
The Business and Human Rights Review

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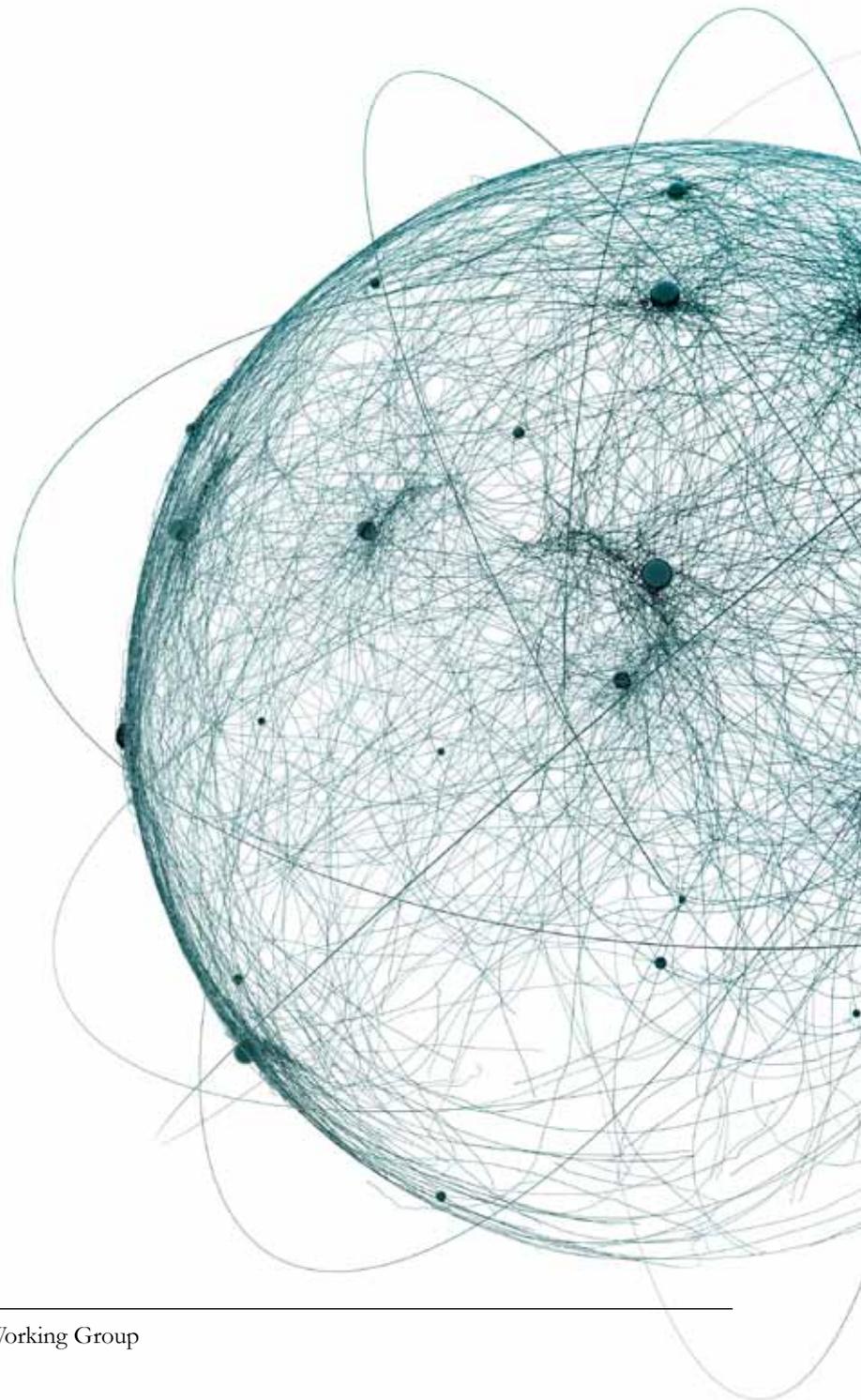
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Foreword

Justice Richard J. Goldstone

Former Justice of the Constitutional Court of South Africa; chief prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda.



The Business and Human Rights Review provides an important and timely interdisciplinary forum for lawyers and members of the business community to discuss the growing relationship between corporations, both domestic and transnational, and the protection of the human rights of people impacted by commercial activities.

The 1948 Universal Declaration of Human Rights (the **Universal Declaration**) was an aspirational document directed at Member States of the United Nations. The Universal Declaration was not binding on any state as a matter of international law. However, its prescient provisions were instrumental in forging later international conventions that provide the basis upon which governments have become obliged to respect and protect the fundamental human rights of their citizens.

Together with international humanitarian law, international human rights law has become a permanent feature on the radar screens of governments and international organisations. Domestic and international non-governmental human rights organisations have played a major role in naming and shaming those regimes that unfortunately still fail to protect the fundamental rights of their own citizens. This role has now been appropriately extended to commercial enterprises.

The activities of transnational corporations have grown exponentially in recent years. The budgets of some of them exceed those of some members of the United Nations. They employ millions of people in many countries. It is hardly surprising that the conditions of those employees, and the impact of corporate activities on local communities and other stakeholders, have attracted the attention of both governmental and non-governmental actors.

The United Nations Guiding Principles on Business and Human Rights (the **Guiding Principles**), adopted by consensus by the United Nations Human Rights Council on 16 June 2011, acknowledges the growing significance of corporations on the global economy by encouraging businesses to respect human rights and provide access to remedies for human rights impacts. Many of the articles in this issue describe the important work already underway at the UN, in the NGO community and in businesses around the world to implement the Guiding Principles in particular contexts.

These developments bring with them new challenges. In my opinion, as a jurist, none of these challenges is more important to resolve than the provision of accessible courts and tribunals with jurisdiction to consider and enforce appropriate remedies for human rights violations. Governments generally do not welcome the exercise of

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extraterritorial jurisdiction by foreign courts. This is well illustrated by opposition to some cases presently before United States courts under the Alien Tort Statute of 1789 that entitles foreign citizens to bring civil suits for acts committed “*in violation of the law of nations*”.

The governments of both the United States and South Africa have objected to the pending case in the New York Federal Court in which victims of apartheid are seeking damages against corporations who are alleged to have been complicit in implementing the apartheid system in South Africa. In the closely watched *Kiobel v. Royal Dutch Petroleum* case, the United States Supreme Court has recently ruled on the extraterritorial scope of the Alien Tort Statute, with obvious implications for non-US human rights claimants pursuing remedies for human rights violations in US courts.

Absent appropriate judicial remedies, human rights victims will have to rely only on further naming and shaming by non-governmental organisations and the weak sanctions that might be imposed by the United Nations and the World Bank. Of course, not all human rights impacts require judicial remedies – indeed, providing access to non-judicial remedies and informed consultation will be critical as businesses seek to proactively engage within the stakeholders and communities in which they operate. The Guiding Principles specifically encourage corporations to embrace such remedies.

Following in the tradition of the Universal Declaration, the Guiding Principles provide an important aspirational guidepost for states and businesses alike. But there is a long way to go before we sleep. As transnational corporations grow ever larger and more complex, they must devote careful attention to respecting human rights in all of their activities, and providing appropriate remedies where those activities result in human rights impacts. In this context, *The Business and Human Rights Review* provides an important platform for discussing the way forward.

Justice Richard Goldstone is a former commercial lawyer and judge in South Africa. During the final years of the apartheid era, he chaired the Goldstone Commission to investigate political violence and intimidation that occurred between 1991 and 1994. He then served as the first chief prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and for Rwanda between 1994 and 1996. Nominated by President Nelson Mandela, he served as a justice of the South African Constitutional Court until his retirement in 2003. He has also been a member of various independent international commissions, including the Independent Inquiry Committee into the UN Oil-for-Food Programme, a post to which he was appointed by the UN Secretary-General in 2004.





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“... if human rights can offer an opportunity to deliver resilience and sustainability with recognised sector leadership, then it becomes a seductive business proposition.”

Moving to Metamorphosis

Dr. Puvan Selvanathan



Dr. Puvan Selvanathan, a member of the United Nations Working Group on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises, says that human rights offer enterprises a great opportunity for innovation and leadership.

We are well past the point where a case needs to be made for human rights to be considered as a concern for business. I think that more than enough has been identified, dissected, postulated, synthesised and tool-kitted to give even the most hard-nosed profiteer pause to at least entertain the idea that having a position on human rights is better than not. You certainly would not be laughed out of the room today for putting human rights on the agenda at the Risk Management Committee. It may be that they will just not laugh out loud – but that is still a pretty major step. Business has finally been invited to join governments and civil society on stage, and at least we all agree that without this new actor the human rights epic cannot conclude in a satisfying fashion. Questions remain: should business be confined to the dock? Who exactly sits on the bench and in the jury? And, more pertinently,

is this simply a never-ending courtroom drama or *Last* on a much, much smaller budget?

The business and human rights ‘movement’ is vulnerable. The UN Guiding Principles on Business and Human Rights (the **Guiding Principles**) created a cocoon, a hard casing for the pupa for a metamorphosis to give the movement wings. The Guiding Principles were the culmination of years where the caterpillar of governments, UN systems and civil society gorged itself on treaties, ideals and frustrations in a world largely unprepared for caring. This has now changed. Once we learnt to care for the whales, the trees and the climate, the world now appreciates that humanity itself needs some attention. However, if this appreciation requires homage to be paid to the caterpillar before a butterfly can be formed, then the metamorphosis is unlikely to

happen. Business will not sit in the dock being cross-examined by the caterpillar. It will not apologise for legal, licensed and profitable – yet morally dubious – behaviour in an age before caring. It will not answer to the caterpillar on why and how its policies and practices are developed; and if it has volunteered to be party to the creation of the butterfly, it probably will not appreciate having its motives for doing so met with the caterpillar’s scepticism or suspicion. If empowered to act business could inject scale, technology and funds to take human rights from a fringe production into a 3D IMAX showing.

