio Madalena
and Diogo Pereira*



Allen & Overy LLP's London-based International Arbitration Group associates, Ignacio Madalena and Diogo Pereira, consider the interplay between international human rights law and international investment treaty law in light of the growing trend of arbitral tribunals being asked to address the human rights obligations of both States and investors.

Observance of human rights by foreign investors continues to be a subject of global concern

In recent years, corporate involvement in human rights violations has become a cause of great concern within the international community. In some cases, foreign investors have been held responsible for specific violations of human rights, such as forced labour, interference with a local population's access to water, or threats to public health and the environment. In other cases, tribunals have determined that corporations have collaborated with host States in committing human rights violations. While various codes and rules exist to address the conduct of multinational corporations, their direct binding force is often unclear. Corporations should be aware that international human rights obligations can restrict their international business activities, and can limit the protections available under international investment law.

Multilateral and bilateral investment treaties (**Investment Treaties**) are designed, in part,

to enhance investment flows from capital-exporting States to developing nations by giving investors sufficient confidence that their investment will be free from undue governmental interference. A typical Investment Treaty sets out requirements for the admission and establishment of nationals of the other contracting State as protected investors, and imposes specific obligations upon the host State regarding investment protections. These include, for instance, the obligation to provide 'fair and equitable treatment', as well as the obligation to pay prompt, adequate and effective compensation in cases of expropriation. If a breach of these obligations takes place, the investor has a cause of action, through arbitration, against the offending State. The available fora include the International Centre for Settlement of Investment Disputes (**ICSID**) as well as other arbitration institutions. Whilst Investment Treaties expressly address many of the concerns held by international investors, they are largely silent on the issue of human rights.

The tension between a State actor's human rights and Investment Treaty obligations is highlighted in two contexts: (1) in relation to whether an Investment Treaty restricts a State's freedom to adopt measures that promote or protect human rights; and (2) where an Investment Treaty directly addresses potential illegalities, including international human rights breaches, in the formation and performance of an investment in the host State.

States' regulatory freedom to promote and protect human rights

There are certain peremptory norms – or *jus cogens* – in the field of international human rights which are binding on States. Although there is no clear consensus on the scope of these norms, it is generally accepted that they include the prohibition of genocide, torture, slavery and forced labour. States are not only entitled, but are internationally bound, to adopt all necessary measures to ensure that any conduct in their territory which violates these norms is prosecuted and punished. Every State

“Tribunals are increasingly recognising the right of a State to regulate in the public interest when the exercise of such sovereign power is proportionate, reasonable and non-discriminatory.”

Ignacio Madalena and Diogo Pereira, Allen & Overy LLP

must ensure that certain fundamental human rights are duly protected within its territory, and those rights prevail over the provision of any Investment Treaty. In practice, however, not all human rights have equal weight under international law and their interplay with Investment Treaty obligations has, on certain occasions, been controversial.

Concerns about the impact that State actions to protect human rights may have on foreign direct investment have been raised primarily in the context of public health, water and sanitation, protection of the environment, cultural heritage, and the rights of indigenous people. For example, in the context of regulation aimed at protecting public health, claims are currently being brought by Philip Morris against Uruguay¹ and Australia² challenging regulations on the packaging of tobacco products. Uruguay and Australia argue that regulation of tobacco packaging is directly related to the promotion of public health and reducing the consumption of an addictive and harmful product. Philip Morris argues that it has been adversely affected by the regulations, and that such regulations are in breach of the protections afforded to it under the relevant Treaty. These cases are still ongoing.

Another example is the case of *Piero Foresti, Laura de Carli & Others v South Africa*,³ where various human rights issues arose from the enactment of the Mineral and Petroleum Resources Development Act 2002 (**MPRDA**). The MPRDA was aimed at repairing the injustices of exploitative labour, forced land deprivations and discriminatory ownership policies which characterised South Africa’s mining sector during apartheid. It granted the South African government authority to seize all natural resources located in the country and to determine mineral exploitation rights. Companies that previously held private mineral rights were required to apply for licences to continue operating their mining activities. In November 2006, several Italian citizens and a number of Luxembourg-based corporations in South Africa’s mining industry filed a request for arbitration at ICSID challenging the MPRDA on the grounds that it was in breach of South Africa’s international obligations under the bilateral investment treaties (**BITs**) with Italy and Belgium-Luxembourg. Ultimately, however, proceedings were discontinued when the claimants were granted new mining rights and a decision was never given on the conflict between the BITs and human rights.