Why would businesses do it? Having established that there is probably some material impact to their operations; and having applied some formulaic time/cost calculation if the very worst happens; and then ascribed some factor of probability

“The prospect of engaging in human rights should deliver more than just the feeling that it is the right thing to do – it needs to engender ownership, innovation, value, promise and hope. Business uses these words everyday, and they are conspicuously absent from the lexicon of the traditional human rights advocate.”

using the Gulf-spill effects on livelihoods at one end of the spectrum – savvy corporates are looking at a ‘number’ that equals the cost of their exposure to human rights risks. Other than in the extractive industries, this number is probably not intolerable and will not inspire action beyond some lip-service policy-statement. This would be a shame and a reflection of how the traditional human rights movement is unable to incentivise the business actor to give a stellar performance. However, if human rights can offer an opportunity to deliver resilience and sustainability with recognised sector leadership, then it becomes a seductive business proposition.

The prospect of engaging in human rights should deliver more than just the feeling that it is the right thing to do – it needs to engender ownership, innovation, value, promise and hope. Business uses these words every day,

and they are conspicuously absent from the lexicon of the traditional human rights advocate. Given that we all strive for the same outcomes, human rights language needs to evolve to adopt and co-opt these new words and the incentives they offer. For the reason that my children cannot conceive of the time when there was only one phone at home attached to the wall in the hallway, human rights needs to cut the cord that tethers the movement to the past. *The Lord of the Rings* was brought to life through a new medium for a new generation most of whom would never have read the books; and the real wizards in the *Harry Potter* phenomenon are those who conjured the holy alliance between book, film, software and merchandising, each reinforcing the other to make that series the cultural juggernaut that it was.

Having business ‘and’ human rights is not a cynical juxtaposition, it is an opportunity to recalibrate and catalyse the urgent need for scaling universal values for humanity.

The US Supreme Court’s recent ruling in *Kiobel v. Royal Dutch Petroleum* on the extraterritorial reach of the US Alien Tort Statute (**ATS**) is a gift-wrapped opportunity for evolving the global human rights agenda. Things have changed since 1789 when ATS was promulgated, and just as much since the 1980s when ATS began being touted as a platform to test international human rights. Today businesses, governments and civil society all have roles to play in delivering an environment that engenders rights-based approaches.

The US Supreme Court's rational and geo-politically sensitive pronouncement on the ATS is entirely in-sync with the fluidity and dynamics that epitomise the relationships between governments; between governments and businesses; and between both with civil society. The solution was never going to be as simple as ATS, and it is good that the Justices have reminded us of that. In the absence of guidance and mutable laws elsewhere, the seemingly succinct but plainly nebulous ATS was expediently interpreted to respond to human rights challenges as we understand them today.

The Guiding Principles are designed for considering human rights in the 21st century. They require that business should respect human rights; that victims should have meaningful and speedy access to remedy; and – critically – that governments

anchor everything under a duty to protect. The US Supreme Court ruling on ATS reinforces the obligation of every government to protect the human rights of their own citizens. It does so by reminding the peoples and businesses that empower those sovereign governments that remote US courts and laws cannot be a surrogate for good governance. If conditions for the protection of human rights do not exist at home, and irresponsible businesses are perversely incentivised to disrespect human rights, then these local conditions must be remedied locally.

The innovation of the Guiding Principles is in offering a three-pillar framework for ensemble acting. To work, it is not enough if each actor identifies only with its 'own' pillar, or horse-trade responsibilities and accountabilities. The Guiding

Principles call for appreciation of the value that the other actors bring to the enterprise, and underscore that all are integral to the pursuit and delivery of human rights. Let's stop second-guessing each other and get on with it.

UN Working Group, established by the United Nations Human Rights Council in 2011 for a period of three years, consists of five independent experts of balanced geographical representation. Its role includes, among other things: (1) promoting the effective and comprehensive dissemination of the Guiding Principles on Business and Human Rights; and (2) identifying, exchanging and promoting good practices and lessons learned on the implementation of the Guiding Principles.

UN Global Compact Local Networks and their importance in the implementation of the Guiding Principles



Sir Mark Moody-Stuart

Sir Mark Moody-Stuart, Vice Chair of the UN Global Compact, Chairman of the Foundation for the Global Compact and former Chairman of the Royal Dutch Shell Group, explains the role of UN Global Compact Local Networks in helping companies engage with the local human rights challenges they face around the world.

Launched by the UN Secretary-General in 2000, the UN Global Compact (UNGC) is both a policy platform and a practical framework for companies that are committed to sustainability and responsible business practices. It involves all relevant social actors (companies, whose actions it seeks to influence, governments, labour, civil society organisations and the UN). There are more than 7,000 businesses around the world that have signed up to embedding the ten principles of the UNGC into their day-to-day operations, and to reporting publicly on how they are doing so, making it the largest voluntary corporate responsibility initiative in the world. The ten principles are based on the major UN Conventions on human rights, the environment, working conditions and anti-corruption. Annual surveys of participant progress generally have shown that the area of human rights is the one that many businesses find most difficult to engage

with on a day-to-day basis. This is not due to any insensitivity to issues of human rights. Rather it is that the very phrase ‘human rights’ conjures up images of gross abuses, which most companies see as being remote from their direct activities.

John Ruggie’s development of the “Protect, Respect, Remedy” framework in the UN Guiding Principles on Business and Human Rights (the **Guiding Principles**) has played a major role in changing this perception. The extensive process of discussion with companies and civil society organisations brought to light hundreds of practical examples and their implications. The role of governments to “protect” is clear, but equally so is the role of companies in the “respect” and “remedy” elements of the Guiding Principles framework. This is where the UNGC Local Networks come in.

For progress to be made in widening the implementation of the ten UNGC principles and the Guiding Principles around the world, issues have to be tackled in each and every country. There are currently Local Networks in over 100 countries. These bring together companies large and small, national and international, with civil society and labour organisations of similar wide size and variety. As you might expect, the country networks differ greatly in their state of development and effectiveness. My assessment is that about half of the networks are pretty effective, a further quarter of the networks are developing, and the remaining quarter are struggling. The UNGC has charged its leading signatory companies with supporting, outside their own home country, at least one Local Network. This is often just simple in-kind support, with a meeting place and minor administration and, hopefully, leadership.

“... the presence of responsible companies working to international standards can make a significant contribution to the economy and society of a fragile state.”

In the first UN Forum on Business and Human Rights held in Geneva last year, time and again I heard the 900 delegates from both civil society and business call for a “safe space” where sensitive issues in a country could be discussed openly and where organisations from different sections of society could come together. The Local Networks provide one such “safe space”.

The UNGC umbrella provides a potentially neutral venue. Although business-led, the UNGC is not a business organisation. From its outset it has involved civil society and labour organisations as signatories. As part of the commitment to the UNGC, all signatories agree to work together in order to implement the ten principles, including those on human rights. There is an acknowledgement that no one organisation or part of society can address such problems in isolation. While there may be disagreement on the means, there is a common commitment to the goals.

The Guiding Principles place an onus on companies to undertake due diligence in countries with potential human rights problems before commencing work. Discussion with members of a Local Network, civil society and labour organisations as well as other businesses can alert a newcomer to ethnic sensitivities,

security problems, and other issues in an historical context, with examples of what may have gone wrong in the past. This gives a broader picture than one which could be gained simply from business organisations.

One of the major contributions that a business can make to a local economy is through its supply chains. The variety of businesses, large and small, in a Local Network make it potentially a good starting point for determining not just what is possible and at what standard, but also (again) whether there are particular ethnic or regional sensitivities. The Local Network gives companies of varying sizes and differing sectors an opportunity to meet and assess the possibilities of working together to mutual advantage.

Lastly, Local Networks can be of assistance in dispute resolution and in finding appropriate remedies. For example, where allegations are raised at an international level about the activities of a multinational company, the most effective resolution is often achieved at a local level where the context is clear and facts are more readily accessible. The UNGC office in New York is increasingly using Local Networks as sources of advice and local expertise.

Much is often made of the risks of companies operating in fragile states where national governance may be

weak. On the contrary, I believe that the presence of responsible companies working to international standards can make a significant contribution to the economy and society of a fragile state. For every risk there is a potential corresponding upside. There is a risk that a company may be perceived as being biased in some way in its employment practices. On the other hand, if people from potentially opposing groups work together in a company to common standards and a common goal, they rapidly find that the things they have in common outweigh their historical differences. Likewise, the development of local supply chains can bring economic activity to previously disadvantaged or depressed areas or groups of people.

None of this is to say that Local Networks are always effective. But where they are, they provide very useful contacts with other businesses and civil society and can assist companies in rapidly moving up the learning curve. This is particularly true in relation to human rights issues. In conclusion, it is in the best interests of everyone to strengthen and support Local Networks wherever possible. They can deliver significant benefits.

Improving accountability through the contractualisation of human rights

Dr. Youseph Farah



Dr. Youseph Farah, a lecturer in law and a member of the Business and Human Rights Project at the University of Essex, argues that the inclusion of human rights obligations in contracts may help promote corporate responsibility for human rights.

The central thesis in this article is that ‘contract’ plays a seminal role in pushing forward the objectives of the UN Guiding Principles on Business and Human Rights (the **Guiding Principles**)¹ and, under certain conditions, may require corporations to behave according to internationally recognised human rights.

The Guiding Principles do not propose to create new obligations under international law.² Therefore the Guiding Principles alone do not resolve the existing debate as to whether corporations are bearers of obligations under international law.³ Instead the Guiding Principles reiterate that states are the principal bearers of international human rights obligations, and have existing obligations to “respect, protect and fulfil human rights and fundamental freedoms”.⁴

Furthermore, the Guiding Principles stipulate that corporations have a responsibility to respect internationally recognised human rights, which are

understood, at a minimum, as those rights expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization (ILO)’s Declaration on Fundamental Principles and Rights at Work.⁵ The use of the term ‘corporate responsibility’ in the Guiding Principles conveys the sense that corporations are expected to behave responsibly on a voluntary basis.⁶

In spite of the moralistic nuance which the term ‘responsibility’ projects, we must avoid labelling the Guiding Principles as merely soft law. The dynamic through which the Guiding Principles may (or may not) give rise to hard law obligations may be rather more complex.⁷ Rather than attempting to understand the Guiding Principles according to an artificial hard law/soft law framework, it may be more fruitful to examine whether the Guiding Principles are effective in holding corporations to their

responsibility to respect internationally recognised human rights.

In this article, I will suggest that the interaction between ‘contract’ and the Guiding Principles may push forward respect for human rights in both the contracting process and in the performance of long-term extensive contracts and, as a result, operationally assist in the materialisation of international human rights.

This interaction is potentially bi-directional, where ‘contract’ has a noticeable impact on the deployment of human rights standards in host countries and, in turn, human rights standards have an impact on the principles regulating these contracts.

‘Responsible contracting’ and ‘contractualisation’ of human rights

Two specific practices in international investment contracts demonstrate the contractualisation of human rights – that is, the inclusion of human rights norms and obligations in contracts. First, such contracts may include



contractual terms designed to avert or mitigate any risk to human rights resulting from the performance of the contract. This accords with many of the provisions in the Guiding Principles. In particular, Guiding Principle 1 makes it clear that states must protect against human rights abuse within their own territory and/or jurisdiction by business enterprises. Pursuant to Guiding Principles 5 and 6, states should also exercise adequate oversight in order to meet their international human rights obligations when they contract with business enterprises, and should promote respect for human rights by business enterprises with which they conduct commercial transactions. At the same time, businesses have a responsibility to respect human rights, which requires them to gauge their human rights risks by identifying and assessing any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships, and to address those human rights impacts.⁸

As such, when a corporation and a host state enter into a contract with each other, they should do so in a manner that addresses their respective human rights duties and responsibilities. In this regard, the report of Professor John Ruggie (the former UN Special Representative on the issue of human rights and transnational corporations and other business enterprises) to the Human Rights Council outlining ‘principles for responsible contracts’ suggests that corporations and host states should identify human rights risks, and “integrate the management of human rights risks into investment project contract negotiations”.⁹

Similarly, controlling parties should refrain from agreeing to contractual terms that could have a chilling effect on the protection and respect of human rights. Guiding Principle 9 calls on states to ensure that they retain adequate policy space to meet their human rights obligations. At the same time, the commentary to Guiding Principle 9 recognises that investors

need to be provided with necessary protection. Thus, for example, where stabilisation clauses are used in an investment contract they should be “drafted so that any protections for investors against future changes in law do not interfere with the State’s bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations”.¹⁰ Investors may also contractually commit to abide by health and safety regulations and ILO labour standards, to engage responsible security forces, and to access water resources in such a way as not to prejudice the needs of the local community.¹¹

“... serious challenges remain in terms of the effectiveness of human rights-related contractual commitments in fulfilling the corporate obligation to ‘respect’ human rights.”

Second, more recently, there has been an effort to achieve greater accommodation of internationally recognised human rights in international investment contracts than that which is envisaged under the ‘respect’ pillar of the Guiding Principles.

For example, in some investor-host state agreements, extractive corporations have undertaken obligations to provide critical social infrastructure such as adequate education, health clinics, railways, and adequate housing to employees and their families. This form of contractualisation of human rights resembles, albeit not normatively, the state’s obligation to ‘protect’ and fulfil human rights.

Challenges associated with the contractualisation of human rights

Notwithstanding significant evidence of the ‘contractualisation’ of human rights in international investment contracts, serious challenges remain in terms of the effectiveness of human rights-related contractual commitments in fulfilling the corporate obligation to ‘respect’ human rights.

The first challenge relates to the interpretation of a contractualised human right. As a practical matter, we are asking whether contracts that primarily create *in personam* rights can successfully include obligations that often operate in relation to the state, and which are not easily described in

contractual terms. A similar debate took place in relation to whether human rights are compatible with private law;¹² for some, it was argued that the “insertion of fundamental rights into private law engenders problems of... translation”.¹³ Human rights have traditionally been invoked against states and have been interpreted in the context of the state’s wider socio-economic objectives. The human rights obligation may be understood as less pressing or mandatory when applied in the private context. The problem may be exacerbated if the investment contract calls for an application of contractualised human rights in accordance with acceptable industry standards. For example, Sheldon Leader argues that “the requirements of health and safety, respect for land rights; gender rights, and environmental standards can then adjust up and down in accordance with commercial pressures, so long as the bulk of projects around the world stay in step with one another”.¹⁴

However, given that an investment contract should be treated as subordinate to human rights, in principle it should not dilute the content of contractualised human rights or the methods and standards of redress in the event of a violation.¹⁵ One way of averting such an undesirable result is by subjecting the human rights undertakings in a contract to international law¹⁶ as a concurrent body of law existing side

by side and at times corrective of the law governing the contract.

Contractualisation of human rights and safeguarding third parties’ rights

A second significant challenge in the contractualisation of human rights relates to the applicability of contractual terms as to third parties. Contracts create rights and obligations between the parties to a contract.¹⁷ Under contractualisation of human rights, accountability operates in the first instance between the contractual parties, each owing rights and obligations to the other. However, the beneficiaries of contractualised human rights are very likely to be third parties who are not party to the contract – in the case of an investor-host state agreement under which the investor commits to the provision of health clinics within a certain community, the direct beneficiaries of that commitment are the people living in that community. Such third-party beneficiaries, may find it more difficult to make those contractualised human rights meaningful and effective, even if benefits are bestowed on them in the investment contract.¹⁸

It is therefore important to safeguard the rights of third-party beneficiaries by ensuring that the body of law which governs the contract permits them to hold the corporation accountable to its obligations to third-party beneficiaries under the contract. Under an

investor-host state agreement, one possibility could be the inclusion of an express undertaking in the contract stipulating that third-party beneficiaries will be able to enforce the terms of the contract.¹⁹

But of course it would be too wishful to expect most investors to accede to such a contractual regime which could make them potentially accountable to a large number of claimants. An example of such reluctance was seen in one pipeline project, where the investor made a ‘Human Rights Undertaking’ to respect, *inter alia*, internationally recognised human rights and environmental laws. However, in the same document it was stated that nothing in the Human Rights Undertaking, express or implied, should confer a benefit on, or grant any right to enforce any of its terms against, the host governments under the contract.

UN Guiding Principles may require cooperative ethics

The contractualisation of human rights poses a third challenge, namely the extent to which it is compatible with classical notions of contract law. By way of example, the Guiding Principles require corporations to “avoid causing or contributing to adverse human rights impacts and to prevent or mitigate such impacts that are directly linked to their operations, products or services... even if they have not contributed to those impacts”.²⁰ This responsibility is to be achieved by carrying out human rights ‘due diligence’.²¹ The content and scope of ‘due diligence’ required under the Guiding Principles, including the operationalising and integration of human right risks into the management of the project, are not fixed against

values existing at the time of entering into the contract. Rather, the Guiding Principles envisage ‘due diligence’ as an iterative process which exists and evolves throughout the life of the contract. As a result, certain classical conceptions of contract law that champion self-interest ethics and contractual stability may struggle to support the requirement that corporate responsibility should be “ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve”.²² Thus, the often legitimate need for contractual certainty in any economic order may be superseded by a legitimate demand to respond to change that affects the human rights of individuals.

It is essential to highlight here that the unique evolving nature of the due diligence obligation envisaged under the Guiding Principles seems to favour the assessment of contractual obligations under a ‘cooperative ethics’ approach – that is, one in which contracting parties are expected to cooperate in order to optimise and promote both parties’ economic interests, and the interests of individual stakeholders.