During the last decade, international investment law has evolved to confer greater regulatory freedom on States in areas of public interest. Recent awards reveal that liability under Investment Treaties is not based on the effects of the contested regulatory measure, but rather on whether the contested regulation is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, or involves a lack of due process.⁴ In the landmark decision rendered in *Saluka v Czech Republic*⁵ the tribunal acknowledged that a foreign investor should expect a host State to regulate certain areas of public interest, and held that the State cannot be held liable for implementing *bona fide* policies to this effect (provided they are consistent, transparent, even-handed and non-discriminatory in their effect on foreign investors). Under this approach, Investment Treaties should not prevent host States from modifying their laws to respond to human rights considerations.

In other cases, proportionality and reasonableness were at the centre of the tribunal’s analysis.⁶ Under this approach, a governmental measure is likely to violate Investment Treaty obligations unless it “*bears a reasonable relationship to some rational policy*”.⁷ In other words, a governmental measure will be considered unreasonable if it is not based on the pursuit of a legitimate policy.

“An Investment Treaty cannot limit a State’s sovereignty to take measures to protect its citizens from gross human rights violations.”

Ignacio Madalena and Diogo Pereira, Allen & Overy LLP

Investment Treaties do not protect illegal investments

Investment Treaties are typically silent on human rights issues. However, the protection those treaties confer is generally conditional on the investment’s consistency with the laws of the host State, including labour laws, environmental laws, corporate laws and any other domestic law to which a domestic investor is subject. Further, even in cases where the treaty does not specifically refer to the consequences of an illegal investment, protection under the Investment Treaty will be excluded where the investment departs from international law.⁸ Presumably, illegality of an investment may include a departure from fundamental human rights.⁹

In practice, when an investor brings a claim against a State pursuant to an Investment Treaty, if the investment is tainted with illegality, the tribunal might decline jurisdiction to hear the case.¹⁰ In some instances, the illegality of an investment has been raised as a defence on the merits and tribunals have found that the substantive protection of an Investment Treaty does not apply when the host State takes action against a foreign investor engaged in illegal activities.¹¹

However, beyond the strictures of a host State’s domestic legal framework, foreign investors are bound by *jus cogens* norms such as genocide, slavery,

racial discrimination, crimes against humanity and torture. In such cases, an Investment Treaty cannot limit a State’s sovereignty to take measures to protect its citizens from gross human rights violations. In the words of one ICSID tribunal, Investment Treaties do not protect investments made “*in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs*”.¹² Arbitral practice has not yet defined whether and to what extent other, non-peremptory, international human rights obligations can preclude investment protections.¹³ Generally, however, unless the laws of the host State provide otherwise, they will not impede a foreign investor’s protection under an Investment Treaty.

Treaty drafting options preserve States’ regulatory freedom on human rights questions

In considering the scope of a State’s right to regulate, arbitral tribunals have looked to the express language of the applicable Investment Treaty. This approach is consistent with the main criteria for treaty interpretation under the Vienna Convention on the Law of Treaties, requiring a reading of the treaty provisions in accordance with their ordinary meaning, considering the object and purpose of the treaty. To that extent, it is for the

tribunal to consider whether the treaty operates as a mechanism of strict liability in cases where a national law affects foreign investments, or whether the contracting States reserved their right to regulate in certain areas of public interest.

Several options exist for States to preserve their right to regulate in areas affecting human rights protection. For example, certain Investment Treaties reserve a right for the State to regulate in areas such as national security, public health and environmental protection, as long as the regulation is passed in a non-discriminatory, non-arbitrary, reasonable and proportionate manner. Article 1114.1 of the North American Free Trade Agreement (NAFTA) specifically refers to the interaction between the rights of investors under Chapter XI of the NAFTA and the rights of the host State to regulate on environmental matters. More recently, the 2012 U.S. Model BIT, released in April 2012, specifically provides for the right of contracting States to regulate on questions of public interest (environmental and labour standards, in particular) and for the contracting States’ express obligation not to derogate from any existing standards when encouraging foreign investment. A similar, though less affirmative, language had been endorsed in the previous 2004 U.S. Model BIT.

“Investment Treaties are typically silent on human rights issues.”

Ignacio Madalena and Diogo Pereira, Allen & Overy LLP

Conclusion

Arbitral tribunals are still defining the exact contours of the relationship between international human rights and international investment law, but concerns have been raised that greater effort should be made to

achieve coherence between them. Arbitral practice indicates that tribunals are becoming increasingly reluctant to protect investments tainted with illegality or corruption. Despite the uncertainties, tribunals are also increasingly recognising the right of a State to regulate in the public

interest when the exercise of such sovereign power is proportionate, reasonable and non-discriminatory, and when the regulatory measures in question are not merely a disguise to arbitrarily deprive an investor of the enjoyment of its investment.

* The views in this paper are personal and do not necessarily reflect the views of Allen & Overy LLP or its clients.

- 1 *Philip Morris Brand Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Request for Arbitration, 19 February 2010.
- 2 *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, Notice of Claim, 22 June 2011.
- 3 *Piero Foresti, Laura de Carli & Others v. South Africa*, Award, 4 August 2010.
- 4 *Methanex Corporation v. United States of America*, Award, 3 August 2005, Part IV Chapter C pgs. 3-4 para 7, referring to *Waste Management Inc. v. United Mexican States*, Award, 30 April 2004 (the minimum standard of fair and equitable treatment was defined as preventing legislation that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety”).
- 5 *Saluka v. Czech Republic*, Arbitration, Award, 17 March 2006.
- 6 *Técnicas Medioambientales S.A. v. Mexico*, Award, 29 May 2003; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, Award, 18 August 2008, para. 340 (“The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest”).
- 7 *Bivater Gauff Limited v. Tanzania*, Award, 24 July 2008.
- 8 *Pluma Consortium Limited v. Bulgaria*, Award, 27 August 2008, para. 138 (highlighting that the applicable IIA, the ECT, “does not contain a provision requiring the conformity of the Investment with a particular law” but “This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law”). See *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award, 16 August 2007.
- 9 Article 1131, North American Free Trade Agreement (NAFTA) (stating that a tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”); Article 26(6), Energy Charter Treaty (ECT) (stating that the tribunal “shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law”); Article 42 (1), The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (establishing that in the absence of an agreement of the parties on the applicable law, “the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable”).
- 10 *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award, 16 August 2007.
- 11 *World Duty Free v. Kenya*, Award, 4 October 2006; *Genin et al v. Estonia*, Award, 25 June 2001; *International Thunderbird Gaming Corporation v. Mexico*, Award, 26 January 2006 (the illegality of an investment has negative consequences for the protection of the investment. In such cases tribunals found that the substantive protections of the investment protection treaty do not apply. However, they held that these protection standards had not been violated by the host State when taking action in response to the illegalities committed by the investor).
- 12 *Phoenix Action Ltd. v. Czech Republic*, Award, 15 April 2009; Commentary to Article 26 of the International Law Commission Draft Articles, The Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E.2, pg. 208. para. 5; *Methanex Corporation v. United States of America*, Award, 3 August 2005, Part IV, Chapter C, pg. 11, para. 24 (“as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or jus cogens and not to give effect to parties’ choices of law that are inconsistent with such principles”); *Phoenix Action Ltd. v. Czech Republic*, Award, 15 April 2009, para.78 (confirming that “nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs”).
- 13 *Ineyisa Vallisoletana S.L. v. Republic of El Salvador*, Award, 2 August 2006.

Human rights in context:
women, human rights and business



Addressing diversity: women on company boards

Joanna Page and Edward Rance*



Allen & Overy LLP's London-based Corporate Litigation partner, Joanna Page, and trainee, Edward Rance, consider why the proportion of women on corporate boards is so low, ask whether this is a cause for concern and examine the proposal for quotas.

The proportion of women sitting on the boards of directors of the UK's top companies remains small. A report, prepared for the UK Government by Lord Davies in February 2011, stated that women comprised 12.5% of the boards of the FTSE 100 in 2010 and 7.8% of the boards of the FTSE 250.¹ More recent Government figures put the percentage at 15.6% and 9.6% respectively.² Whilst that represents improvement, governments across Europe and the EU Commission have expressed concern at the slow pace of change.

Where are the women?

From Lord Davies' analysis of the UK FTSE 100 in 2010, it is clear that only 5.5% of executive directors and 15.6% of non-executive directors are women.³ Though this represents progress, 46% of the FTSE 250 companies in 2012 still have no female board members at all.⁴

These percentages are not dissimilar to the rest of Europe or the world. Data available in 2009 indicated that most countries in Asia and Latin America have less than 5% female representation on their quoted company boards. Exceptions include countries where there is a high level of female participation in public life, such as the

Philippines, where women are reserved seats on local legislative bodies.⁵

Why the imbalance?

Given the proportion of highly qualified and experienced women in the workforce, the mystery of the past few decades is why so few women have reached board level.

One reason regularly given is that women are leaving employment before they reach senior management or are choosing to remain in employment at a more junior or a less demanding level. If that is correct, is this a symptom of other failures to achieve diversity or a result of personal choices made lower down in the management structure? The response often given is that there is insufficient flexibility in the options available for working mothers and insufficient willingness to recognise underlying competencies rather than prior experience. Other reasons given are that boards may have a tendency to recruit, even unconsciously, in their own image or from amongst those they know. Given that the pre-existing image of many boards is predominantly male, the pace of change could remain slow. Recent research by the Equality and Human Rights Commission in the UK

postulates that gender bias might even exist in executive recruitment firms⁶ and in response, a voluntary code of conduct for executive search firms was launched in July 2011.⁷