This is in contrast to classical conceptions of contract law which are rooted in individualistic ethics aimed at protecting the adversarial nature of contract, and championing freedom of contract and contractual certainty.²³

Adopting an approach that is committed to cooperative ethics may have implications for the ways in which we interpret, apply and protect the contractual interests brought about by the contractualisation of human rights. For example, under English contract law, the award of damages is the

common and primary remedy for breach of a contract. However, in large investment projects, circumstances may favour or require specific performance of the contractual obligation in order to avert or mitigate the adverse human rights impact. The remedy of specific performance, which is exceptionally awarded under English contract law, compels a party in breach to perform its obligations under the contract. By way of illustration, consider an undertaking in an investment contract by a corporation to hire responsible security forces that are adequately trained and guided, and to follow relevant international limitations with regard to the use of force or firearms.²⁴ The objective of this contractual undertaking is to protect individuals from being harmed by irresponsible security forces. Where the company is found to be in breach of such an obligation, specific performance of the obligation may be preferable to damages as a remedy.²⁵

In addition, questions arise in relation to how explicit contractual terms must be performed. Under English contract law, as a general rule performance must be precise and exact.²⁶ Consider the situation where the difference between the promised performance on the one hand and the actual performance on the other hand was due to the state’s lawful motive to abide by its obligations under international human rights law; would this situation not call for contractual re-negotiation, or should a restrictive attitude be adopted in respect of the contractual obligation, such that the performance of the obligation which does not strictly accord with the contractual terms should trigger the termination of the contract? This challenge could to an extent be dealt with through careful

drafting of the contract and does not necessarily require a deviation from the classical conceptions of contract law.²⁷

However, it might be too early to ascertain how this nomenclature of contracting ethics would have a bearing on the corporation's responsibility to enter into responsible contracts or play a role in the promotion of human rights.

The contractualisation of human rights may give rise to obligations. This will push forward corporate 'respect' for human rights. In some instances, contractualised human rights may even include commitments by businesses as though the businesses have assumed

the duties of a state to implement its human rights obligations, which goes beyond the corporate responsibility to respect human rights under the Guiding Principles framework and may further raise the human rights standards expected of businesses.

That said, the effectiveness of human rights-related contractual commitments in fulfilling the corporate obligation to 'respect' human rights faces a number of challenges. Some challenges are specific, such as safeguarding the rights of third-party beneficiaries under a contract, or translation problems associated with the contractualisation of human rights. Others are more

general in nature. In particular, the classical model of contract law (for example, under English law), which encourages self-interest ethics and which has important doctrinal ramifications such as those seen in relation to the assessment of remedies, may not be best suited to push forward the objectives of the Guiding Principles. Therefore, it may require further refinement before it, without more, provides a comprehensive mechanism for 'protecting' human rights.

¹ *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework*. The Human Rights Council endorsed the Guiding Principles in its Resolution 17/4 of 16 June 2011.

² *Ibid.*

³ See Andrew Clapham, *Human Rights Obligations of Non-State Actors*, OUP 2006, ch 2 and 3.

⁴ *Supra* note 1.

⁵ *Supra* note 1, Principle 12.

⁶ *Supra* note 3, 195 (where the term 'responsibility' was given this interpretation in the context of Corporate Social Responsibility).

⁷ See, for example, Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', (2000) 54 *International Organization* 421, 424.

⁸ See Guiding Principles 11ff.

⁹ See John Ruggie's Report to the Human Rights Council, *Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, A/HRC/17/31/Add.3, 25 May 2011 <<http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>>, para 1.

¹⁰ *Ibid.*, para 30.

¹¹ See Article 4.3 of the Consortium--Chad Convention for the Development of Oil Fields referred to in Sheldon Leader, 'Human Rights, Risks, and New Strategies for Global Investment', (2006) 9 *Journal of Economic and International Law* 657, 680.

¹² Frances Raday, 'Privatising Human Rights and the Abuse of Power', (2000) 13 *Canadian Journal of Law and Jurisprudence* 103, 103.

¹³ See Hugh Collins, 'On the (in)compatibility of Human Rights Discourse and Private Law', LSE Law, Society and Economy Working Paper 7/2012 <http://www.lse.ac.uk/collections/law/wps/WPS2012-07_Collins.pdf>, in relation to the transplant of human rights into the private sphere.

¹⁴ Leader, *supra* note 11, 676.

¹⁵ *Ibid.*, 668.

¹⁶ International law should be understood to include international human rights law.

¹⁷ See Ewan Mckendrick, *Contract Law, Text, Cases, and Materials*, (5th edn, OUP 2012), ch 25.

¹⁸ Under English law, by virtue of the doctrine of privity, a contract cannot generally confer rights or impose obligations on a person who is not a party to the contract (see for example *Tweddle v Atkinson* (1861) 1 B & S 393, 398).

¹⁹ See UK Statute, Contracts (Rights of Third Parties) Act 1999, s 1(1)(a).

²⁰ *Supra* note 1, Principle 13 (see also commentary).

²¹ *Supra* note 1, Principle 17.

²² *Supra* note 1, Principle 17(c).

²³ For further discussion of the meaning of 'individualistic ethics' and its role in English contract law, see Roger Brownsword, *Contract law: Themes for the Twenty-First Century* (2nd edn, OUP 2006).

²⁴ It is important to note that this commitment is a legally binding obligation and would be enforced under national contract law. See Clapham, *supra* note 3, 233.

²⁵ It is important to note that compensatory damage is the most commonly awarded remedy in international human rights litigation. However, in *Case Concerning the Factory at Chorzów (Germany v Poland)*, Merits, Judgment No. 13, 13 September 1928, PCIJ Series A No 17, the International Court of Justice stated that restitution, where possible, is the preferable remedy (at p 4). See Jo M Pasqualucci, 'Victim Reparation in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure', (1996) 18 *Mich J Int'l L* 1, 25.

²⁶ See the distinction between *Cutter v Powell* (1795) 6 Term Rep 320, which advocated the 'entire performance rule', and *Boone v Eyre* (1779) 96 ER 767, which allowed for the principle of 'substantial performance', the latter being the exception to the 'entire performance rule'.

²⁷ Jay M Feinman, 'Relational Contract Theory in Context', (1999-2000) 94 *NwULRev*, 737 and Ian Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law', (1977-1978) 72 *NwULRev* 854.





Getting it right in Myanmar (Burma)

Institute for Human Rights and Business (IHRB)

IHRB highlights the human rights challenges facing companies that are exploring opportunities in Myanmar and suggests that the UN Guiding Principles can help them tackle such challenges.

One year after the suspension of most international sanctions, there has not been a stampede of international investment into Myanmar. However, there has been a continual flow of trade missions, the re-establishment of diplomatic ties and opening of new embassies, and a welter of new legislation pushed through the parliament in Naypyitaw. A new Foreign Direct Investment law is in place, and enabling legislation for Special Economic Zones will emerge in due course. Business continues to come, in particular from Asia, and the next two years will be critical in defining a level playing field, one in which human rights will increasingly be seen as a responsibility for all. It is important to ensure that it remains a non-competitive and non-protectionist issue. Constructive engagement will be critical, not just with large companies, but also with the much larger number of local and international small- and medium-sized enterprises that will represent the major part of the new economy.

IHRB issued an Occasional Paper in September 2012 setting out some of the main challenges businesses face in Myanmar.¹ Additional research and sector-wide human rights impact assessments will follow in 2013. This article will not attempt to summarise or simplify the complex social, economic and political issues facing the country. Rather, it summarises some of the first steps any business should take when considering investment, distribution or trade in Myanmar.³

With the suspension and relaxation of sanctions, several governments have placed some expectations on companies within their jurisdiction that seek to do business with Myanmar. When announcing their decision to suspend sanctions on April 23 last year, foreign ministers of the European Union welcomed European companies exploring trade and investment opportunities in Myanmar. At the same time, they stressed this should be done by “promoting the practice of the highest standards of integrity and corporate social responsibility” and specifically referred in this context to the UN Guiding Principles on Business

and Human Rights (the **Guiding Principles**), the Organization for Economic Co-operation and Development’s Guidelines for Multinational Enterprises and the EU’s own Corporate Social Responsibility strategy as appropriate standards to inform business conduct in Myanmar.

A related development is seen in the United States Government’s adoption of a requirement that US companies investing more than USD500,000 in Myanmar report publicly on their human rights policies and procedures, consistent with the Guiding Principles.⁴ More specific requirements have been imposed on companies in the oil and gas and financial sectors, as well as companies with business ties to the armed forces. Additionally, the Myanmar Government has supported the idea of joining the Extractive Industries Transparency Initiative, which places the onus on extractive industries to disclose payments to governments and on governments to disclose receipt of payments.



Businesses exploring investment opportunities in Myanmar will therefore need to familiarise themselves with the Guiding Principles, and develop policies, practices and procedures that are consistent with those principles.

Many businesses considering new investments in Myanmar have expressed support for the country's development goals and announced plans to encourage entrepreneurship locally, and operate in a responsible manner. Towards that end, businesses are likely to make use of existing tools which have aided in investment processes in different contexts in other countries.

As the National Human Rights Commission in Myanmar has stated publicly, the most frequent complaints from citizens involve land acquisition by businesses.

Recent high-profile cases in which communities have confronted companies over their activities include the copper mine in Monywa and the proposed Special Economic Zone in Thilawa. Addressing land acquisition issues will be a major challenge for businesses and, to do so, they should turn to several tools which should be consulted carefully. These include the Performance Standards of the International Finance Corporation;⁵ the recently adopted Voluntary Guidelines for land tenure from the UN Food and Agriculture Organisation (the **Voluntary Guidelines**);⁶ the guidelines for evictions in the context of development from the UN Special Rapporteur on adequate housing;⁷ the core principles for land acquisition and leases from the UN Special Rapporteur on the right to food;⁸ and other standards.

Another challenge is ensuring that security forces guarding the property and assets of the company are trained properly and, if they are armed, they should be trained so that they make only proportionate use of force. The central allegation in the Monywa case was that the use of force was disproportionate. In establishing relationships with security forces, businesses should draw on the Voluntary Principles for Security and Human Rights in the extractive sector (the **Voluntary Principles**).⁹ Some companies operating, or intending to operate, in Myanmar are members of the Voluntary Principles process.