Another reason rarely given in the written reports, but given more regularly anecdotally, is that many women do not relish sustained high-profile leadership roles, preferring a supporting role instead. If that is a factor, is it a result of more recent social and embedded generational norms which are capable of change, or something deeper? Given the number of high-profile women in some walks of life, such as politics and the not-for-profit sector, it would not seem to be hard-wired into the female psyche. The demands of child-rearing and the pressure that places upon parents seems the most significant reason. Even if women can afford excellent childcare, children do need time and attention. Even flexible roles can place enormous demands upon the energy and organisational skills of parents. Sometimes it is remarked upon that boards are not welcoming environments for women. Women are so outnumbered that they do not feel able to make a contribution to the debate on their own terms. There is

interesting research which suggests that three women on a board or other decision-making body is the minimum required to create a dynamic where women play their fullest role and contribute naturally.⁸

Why change?

The world's top companies contribute to the economy, set the standard in many areas of corporate life, undertake critically important research and development and lead the way in customer service. They are vital employers.

There is plenty of evidence of a correlation between greater gender diversity on boards and successful businesses. As Lord Davies put it, “*diverse boards are better boards*”.⁹ That is unsurprising when women make around 70% of consumer purchasing decisions and constitute a large proportion of the workforce.

An additional perspective in any discussion might make decision-making more difficult, requiring additional patience, intelligence and determination on the part of all board members but could make the end product better.

Quotas at quoted companies

Flexible working solutions, willingness to accept different forms of experience and patience with employees through

the very early years of parenthood undoubtedly plays a part. But the slow pace of change suggests that more might be needed. In 2011, Lord Davies shied away from imposing quotas, instead proposing a series of voluntary actions. He encouraged businesses, particularly FTSE 100 companies, to set themselves a 25% target for the number of women on boards. Other European countries have imposed quotas. Norway did so in 2004 and Belgium, France, Italy, the Netherlands and Spain have recently followed suit.

Last year, the EU Commissioner, Viviane Reding, challenged EU quoted companies to redress the gender imbalance on their boards and to pledge to achieve targets of at least 30% of board roles filled by women by 2015 and 40% by 2020. As at March 2012 only 24 companies across the EU had subscribed to that pledge. In a public consultation launched in March 2012, Vivian Reding invited views on whether quotas should be imposed. The UK Government's response to the public consultation expressed strong opposition to the idea of quotas, instead emphasising the need for “*cultural change*” and a “*voluntary business-led strategy*”.¹¹ The Government's response emphasised the improvement in the percentages of women on boards achieved between Lord Davies' report in February 2011

and February 2012 and suggested that the trajectory for change would lead to women comprising 26.7% of FTSE 100 boards by 2015. On 14 September 2012, ten countries, including the UK and The Netherlands, wrote to Commissioner Reding and President Barroso, expressing their opposition to the adoption of legally binding quotas at a European level. Those countries were joined by Denmark in doing so on 20 September 2012.¹²

Many instinctively balk at quotas. Quotas carry the risk that a woman may be appointed to a board, even when there is a better qualified male candidate. Reducing the quality of the decision-making in our top companies runs the risk of damaging the company as well as devaluing the promotion of women to mere tokenism. Even Commissioner Reding commented that she was “*not a fan of quotas*”, but she tempered this by saying that she “*does like the results*”.¹³ Given that several European countries have already introduced quotas, there is a real possibility that still more may follow suit in the future. Current opposition to the introduction of a 40% quota at a European level does constitute sufficient power to veto the proposal but the debate about whether quotas are necessary to achieve a real and evident gender balance on corporate boards is plainly far from over.

* The views in this paper are personal and do not necessarily reflect the views of Allen & Overy LLP or its clients.

1 Department for Business Innovation & Skills, *Women on Boards* (February 2011) 7.

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Lessons from leading ladies

We interview women pre-eminent in the fields of business and human rights to garner their views on the relationship between human rights and business, uncover their aspirations and learn from their experience.

Shami Chakrabarti

Director of Liberty (The National Council for Civil Liberties)



Should business be concerned about human rights and corporate responsibility issues? If so, why?

Businesses need not be “concerned” about human rights – but they should be engaged with them. Human rights matter to businesses as much as anyone – they belong to every single one of us, regardless of sex, race, nationality, sexual orientation, political opinion or career. They are predominantly owed by the State to the people, but corporations must also be aware of their obligations – we’ve seen too many examples of big businesses forgetting their responsibilities in the past and, in the end, it undermines trust and credibility.

Are human rights and corporate responsibility policies compatible with the objectives of business?

All businesses are ultimately about people. As such, corporations have a duty to respect human rights in their work. I think businesses also have a wider responsibility to promote understanding of fundamental rights and freedoms. The Rule of Law is as crucial to the economy as it is to other

aspects of life – it is about common values that build confidence and bind our society together.

If you could recommend one human rights policy to businesses, what would it be and why?

All of the rights and freedoms contained within the Human Rights Act are important to businesses. Businessmen can fear unfair instant extradition as consumers can fear for their privacy. But it is Article 14, no discrimination, that I would recommend. We have made great strides in tackling discrimination over the last 50 years, but there is still a very long way to go. Without Article 14’s protection, many other human rights are simply meaningless.

If you could offer human rights NGOs one piece of advice for working with businesses on human rights issues, what would it be and why?

Support from businesses can obviously be very useful for human rights NGOs and charities. But you must always maintain a very clear divide between your organisation and the particular corporation helping you out. Your messages and your

campaigning objectives must remain paramount and must never be trimmed or tempered by the business providing the support.

What has been the most significant change to your sector in the last decade and what do you consider the biggest challenge to your sector in the next?

The last decade has been defined by the response to the September 11 atrocities in the US: Guantanamo, Belmarsh, control orders and blanket stop and search. Democrats resorting to kidnap, torture and murder in freedom’s name, and the fight against such reactionary measures, consumed my thirties. The biggest challenge in the next decade will undoubtedly be the ongoing defence of the much-maligned Human Rights Act and broader common values in times of economic uncertainty.

Are there any challenges particular to women working in your sector? If so, how does the organisation at which you work try to alleviate those challenges?

“The biggest challenge in the next decade will undoubtedly be the ongoing defence of the much-maligned Human Rights Act and broader common values in times of economic uncertainty.”

Shami Chakrabarti, Director of Liberty

Regardless of gender, one of the biggest challenges to all human rights defenders is always a lack of resources. During a recession all charities and NGOs inevitably suffer. At Liberty we try and make the most of what we have and stretch every penny. We are only a small organisation but that also means we can be pretty dynamic and light on our feet when it comes to our campaigning.

What is the best advice you have received during your career? Is there any additional advice you would offer to women who wish to pursue a career in your sector?

Somebody once told me that if you are uncertain about accepting a new job, imagine turning it down over the phone and then consider how you would feel having hung up. That was great advice. In terms of advice I would offer: law is not easy and if you just want to make lots of money there are easier ways of going about it. But if you care deeply about the basics of democracy, there is nothing else like it.

If you could achieve one thing in your career, what would it be and why?

A genuine cultural acceptance of the Human Rights Act is a definite goal for the future. It is one of the most valuable pieces of legislation on the statute book, enshrining and protecting our fundamental common values. There are still too many damaging myths and too much false information surrounding the Act – so persuading people otherwise remains both a terrific task and a real privilege.

What position of power would you most like to hold and why?

I have always maintained that I do not think I would suit party politics. But having crossed swords with many a Home Secretary during my time at Liberty, and having witnessed some of the rushed and draconian legislation that has come out of the department over the years, I wouldn't mind swapping seats with Mrs May – maybe just for a day or two...

What do you think is the best way to honour International Women's Day?

International Women's Day is a day for celebrating women's struggle for equality through history and across the globe, and events like the Women of the World festival are an excellent way of marking such an event.

But despite the great advances made over the years, today 70 % of those living in poverty are women and in too many countries women are still battling for equal rights, so there is still work to be done. Perhaps every employer should reflect on one constructive new practice or policy for the advancement of its women staff as a way of honouring the day?

LIBERTY

Liberty is a UK-based registered charity, also known as the National Council for Civil Liberties. Founded in 1934, it is a cross-party, non-party membership organisation which provides fundamental rights and freedoms in the UK.

Liberty campaigns to protect human rights and freedoms through the courts, in Parliament and in the wider community. It does so through a combination of public campaigning, test case litigation, parliamentary lobbying, policy analysis and the provision of free advice and information.

Pam Jestico

*Managing Director of Group Wholesale & Market Risk
at HSBC Holdings plc*



Should business be concerned about human rights and corporate responsibility issues? If so, why?

Yes. There is only an upside to ensuring that what you are doing is good for the environment and not abusive to the people who work for you. Surely human rights and corporate responsibility can only be positive for your business and enhance its reputation.

Are human rights and corporate responsibility policies compatible with the objectives of your business?

Absolutely. At HSBC we have core values and principles driven from the very top which are there to set the standard for behaviour in all departments of the bank and should drive how we interact with each other, with our clients, and the wider community. These include being open, honest, transparent, trustworthy, treating people fairly and understanding the impact of our actions.

If you could recommend one human rights policy to businesses, what would it be and why?

More active promotion of meritocracy in the workplace. It has to be right to put the best person for the job in the role so all businesses need to get smarter at identifying the right

person. Just imagine how it would feel if each time you heard of someone taking on a different role in your organisation your immediate reaction was – yes, that's a good choice, that's the right person for that job. It would give such a lift to people within the business.