Labour is another critical challenge. In dealing with issues related to labour rights, businesses would benefit by studying initiatives such as the International Labour Organization's Better Work Programme, and take guidance from initiatives related to ethical trading and fair labour. Burmese trade unions are increasingly aware of rights and, emerging from an



environment where any activism by them was unacceptable to one where they can demand their rights, they are likely to be assertive.

There is the complex challenge of identifying the right partners. Most local banks and businesses have prospered during the period when Myanmar was under economic sanctions, and successful businesses are likely to have close links with the government or the military. In some cases, there are individuals or businesses who remain on current lists of individuals against whom there are specific government sanctions. Navigating through that will not be easy, and companies will have to undertake rigorous background checks and enhanced due diligence. Corruption is also a major challenge. Companies are likely to turn to laws in their own jurisdiction for guidance in this area. And in working to eliminate discrimination, companies should learn from affirmative action policies practised elsewhere.

While each of these tools and frameworks offers useful guidance, including specific advice, no single set of tools can be sufficient to prevent abuses from occurring. By relying only on tools developed for specific contexts, companies run the risk of implementing their policies in a piecemeal manner, exposing them to further risks. To address this concern, companies should recognise the importance of a comprehensive approach to implementing their responsibility to respect human rights. The Guiding Principles, developed after six years of intensive consultations with businesses, civil society groups and governments and adopted by the UN Human Rights Council unanimously in 2011, offer an innovative and comprehensive framework to shape responsible business conduct in Myanmar. In addition to reaffirming existing state obligations, the Guiding Principles make clear that all companies bear an independent responsibility to respect human rights.

GUIDING PRINCIPLE 7

Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

- Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; and
- Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

“Myanmar therefore offers a golden opportunity to make responsible business investment a common practice for all.”

This notion of corporate “respect” for human rights goes beyond “respect” as the concept is understood in the state-based human rights lexicon.¹⁰ Corporate respect for human rights in the Guiding Principles stresses the importance of avoiding actions that infringe on the protection of rights. Doing so requires several positive, affirmative steps, including undertaking human rights due diligence. This involves companies conducting risk and impact assessments, taking corrective steps to ensure they will not be contributing to, or benefiting from, abuses. Companies should instead operate in ways that uphold human rights, and set internal management processes and targets with incentives to ensure compliance, combined with processes to track and monitor performance. Undertaking these steps with respect to investment in Myanmar will not be easy, but it is necessary.

Companies based in countries that have imposed sanctions on Myanmar are increasingly familiar with the due diligence steps set out in the Guiding Principles.¹¹ Additional specific guidance regarding what companies must not do in weak governance zones¹² and on how companies can operate in ways that respect human rights even in such areas is also of importance in this context.¹³

Companies do not operate in a vacuum. The Guiding Principles emphasise the duties of states to protect people from human rights abuses involving non-state actors, including businesses. Guiding Principle 7 stresses the key role governments must play in high-risk environments.

It should be stressed that the Guiding Principles apply to all companies regardless of their size, sector, operational context, ownership

or structure. The Guiding Principles make it clear that companies should have a policy commitment to respect human rights; a human rights due diligence process to identify, prevent, mitigate and remedy any potential or realised adverse impacts they cause or to which they contribute.¹⁴ Careful reading of the Guiding Principles will show that implementing them is not a box-ticking exercise, but requires serious commitment on the part of governments as well as significant investment of management resources and effective allocation of responsibilities within companies. The Guiding Principles encompass current legal requirements, prevailing best practices, and societal expectations of businesses.

The challenges facing Myanmar are many. The country has been affected by many years of armed conflict and human rights abuses have been

THE EXAMPLE OF ERICSSON

Ericsson, the Sweden-based global telecommunications company, was one of the first international companies to engage with IHRB in support of the establishment of the Myanmar Centre for Responsible Business. Ericsson (a 137-year-old company) had been operating in Myanmar for many years before withdrawing in 1998 because of the deteriorating human rights situation.

Elaine Weidman Grunewald, Vice-President for Sustainability at Ericsson, comments: “Today less than 5% of the population in Myanmar has access to telecom, and the business potential is significant. At the same time, we have seen great potential for telecom to contribute to the social and economic development of the society, and our recent report projected that a realistic scenario could be some 7% GDP growth in three years. Over the last year we have seen many positive signs

regarding investments in Myanmar, including an improvement on how human rights are considered. At the same time, we saw a number of risks. For us it was important that, when re-entering a country such as Myanmar, one of the very few in the world where we are not currently operating, we would be better prepared if we faced the challenges in collaboration with a range of stakeholders. The Myanmar Centre for Responsible Business will be extremely valuable in helping us increase our knowledge about the opportunities for good governance as well as the risks faced, and to share with other stakeholders strategies for mitigating those risks. We look forward to working with a broad range of actors, including other international and local companies, governments, civil society and trade unions, to tackle common challenges in the country. In the world of telecom, Myanmar is a growth market, and we look forward to positive engagement and the work ahead.”

widespread. Many political prisoners have been released, but human rights groups say some still remain behind bars. A new leadership is taking gradual steps towards helping Myanmar make a successful transition to democracy, but there are severe constraints on the bureaucratic capacity to respond to the many demands being made on their time. As Myanmar has remained isolated from the international community for at least two decades – or five, if the so-called “Burmese Way To Socialism” which lasted from 1962 to 1988 is included – the international community needs to renew its acquaintance with Myanmar, just as Myanmar has to readjust to a new world with a different set of rules, and new expectations and standards that apply to business.

Many parliamentarians and other officials are committed to the reform agenda set by the government. The National League for Democracy (NLD) is an opposition party that has acted responsibly and whose leader exemplifies non-violent and peaceful struggles for democratic change. The NLD has placed human rights at the centre of its economic policies.

Myanmar therefore offers a golden opportunity to make responsible business investment a common practice for all.

The human rights challenges are formidable: several human rights groups have expressed caution about the challenges companies will face, even those committed to operating responsibly in the new environment, given the extent of ongoing human rights challenges.

It is clear that the road ahead will be uneven. Much will depend on how the government acts to avoid the resource curse that many countries with abundant natural resources have faced. Foreign investors – potential and existing – have an internationally recognised responsibility to act in an accountable and transparent manner. Myanmar’s long-suffering people deserve no less.

THE MYANMAR CENTRE FOR RESPONSIBLE BUSINESS

IHRB and the Danish Institute for Human Rights are working to establish a new Centre for Responsible Business in Yangon to provide guidance on how the Guiding Principles, and other relevant international standards, can be applied concretely in Myanmar. The new Centre, which will be registered under local law, is due to commence its activities during the third quarter of 2013. It will be open to all actors: local and international businesses, governments, parliamentarians, investors, civil society representatives, trade unions and local communities. Initial funding has been secured from a number of governments, including the UK Government’s Department for International Development and the Norwegian Ministry of Foreign Affairs. The Centre will not charge for its services but rather will strive to work impartially towards the goal of achieving a ‘level playing field on social issues’, to ensure that, when it comes to doing business in Myanmar, respect for human rights is commonly understood as a shared expectation for all. Tough discussions no doubt lie ahead. But there are hopeful signs that the people of Myanmar, and its government, seem willing to engage.

1 <www.ihrb.org>

2 <<http://www.ihrb.org/about/programmes/multi-year-project-in-myanmar.html>>

3 The EU statement can be found here: <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/129703.pdf>

4 <<http://www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf>>

5 The full text and accompanying documents of the Performance Standards and Guidance Notes can be found here: <http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework+-+2012/Performance+Standards+and+Guidance+Notes+2012/>

6 The Voluntary Guidelines can be found here: <www.fao.org/nr/tenure/voluntary-guidelines/en/>

7 <http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf>

8 <<http://www.oecd.org/site/swacmai2010/44031283.pdf>>

9 <www.voluntaryprinciples.org>

10 See Institute for Human Rights and Business, *Setting Boundaries: Clarifying the Scope and Content of the Corporate Responsibility to Respect Human Rights* (Dec. 2009) <http://www.ihrb.org/pdf/Setting_Boundaries-Clarifying_Scope_and_Content_of_Corporate_Responsibility_to_Respect_Human_Rights.pdf>

11 See Institute for Human Rights and Business, *The State of Play Report 1 and Report 2* (2011 and 2012). <<http://www.ihrb.org/about/programmes/duo-diligence.html>>

12 <www.redflags.info>

13 See Institute for Human Rights and Business, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries* (2011) <http://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf>

14 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, Remedy” Framework* (A/HRC/17/31) <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf>

Advancing Children's Rights in Business

United Nations Children's Fund (UNICEF)

Developed by UNICEF, the UN Global Compact and Save the Children, the Children's Rights and Business Principles provide a comprehensive guide for companies on the range of actions they can take in the workplace, marketplace and community to respect and support children's rights. UNICEF's CSR Unit, Division of Private Fundraising and Partnerships, offers a snapshot of UNICEF's two-year platform with 20 leading companies in Sweden to implement the Principles.

Companies interact with children on a daily basis, although often this is neither directly nor by design. Children may be workers in their factories and fields, the family members of their employees, and community members in the neighbourhoods where they operate. In many countries, children are increasingly recognised as a consumer group themselves, with discretionary income to spend and increasing influence on family purchases. Children may be a market force, but nonetheless need protection from inappropriate advertising and from unhealthy or unsafe products and services.