If you could offer human rights NGOs one piece of advice for working with businesses on human rights issues, what would it be and why?

Make sure that the NGO has the attributes itself that it expects to see in the businesses that it works with. To bring about change it helps to show that you have embraced it yourself.

What has been the most significant change to your sector in the last decade and what do you consider the biggest challenge to your sector in the next?

When I started in restructuring the sector was still very much following the 'London Rules'. A Co-ordinating Committee was formed based on a) exposure, b) capability and c) capacity. No restructuring was ever the best outcome for each bank; it was a compromise for all that meant that everyone shared the responsibility of trying not to make a drama out of a

company's financial crisis. What we see now is a more volatile situation where it is apparent that some institutions will simply look to try to achieve the best result for themselves. This will increase the challenge of being able to do what is really the best for the company (which may involve thousands of jobs), and what is the least painful and most just outcome for both banks and company.

Are there any challenges particular to women working in your sector? If so, how does the organisation at which you work try to alleviate those challenges?

I think the challenge for women in my sector (restructuring) is one of recognition. It has in general been an area where men have dominated for some time and have often used aggressive tactics to get things done. There are better ways of achieving consensus and being positively assertive, which women tend to use, has proven effective. Within HSBC, the more collegiate approach that women tend to adopt is welcomed. In fact our Global Restructuring Team, which is a market leader, currently has more women than men.

What is the best advice you have received during your career? Is there any additional advice you would

“There is only an upside to ensuring that what you are doing is good for the environment and not abusive to the people who work for you.”

Pam Jestic, HSBC Holdings plc

offer to women who wish to pursue a career in your sector?

My parents brought my sisters and I up to very firmly hold the view that we are in charge of our own destiny, in control, and that we could do whatever we wanted to do. Whilst there have been times that I have wondered if that is true, if you have the self-belief and drive you will get there. My advice to other women is that if you are sure that you are right, persevere. Stand up for what you believe in, particularly if you know that it is the right thing to do.

If you could achieve one thing in your career, what would it be and why?

To be remembered for, and having the satisfaction of knowing, that I made a positive difference. To be able to look back at my career and know that I have set a precedent and changed something for the better.

What do you think is the best way to honour International Women’s Day?

Arrange something that is high-profile and that people will remember.

What if every CEO from a FTSE 250 company were to be accompanied throughout the day by a woman from a non-executive management role in the business with whom they have to discuss what they are doing? It would be interesting after the event to see if the CEOs felt they made any different decisions or behaved differently during the day and if the accompanying colleague felt they had learned any skills that would help with their own personal development.



Clare Algar

Executive Director of Reprive



Should business be concerned about human rights and corporate responsibility issues? If so, why?

The obvious answer is “because it’s right”. Businesses have power and the decisions they make have consequences. That does not come without responsibility. There is no such thing as a free lunch; not taking responsibility for your own actions is like walking away without paying the bill. You may get away with it – the law may even make that easy in some cases – but that does not make it right. There is a myth that businesses should only ever act in their own immediate interest to maximise shareholder value. That is a stripped down version of an idea former General Electric CEO Jack Welch is now utterly scathing about: he says profit is the consequence of good business, not the goal.

Beyond that there are practical reasons: business does not flourish under oppressive regimes and blowback can be very expensive and unpleasant. But that misses the point. The reason to do it is because as human beings – and we don’t stop being human beings when we go into the office – we can choose to create a world which is vile or one which is splendid. I think we’ll all do better if we go with option two.

Are human rights and corporate responsibility policies compatible with the objectives of business?

Well, that depends entirely on how you define the objectives of business. If you take the short-termist view then they may not be but if you take that view, you are demanding the right to do very bad things to increase your margin. We do not keep slaves in the civilised world, for example, even though it might be possible to do it economically and to profit by it. Why not? Because we make a moral decision about it. It is repugnant. After that it is just a question of degree, of what regulation you find compelling. When you talk to people who hate regulations and ideas like corporate responsibility, you very often find that they have a hard time saying where they draw the line. But that is what laws are: they are the line.

If you could recommend one human rights policy to businesses, what would it be and why?

Know your footprint. By that I mean: know what your effects are and avoid the bad ones. So many appalling human rights situations stem not from the original activity of companies operating in difficult situations but from actions taken to enforce their right to do so. Mining operations in various countries are a perfect example – there is nothing inherently wrong with the idea of extracting minerals, but the implementation can be ugly (in terms of environment, workers’ rights, share of profit to local people whose land is

being exploited). But it applies in all sorts of contexts, and inevitably it can end in blowback – unforeseen negative consequences. Know your footprint. It is good conduct and it is good practice.

If you could offer human rights NGOs one piece of advice for working with businesses on human rights issues, what would it be and why?

Start with the assumption that there is something you have in common and find it. There is a general sense in the NGO world that anyone not working in the NGO world is a little bit evil. But that is hopeless, and it creates an ‘us and them’ mentality which feeds the idea that business should not have and does not have to have an ethical dimension. It says: businesses operate without restraint, the charitable sector does conscience. It is much better to have everyone operating with a bit of understanding.

What has been the biggest change to your sector in the last decade and what do you consider to be your biggest challenge in the next?

It may be money – obviously the last few years have seen a huge drop-off in the amount of money in foundations and so on. At least one organisation which funded us was almost completely wiped out by the financial crisis. It is more competitive, but at the same time there are new avenues

‘Profit is the consequence of good business, not the goal.’

Clare Algar, Executive Director of Reprieve

to explore – crowd funding and so on. Or it may be data. There’s so much more government data available than there has been, and not unrelatedly, also tools to understand and manipulate it. We have had some strong results using data we had to uncover the realities of some of our cases.

The biggest challenge? Keeping people interested and supportive during what may be a long recession, and fighting off the inevitable attempts by financially straitened administrations to do silly things – whether that means taxing donations or enacting unjust laws.

Are there any challenges particular to women working in your sector? If so, how does the organisation at which you work try to alleviate those challenges?

The challenges facing women are essentially the same across the board: getting paid equally, getting shown appropriate respect, managing career progression as well as having children if that’s what you want to do. We try to be flexible and helpful about the last one, and pay is very even across the organisation, not just in terms of gender, but in general: the gap between the lowest paid and the highest paid at Reprieve is pretty slender. As to getting taken seriously: that’s something you don’t give people a choice about.

What is the best advice you have received during your career? Is there any additional advice you would offer to women who wish to pursue a career in your sector?

“Ask yourself: will it matter in six days? Six months? Six years?” That is the best bit of managerial advice I have ever come across. That and the understanding that even or especially in the charitable sector you have to hire the right person for the job, not the person you would like to think could do it because they’re nice or they need the work. So everyone at Reprieve is the best person I could find to do the job they do. As to special advice to women: come on, let’s get started!

If you could achieve one thing in your career, what would it be and why?

I’d like to see Guantánamo close. It is not the worst of the secret prisons by any means – the proxy prisons in Africa and elsewhere are more violent, and the detention centre at Bagram Airforce Base is a more grotesque affront to the Rule of Law – but it is the most well-known and the one which the U.S. President pledged to close. It’s the end point of an extraordinary series of legal weaselings intended to deprive prisoners of their right to due process, a place created to be a gap in the legal landscape. That offends me – as it should offend any lawyer – on an almost personal level.

What position of power would you most like to hold and why?

I would like to be in a position to put together a global human rights document with real teeth, one which would go before the world population in a free and fair referendum and which would be fairly and meticulously enforced.

What do you think is the best way to honour International Women’s Day?

Take a moment to consider and try to understand how far we have come and how far we have still to go; and think of one way in which each of us can improve women’s situations, globally or locally, in the next 12 months. And then do it.

REPRIEVE

Reprieve is a registered charity in the UK, which aims to promote the rule of law around the world and secure every person’s right to a fair trial. It uses the law to enforce the human rights of prisoners, from death row to Guantánamo Bay.

Reprieve investigates, litigates and educates, and provides legal support to prisoners unable to pay for it themselves. In doing so, it aims to save lives.

Reprieve prioritises the cases of prisoners accused of the most extreme crimes, such as acts of murder or terrorism, as it considers that it is in such cases that human rights are most likely to be jettisoned or eroded.

Empowering refugee women: the United Nations working for women's rights

Alexandra McDowall and Claire Palmer

Alexandra McDowall and Claire Palmer of the Office of the United Nations High Commissioner for Refugees (UNHCR) look at some of the specific dangers faced by women and girls in refugee crises around the world and what UNHCR is doing to help them rebuild their lives.

The gender agenda

The traditional roles assigned to women and men and their position in society influences the types of harm to which they are exposed. Women and girls are more often subjected to sexual violence, including domestic violence and trafficking. They are also at risk of a whole range of harmful traditional practices, including: female genital mutilation; forced or early marriage; 'corrective rape'; and so-called honour crimes.

As the United Nations agency in charge of the safety and well-being of refugees, UNHCR's responsibility is to ensure respect for the basic human rights of refugees so that no one is returned involuntarily to a country where they have reason to fear persecution. It provides life-saving assistance such as shelter, medical care, food and clean water to those forced to flee their homes. In addition, it helps refugees find lasting solutions, such as voluntarily returning home, or, when this is not feasible, supports people in rebuilding their lives elsewhere.