Yet, even while business and human rights discourse has evolved significantly, children have not been adequately considered by businesses as a key stakeholder group. Business focus on children's issues is often relegated to eradicating the practice of child labour, or to investing in local community initiatives that support children. The past few decades have

indeed seen greater corporate commitments to human rights. Increasingly companies are exerting their influence on supply chains to eliminate child labour. Yet beyond child labour considerations, companies also have a responsibility to respect children's rights and the opportunity to support them through the ways in which they operate their facilities, develop and market their products, provide their services, and exert their influence on economic and social development.

Moral considerations aside, there is good reason for companies to pay attention to their impact on children's rights. The exclusion of a holistic approach to children's rights within corporate human rights initiatives may create a number of risks for businesses, such as:

- *Reputational risks* from stakeholder allegations of direct or indirect violations of children's rights;
- *Legal risks* from lawsuits for alleged violations;

- *Financial risks* from mishandling children's rights within business operations;
- *Security risks* from failing to earn a social licence to operate; and
- *Market share risks* from consumer action on lack of attention to child protection.

Furthermore, apart from demands from investors and other stakeholders, governments are increasingly likely to implement policies and regulations that govern business' respect for children's rights.

Recognising a need for explicit guidance on what it means for businesses to respect and support children's rights, the UN Global Compact, Save the Children and UNICEF, together with companies and other stakeholders, released a set of ten Principles on Children's Rights and Business (the **Principles**) in March 2012. Building upon the UN Guiding Principles on Business and Human Rights (**UN Guiding Principles**), the Principles identify



a comprehensive range of actions that all businesses should take to prevent and address risks to children's rights and maximise positive business impact in the workplace, marketplace and the community. While the UN Guiding Principles provide a broad framework through which companies can embrace a systemic respect for human rights, they call on businesses to pay particular attention to groups or populations that may be particularly vulnerable or marginalised. In all respects, children are a priority stakeholder group as they are frequently the demographic that is the most vulnerable and marginalised.

The Principles fill the gaps in areas where businesses need to make special considerations to meet their responsibility to respect children's rights. David Ford, Director of Corporate Social Responsibility at Alfa Laval AB, commented on the relevance of the Principles to business: "Multinational organisations are rightly under the spotlight for

their potential impacts on society – both positive and negative. There are many corresponding demands placed on the company by legislation and social initiatives. The Principles encompass many of these demands and present them in a way that is relevant to both management and employees, whether it concerns the environment, human rights, labour rights, or business ethics."

Beyond risk mitigation, companies also have the power to use their influence and reach to go beyond their basic responsibility to advance the realisation of children's rights. The Principles articulate the difference between companies' responsibility to *respect* the minimum required of business to avoid causing harm to children; and *support* – taking voluntary actions that seek to advance the realisation of children's rights.

Rather than taking a compliance-based approach towards children's rights, companies have the opportunity to make a positive impact by applying their core competencies through their products and services to advance children's rights and/or using their leverage and sphere of influence to promote behavioural change.

[Integrating the Children's Rights and Business Principles in Practice](#)

Following the launch of the Principles in March 2012, the Swedish Committee for UNICEF began working closely with some of Sweden's largest multinational companies to enhance their knowledge of the framework of the Principles and their specific implications to their business. Through these discussions, companies expressed an interest in further dialogue with UNICEF and with other companies on the challenges and opportunities of implementing the Principles.

THE CHILDREN'S RIGHTS AND BUSINESS PRINCIPLES

All businesses should:

- 1 Meet their responsibility to respect children's rights and commit to supporting the human rights of children.
- 2 Contribute to the elimination of child labour, including in all business activities and business relationships.
- 3 Provide decent work for young workers, parents and caregivers.
- 4 Ensure the protection and safety of children in all business activities and facilities.
- 5 Ensure that products and services are safe, and seek to support children's rights through them.
- 6 Use marketing and advertising that respect and support children's rights.
- 7 Respect and support children's rights in relation to the environment and to land acquisition and use.
- 8 Respect and support children's rights in security arrangements.
- 9 Help protect children affected by emergencies.
- 10 Reinforce community and government efforts to protect and fulfil children's rights.

In response, the Swedish Committee for UNICEF launched a two-year corporate platform, with financial support from the Swedish Postcode Lottery, to engage a wider number of Swedish companies on the implementation of the Principles using the due diligence tools developed by UNICEF. More than 20 companies are currently participating in the corporate platform, each of them with an annual turnover of over USD1 billion. All of the companies are considered leaders within their industries, and some have large and complex supply chains with a wide international presence. Karin Holmquist, Vice President of Corporate Responsibility at Atlas Copco commented, "In the ongoing work to integrate the UN framework on business and human rights, it was natural to also encompass the Children's Rights and Business Principles in this work. Atlas Copco's operations is business-to-business so some of the Children's Rights and Business Principles will be relevant, for example when addressing the value chain."

The platform comprises a series of up to ten workshops that provide an interactive learning environment through which companies can explore

specific business impact in depth, and share information with their peers on various child rights issues. One of the participants, Sim Tee Lam, Communications Manager of Strategic Industries Business Area at AB SKF, stated, "The networking opportunity with other Swedish companies and discussions during different case scenarios are invaluable for us to benchmark and learn from each other."

During the two-year initiative, the companies will participate in training and group exercises focused on: 1) the business and human rights landscape; 2) each of the ten Principles and the implications for business; and 3) the due diligence tools developed by UNICEF.

Each workshop is focused on a particular dimension of the Principles, concentrating on children's rights in the workplace, marketplace, and the community.

Integrating children's rights into corporate due diligence

Principle 1 of the Principles calls for all businesses to put in place appropriate policies and processes, as set out in the UN Guiding Principles,

including a policy commitment, due diligence process and remediation measures for addressing the potential and actual impacts on children's rights. Principle 1 encourages companies to approve a policy commitment to the Principles and conduct due diligence to identify and assess actual or potential adverse impact on children's rights, in the context of the company, business sector and the communities in which they operate.

As part of the corporate platform, companies receive training to assist with the integration of relevant child rights due diligence into their broader human rights programmes and risk management processes using UNICEF's suite of due diligence tools. The tools will support companies' activities to implement appropriate policies; conduct impact assessments; integrate programmes and systems based on assessment findings; and monitor and report on children's rights. The tools have been designed to 'demystify' the connection between children's rights and business. Malin Ekefalk, Director of Social Responsibility at Electrolux AB, notes how the due diligence tools have enabled the company to integrate children's rights into the ongoing effort to implement the UN Guiding

Principles: “The Principles and the impact assessment tool provide an important additional perspective on the impact assessment of, for example, labour standards – fair compensation and decent working conditions for parents have a great impact on the lives of children. This is an important element of our responsibility to respect human rights.”

Some of the participants have already started to incorporate a child rights perspective into their human rights due diligence processes by initiating children’s rights impact assessments and reviewing existing company policies to integrate relevant children’s rights components. Millicom was one of the first companies to pilot the children’s rights impact assessment tool. “The children’s rights assessment we conducted – both on group level and in the DRC – helped us understand the multiple ways our operations can impact children well beyond the more obvious risks, such as child labour. As a result of the assessment we know our gaps and have a very clear action plan on where we need to improve on policies and controls but also where we have an opportunity to drive positive change for children’s rights in our entire industry,” noted Milka Pietikainen of Millicom’s Global Corporate Responsibility Office.

Business and children’s rights in the workplace

Some of the workshops organised through the corporate platform focused on Principles 2-4, which address children’s rights related to the workplace. Companies participated in training and in-depth discussions on child labour, decent youth employment, and family-friendly workplace policies.

To date, the issue of child labour has received the most attention from business with respect to children’s rights. The agriculture, mining and garment sectors in particular have been targeted for the use of child labour in their supply chains and by subcontractors. Due to public pressure to eradicate all forms of child labour, multinational companies have invested significant resources into developing processes and safeguards against the use of child labour in their supply chains. Maritha Lorentzon, Social Sustainability Coordinator at H&M, commented on the applicability of the Principles: “They establish exactly what kind of responsibility business has and that it applies to the whole supply chain – not only the first tier. The Principles make that very clear.”

More and more, companies are being called on to address children’s rights violations that occur several tiers up their supply chains by using their leverage to influence suppliers’ purchasing decisions, even when they do not have direct business relationships.

Yet promoting a workplace that respects children’s and young workers’ rights is about much more than addressing and preventing child labour. The Principles call on companies to promote children’s rights in the workplace by establishing a family-friendly workplace, respecting the rights of young workers, and ensuring the protection and safety of children in all business activities and facilities. Marianne Barner, Senior Advisor Sustainability at IKEA Group, described the company’s approach to children’s rights: “IKEA’s child labour code of conduct ‘The IKEA Way on Preventing Child Labour’, which is part of IKEA’s overall code, seeks to prevent child labour and applies to all suppliers and

their sub-contractors. It is based on national law and the Convention on the Rights of the Child and requires that all suppliers recognise the Convention and act in the best interests of the child.

In addition, 15 years ago, the management of the IKEA Group decided to move from only focusing on eliminating child labour through compliance and auditing of its supply chain, towards a comprehensive commitment to tackling the root causes of child labour – such as debt, poverty, the lack of access to education, disability and ill health – through strategic investments and partnerships in South Asia, mainly in India, where many of its textiles and carpets are purchased.”

Moreover, not all work that is carried out by a child is considered ‘child labour’. Young workers can be engaged in appropriate work as defined by ILO Convention 138, yet they are particularly vulnerable to many forms of violence, exploitation and abuse, including sexual exploitation, unfair wages, and conditions that take advantage of their age, inexperience and powerlessness. At the same time, business can play an important role in promoting decent youth employment and supporting the rights of children who have reached the general minimum age for employment. For example, companies can remove obstacles to encourage and assist young workers to combine work and education. They can contribute to the employability and skills development of young people through the provision of vocational training and apprenticeship programmes. Why are these issues important for business? Violations in the workplace – from child labour to hazardous working conditions to discrimination against mothers or pregnant women – deprive

children of their basic rights, including the right to education. Respect and support for children's rights in the workplace can also bring important business benefits. Incidences of child labour in the supply chain can prompt consumer activism, damage a company's reputation and lead to revenue losses. At the same time, providing a young workforce with age-appropriate healthcare, accommodation and treatment, and providing an adequate living wage or the provision of childcare facilities can go a long way in developing a healthy, capable, and productive workforce in the long-term.

Business and children's rights in the marketplace

Participating companies in the corporate platform also spent time reviewing their responsibilities regarding children's rights in the marketplace, specifically Principles 5-6. Discussions took place on the implications of children's participation in the testing of products, product safety and misuse, marketing and advertising targeting children, and product innovation.

Children's greater susceptibility to environmental hazards must be considered in product development,

safety and testing. High-profile legal cases have targeted the consumer goods, food and beverage and pharmaceutical sectors for child-safety concerns. In addition to concerns about the safety of products and services, companies in certain sectors must consider whether they are providing products, services or resources to employees and customers that encourage the sexual exploitation and abuse of children. The most obvious example of such misuse is the dissemination of online child abuse images via the Internet, mobile phones, computers, video games and other technology.¹

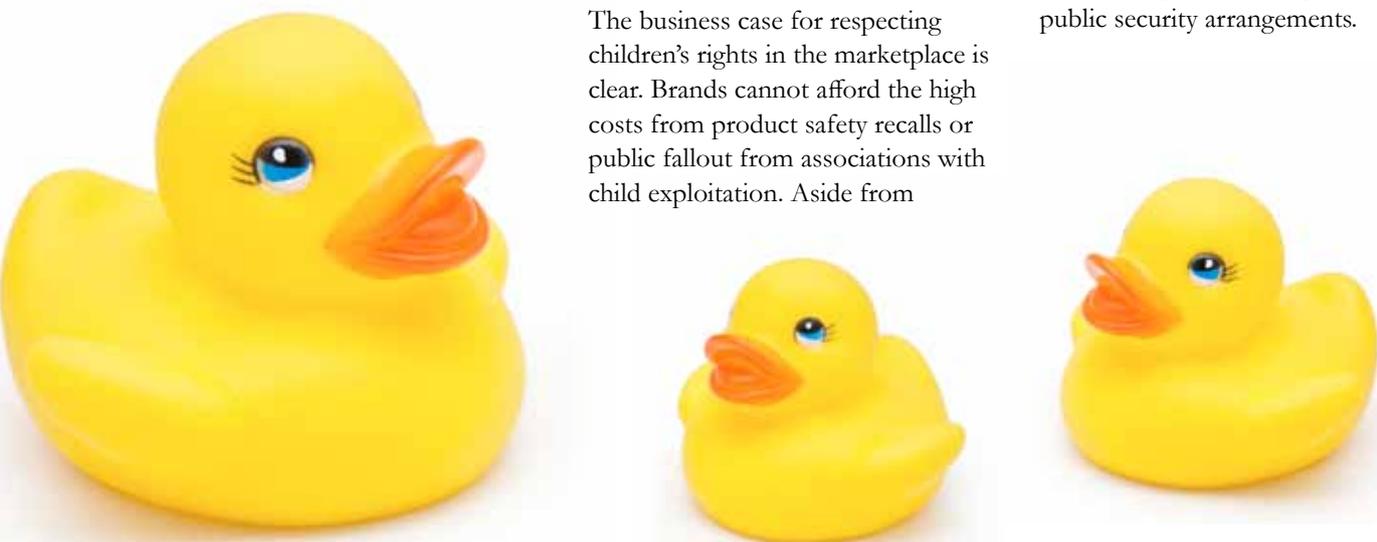
Moreover, children often lack the critical awareness to evaluate advertising messages, and are prone to accepting them as truthful, accurate and unbiased. Advertising can exert a powerful influence on children's behaviour and self-esteem such as normalising violent or sexualised behaviour or unrealistic body image ideals, which can hamper health, psychological and social development. A single focus on consumerism may lead to poor financial habits at an early stage,² for example with mobile phone usage. The food industry in particular is seen as a catalyst for changing consumption patterns and increasing child obesity rates and diet-related illnesses.

The business case for respecting children's rights in the marketplace is clear. Brands cannot afford the high costs from product safety recalls or public fallout from associations with child exploitation. Aside from

assuring that products, services, communications and marketing do not cause mental, moral or physical harm, companies can carry out activities to proactively *support* children's rights. These may include taking steps to maximise the accessibility and availability of products and services that are essential to children's survival and development (ie affordable and nutritional foods in less developed economies), and/or develop marketing campaigns that raise awareness of and promote children's rights, positive self-esteem, healthy lifestyles and non-violence.

Business and children's rights in the community

Beyond companies' direct impact on children through the workplace and marketplace, business operations also can have a severe impact on the environment and health of communities. Participants in the corporate platform were trained on the detrimental impact that business operations can have on children who live near a company's production facilities, physical plants or other premises. Participants discussed the ways in which children's rights can be violated in a number of circumstances, including environment and land use, and the employment of private or public security arrangements.



Due to their physical size, the developmental stage of their internal organs and systems, and their habits, children are far more vulnerable than adults that are similarly exposed to health risks from pollution and toxins. Every year, some three million children under the age of five die from preventable environment-related causes and conditions, ranking the environment high on the list of causes of child deaths.³ Principle 7 calls on companies to bring a child-sensitive approach to environmental impact assessments and siting designs, and to consider alternative siting options to those that are near schools, playgrounds, or other areas where children congregate.

Principle 8 calls on companies to respect and support children's rights in security arrangements. Company personnel or contracted security services may encounter young children and adolescents in a variety of ways: as workers; members of the community; perpetrators; victims; or as witnesses to infractions. All too often, local children or those living on company premises can be vulnerable to harassment or physical and sexual abuse by security forces. Further vigilance will create important opportunities for companies to expand their contributions to child protection in connection with security issues.⁴

In addition to impacts on the physical environment, corporate practices and behaviour can have particular consequences in the local or national context. Companies operating in conflict-affected areas run a

heightened risk of committing or contributing to international crimes, either knowingly or not, as they do business in these areas. Conversely, they may support children affected by emergencies in coordination with local authorities and humanitarian agencies. Principle 9 calls on companies to help protect children affected by emergencies, whether caused by natural disasters or armed conflict.

Companies doing business in countries with weak institutions and rule of law will also have special considerations with regard to children's rights. As powerful actors with considerable political, social and economic clout, Principle 10 calls on companies to reinforce government and community efforts to fulfil children's rights. According to ActionAid, the "total loss to tax avoidance by multinationals in the developing world is estimated to be around £70 billion a year, enough to save the lives of 85,000 children under the age of five in the world's poorest countries every 12 months."⁵ In countries where bribery, corruption and tax evasion are common, companies can take a responsible approach that supports good governance, not one that supplants or undermines it.

The Time is Now

As the UN Guiding Principles become more widely adopted amongst the business community, it is important for companies to consider their impact on vulnerable groups. Human rights are universally applicable, and the violation of a child's right is not more or less important depending on his or her age or where he or she lives.

At a critical stage of human development, the negative impact of businesses on children are often irreversible and may have lifelong consequences. While governments hold the duty to protect children from such violations, non-state actors (including families, civil society and companies) have a strong reason to ensure that children and young people have the opportunity to grow up to be healthy, well-educated and protected from violence and neglect to realise their full potential for the benefit of society as a whole.

Through the corporate platform, companies are learning about important ways to address and eliminate violations of children's rights throughout their supply chains. This includes ways to tackle child labour and many other issues. At the same time, companies are discovering that they have the leverage, resources, and influence to make unique contributions to advance the realisation of children's rights across their markets, value chains and communities.

¹ UNICEF, *Children Are Everyone's Business: A practical workbook to help companies understand and address their impact on children's rights* (June 2012).

² *Ibid.*

³ United Nations Environment Programme, World Health Organisation and United Nations Children's Fund, *Healthy Environments for Health Children: Key Messages for Action* (WHO Press, 2010). <www.who.int/ceh/publications/hehc_booklet_en.pdf>, p 59.

⁴ *Supra* note 1.

⁵ Daniel Boffey, 'British sugar giant caught in global tax scandal' *The Guardian* (London, 9 February 2013) <<http://www.guardian.co.uk/business/2013/feb/09/british-sugar-giant-tax-scandal>>.



Litigation update

Charles E. Borden and Claire Rajan

US Supreme Court decision alters the transnational human rights litigation landscape

As the *Review* went to press, the US Supreme Court handed down its long-awaited decision in *Kiobel v. Royal Dutch Petroleum*,¹ unanimously holding that claims brought by Nigerian plaintiffs against certain Dutch, British, and Nigerian defendants under the Alien Tort Statute (ATS) for alleged human rights abuses committed in Nigeria

must be dismissed. Relying on the Court's recent decision in *Morrison v. National Australia Bank Ltd.*,² the Court held that the presumption against the extraterritorial application of US law applied to the ATS and there was no indication that Congress intended the statute to have extraterritorial effect. By holding that the ATS is subject to the presumption against extraterritorial application and that ATS claims are only viable where they "touch and concern the territory of the United States with sufficient force to displace the presumption", the Court substantially limited the potential ATS exposure of corporate defendants. This is particularly true with respect to foreign corporate defendants, like the *Kiobel* defendants, that do business in the United States (including being listed on US stock exchanges) but which lack additional links to the country. Although the Court did not provide detailed guidance on what would constitute a sufficient territorial nexus for purposes of ATS jurisdiction, the Court did note that "it would reach too far to say that mere corporate presence suffices" to satisfy the standard.