Yet, despite the work of UNHCR, local authorities and refugee communities

to ensure safety within the camps, refugees are still vulnerable to insecurity. Traditionally women are expected to collect the firewood to use for cooking and as resources diminish they are forced to travel further and further from the camps, leaving them vulnerable to attacks. A simple and effective means of ensuring their safety is the installation of lights in the camps. This is one of UNHCR's measures to combat violence against women. UNHCR also works with local communities, both men and women, to undertake targeted action to help victims of Sexual and Gender-based Violence, including psychosocial, medical, legal/judicial and security assistance.

Girls can be particularly affected by forced displacement. They not only lose their normal environment, but are often required to assume more adult responsibilities, including domestic chores and caring for younger children. Too often school is seen as a luxury and of little importance for girls. UNHCR works with families and local communities to demonstrate the importance of allowing girls to attend school. By providing incentives, such as

free school meals, UNHCR is working with refugees to ensure that girls too receive education. Not only do schools provide a safe space for children, educated refugees provide leadership in displacement and in rebuilding communities recovering from conflict.

Protection challenges faced by women and girls are interconnected: discrimination and failure to protect in one area compounds problems in all other areas. For example, without registration, women cannot obtain ID cards and, by extension, access to food, shelter, health care, education and work. Poor quality, overcrowded shelter leads to health problems and family violence. Lack of access to income and self-sustaining activities forces many women to engage in survival sex to feed themselves and their families. This can lead to unwanted pregnancies and sexually transmitted diseases. It can lead to rape and exclusion from the community and from some services. UNHCR works with host countries to ensure that refugees are registered on arrival. Registration is the recording, verifying, and updating of information on people of concern to UNHCR so they can be protected and



UNHCR can ultimately find durable solutions. Registering children helps prevent military recruitment, keeps families together and assists UNHCR in reuniting separated children with their families.

UNHCR understands that refugee women are not just victims. They can be part of the solutions and UNHCR holds dialogues with forcibly displaced women and girls to understand how it can better serve them. The protection recommendations UNHCR receive, such as locks on doors, lights near

latrines and more effective legal protection, feed directly into its programmes.

Women can be disempowered by discriminatory nationality laws. They can also create statelessness in cases where children cannot obtain nationality from their mothers or their fathers. This creates a cycle of marginalisation, with tens of thousands of children unable to access education and health care or develop an identity as part of society.

“Protection challenges faced by women and girls are interconnected: discrimination and failure to protect in one area compounds problems in all other areas.”

Alexandra McDowall and Claire Palmer, UNHCR

INTERNATIONAL WOMEN'S DAY

The origins of International Women's Day (**IWD**) can be traced back to the garment workers' strike in New York on 8 March 1908, when 15,000 women workers marched through the city to demand better working conditions and political rights, marking the anniversary of a similar march on 8 March 1857.

On Sunday 23 February 1917, Russian women struck for “bread and peace” in St Petersburg. Sunday 23 February on the Julian calendar (then in use in Russia) coincided with 8 March on the Gregorian calendar, providing the date on which IWD has been celebrated since.

In 1977, the United Nations adopted a resolution proclaiming that a day for women's rights and international peace would be observed yearly by member States.

The official UN theme for IWD in 2012 was “Empower Rural Women – End Hunger and Poverty”.

Various women's groups, governments and other organisations choose their own themes each year. The European Parliament's 2012 theme was “Equal pay for work of equal value”.

“Women can be disempowered by discriminatory nationality laws. They can also create statelessness in cases where children cannot obtain nationality from their mothers or their fathers.”

Alexandra McDowall and Claire Palmer, UNHCR

Gloria's story

Among the thousands of women and girls to whom UNHCR has provided support is Gloria. Only recently, Gloria was eking out a sparse, but adequate living in the dusty Darfur region of western Sudan. Now she's subsisting on a handful of maize a day in a windblown tent at a UNHCR refugee camp on the Chadian border, waiting patiently for the day when she can return home.

It all started when militants attacked her village, shooting firearms and slashing with machetes. Feigning death, Gloria waited until nightfall before escaping into the desert. After walking

for days, surviving by eating insects and roots and stung by the incessant, wind-blown sand, she was finally found by a UNHCR field team. Her ordeal was over at last. Now the horrors are behind her. But so is the old life that she dearly misses. Gloria lives in hope that one day, she will return.

Celebrating rights: International Women's Day

UNHCR celebrates International Women's Day on 8th March every year and regards it as an important opportunity to recognise women as key contributors to global economies. This year the theme was “Empower

Rural Women – End Hunger and Poverty” to acknowledge the crucial role that rural women play in both developed and developing nations — they enhance agricultural and rural development, improve food security and can help reduce poverty levels in their communities. UNHCR marked this year's International Women's Day with the release of a media package intended to highlight persisting discriminatory nationality laws around the world and their harmful effects. For further information, please see: <http://www.unhcr.org/pages/4f587cbe6.html>

Images kindly provided courtesy of UNHCR



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