The Alien Tort Statute

The ATS is a jurisdictional statute which allows foreign plaintiffs to bring suit in United States federal court for torts committed in "violation[s] of the law of nations or a treaty of the United States." Over the past 30 years, more than 120 ATS lawsuits have been brought in US courts against corporate defendants. The vast majority of these cases have alleged that the corporate defendants aided and abetted, or otherwise contributed to, human rights abuses committed by foreign governments, and have sought millions of dollars in compensatory and punitive damages. Prior to *Kiobel*, many commentators believed that the ATS applied to activity outside the United States and many of the ATS cases brought in recent years focused on alleged human rights violations with only a limited territorial connection to the United States.

Kiobel v. Royal Dutch Petroleum

Kiobel involved claims brought by Nigerian citizens against a Nigerian corporation, Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), and certain British and Dutch companies that indirectly hold shares in SPDC, alleging that SPDC assisted the Nigerian government in committing human rights violations against Nigerian citizens in Nigeria in the mid-1990's. The district court initially found jurisdiction over plaintiffs' ATS claims. The US Second Circuit Court of Appeals reversed and dismissed the complaint for lack of subject matter jurisdiction on the grounds that corporations could not be subject to suit under the ATS. The initial briefing and argument before the US Supreme Court addressed the question of corporate liability for human rights violations under customary international law. In a rare move, however, the Court ordered additional briefing and

argument on the extraterritorial reach of the ATS – specifically, whether and under what circumstances the ATS allows US courts to recognise a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. The Court ultimately ruled on this second question, and did not directly address the question of corporate liability.

The Supreme Court unanimously affirmed dismissal of plaintiffs' claims, but split on the reasons for doing so. The majority opinion, authored by Chief Justice Roberts, and joined by Justices Scalia, Kennedy, Thomas, and Alito, reasoned that the general presumption against the extraterritorial application of US law applied equally to the ATS. The majority therefore dismissed the plaintiffs' claims, observing that in this case "all the relevant conduct took place outside the United States", and left it for future courts to determine when an ATS claim might

be able to displace the presumption against extraterritorial application in a particular case if there was a greater territorial nexus with the United States. The majority, however, did note that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices" to displace the presumption against extraterritorial application.

Although he joined in the majority opinion, Justice Kennedy wrote separately to emphasise the limited scope of the holding, observing that "[o]ther cases may arise with allegations of serious violations of international law principles protecting persons . . . and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation".³

BEYOND THE ATS: TRANSNATIONAL HUMAN RIGHTS LITIGATION AND CORPORATE GROUP LIABILITY

In addition to *Kiobel*, courts outside of the US recently have handed down important decisions addressing the issue of extraterritorial jurisdiction in the context of corporate group liability. Earlier this year, for example, the District Court of The Hague held in the *Akpan* case that the Nigerian subsidiary of a Dutch company could be held liable in the Netherlands for alleged damage suffered in Nigeria from the operations of the subsidiary abroad. The court found it had jurisdiction over the foreign subsidiary as it had been sued jointly with its Dutch parent company even though the parent was ultimately not found liable. In respect of this jurisdiction decision, the court considered relevant that it was foreseeable that the Nigerian company be sued before the court of its Dutch parent as there is “an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign subsidiaries, in which the foreign subsidiary involved was also summoned together with the parent company”.⁴ Although not expressly a human rights case, the issue raised in *Akpan* – whether multinationals can be held accountable in their home jurisdiction for damage alleged to have been caused by, or related to, the operations of one of their foreign subsidiaries abroad – is expected to be of increasing importance to transnational human rights litigants in the wake of *Kiobel*.

The Future of ATS

Although many of the ATS cases brought in recent decades are likely no longer viable post-*Kiobel*, the majority opinion – as Justice Kennedy observed in his concurrence – leaves open many “significant questions regarding the reach and interpretation” of the ATS. In particular, while *Kiobel* conclusively determines that the ATS may not be given extraterritorial effect, and that ATS claims are not viable when all the relevant conduct takes place outside of the US, it does not resolve the question of what constitutes an extraterritorial ATS claim. Future ATS litigation, therefore, is likely to focus, at least as a threshold matter, on

whether the ATS claims at issue possess meaningful territorial nexus with the United States sufficient to justify ATS jurisdiction. Future ATS plaintiffs are likely to press a number of key arguments regarding when and under what circumstances such a jurisdiction-granting nexus exists, such as the extent to which multi-national corporations (including non-US corporations) may be subject to ATS liability: (i) where the conduct or decisions giving rise to such liability occurred in the United States in whole or in part; or (ii) where the conduct or decisions giving rise to such liability were performed by a US corporation or other US nationals in whole or in part.

The *Review* will publish a more comprehensive analysis of the decision and its implications for transnational human rights litigation in the Autumn 2013 issue.

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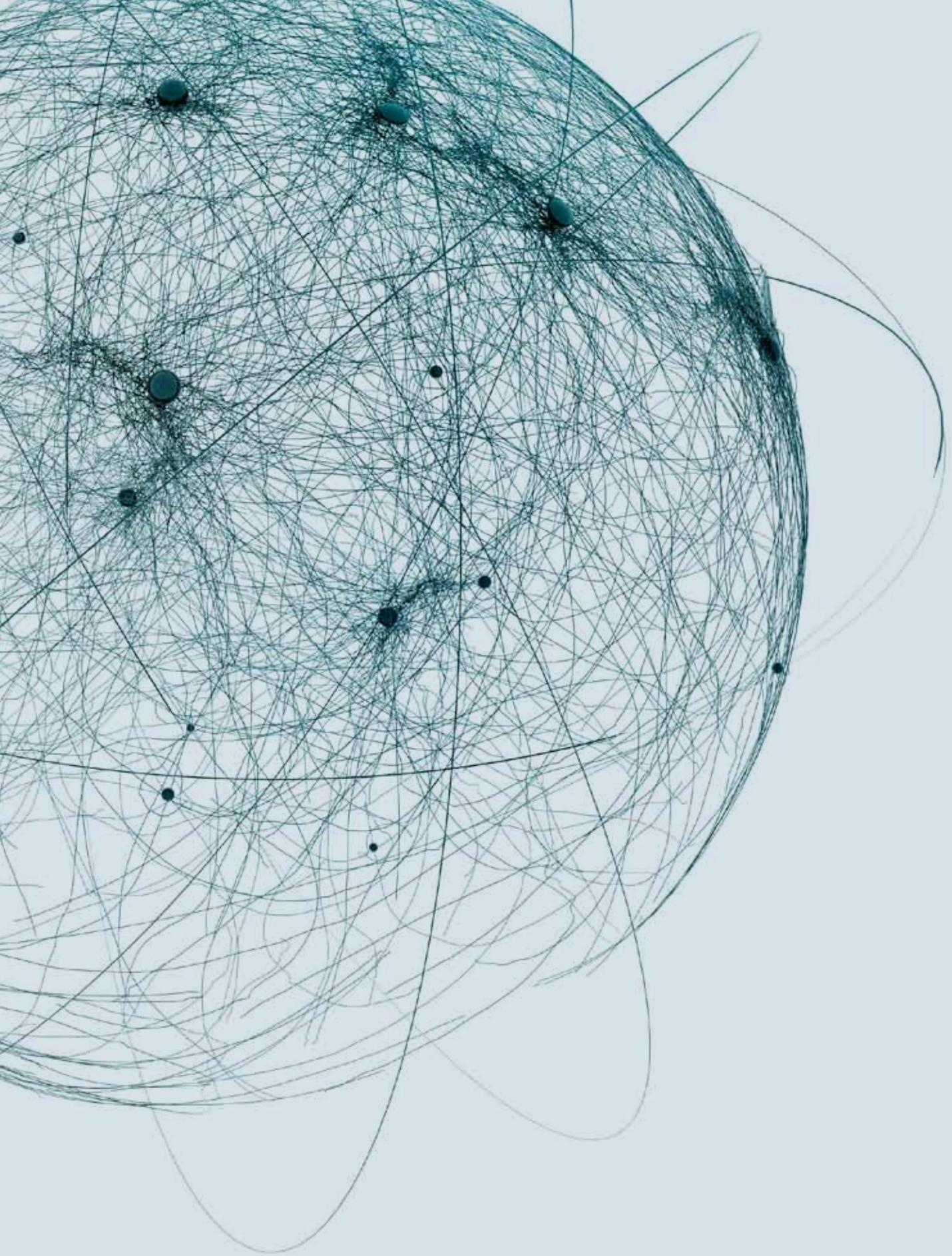
¹ *Kiobel v. Royal Dutch Petroleum Co., et al.*, No. 10-1491 (Apr. 17, 2013).

² 130 S. Ct. 2869, 561 US ___, __ (2010).

³ Separate concurring opinions were issued by Justice Alito, joined by Justice Thomas, and Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan.

⁴ *Akpan, et al. v. Royal Dutch Shell, PLC, et al.*, District Court of the Hague 30 January 2013, LJN: BY9854.





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