



BUSINESS AND HUMAN RIGHTS:

More reasons to “know and show”

by Jennifer Zerk

Are businesses getting to grips with human rights issues? The Second UN Forum on Business and Human Rights, held in Geneva in December 2013, provided a valuable opportunity to take stock of progress being made towards implementation of the UN Guiding Principles (see box on page 11) and to mull over some of the challenges we still face. The event was attended by over 1,700 representatives of business, government and civil society. Well represented, as ever, were the oil and mining industries – sectors that have, for the past 20 years or so, been on the front line of the business and human rights debate.

There are many reasons for this. While these industries are associated with positive human rights impacts (e.g. by supporting development and the generation of wealth), the risks of being involved or implicated in adverse impacts are particularly high. These risks can arise directly from extractive, refining or transportation projects (e.g. as a result of poorly executed resettlement plans through diversion of water supplies, or as a result of noise, environmental degradation or pollution) or from the way the company treats its workforce (e.g. wages, working conditions and housing arrangements for migrant workers). Increasingly, companies are also expected to examine and mitigate adverse impacts arising in their supply chains and through business

relationships. For oil and mining companies, this involves giving careful consideration to the companies and governments they do business with. It means structuring relationships and project agreements such that long-term investments can carry on, into the future, in a “rights respecting” way. It will also mean scrutinising contractors, especially security providers, to reduce the risk of being associated, even indirectly, with human rights abuses.

Embedding good practice

Although all three pillars of the UNGPs are relevant to business enterprises, the pillar businesses will be focusing on most closely is, of course, the second pillar: the “corporate responsibility to respect”. This

second pillar reflects a consensus that it is time for corporate and civil society actors to start moving from a culture of “naming and shaming” to “knowing and showing”. In other words, companies must not only demonstrate a good understanding of the human rights impacts of their business activities and relationships, they must also take steps to address these impacts and be prepared to communicate their performance on human rights issues to wider audiences.

Business leaders at the 2013 UN Forum were keen to share their progress in implementing the “second pillar” over the past two years. For many, this has meant developing new human rights policies, conducting human rights impact

assessments, developing reporting and performance-tracking systems, and using the results to identify new training and capacity-building priorities. The need for a “cross-functional” approach to effectively embed human rights policies and commitments into organisational processes was a common thread.

Involving stakeholders

Stakeholder engagement was a particular focus of the business-led discussions. The UNGPs place particular emphasis on the importance of engaging with affected stakeholders when it comes to developing policy commitments, carrying out due diligence, tracking the effectiveness of corporate responses and designing and implementing effective grievance mechanisms. Many practical examples of engagement with NGOs and stakeholder communities were showcased at the event, including information-gathering activities, innovative training programmes and collaborative impact monitoring initiatives. As Vanessa Zimmerman of Rio Tinto told the main Forum: *“It was recognised that civil society [organisations] often do support companies to ‘know and show’ that they respect human rights, including when relationships start off in a more adversarial manner”*. Some companies reported that bringing company executives into direct contact with representatives of affected groups would often prove the impetus for “tangible and rapid” change.

Problem areas

While the UNGPs have provided greater clarity for companies with respect to social

expectations – not to mention a useful framework for action – there are still difficult areas. Key among these, and of particular concern to companies working in the extractives sector, are the problems that arise when the roles and responsibilities of companies and government become blurred. Companies working in conflict zones or areas of weak governance have plenty of experience of this, and of what the fallout can be. In these situations, it is not uncommon for companies to take on additional responsibilities for infrastructure, security, housing provision and other services, such as healthcare and education. While these decisions and investments may have positive human rights outcomes for local people, they also alter the nature and scope of the company’s human rights risks and can give rise to daily dilemmas.

Against this background, it was not surprising to hear a number of business leaders calling for a greater emphasis on the state’s “duty to protect” (i.e. the “first pillar”), arguing that increased efforts to deal with corruption and to promote the rule of law were likely to have the most positive and long-lasting effects on human rights problems in the long run.

The other key area of difficulty for companies is around the concept of “leverage”. The UNGPs urge companies to use their “leverage” in business relationships to address the human rights impacts that they might not cause directly but which are nevertheless associated with their business activities (e.g. through the supply chain). There is still some confusion about what “leverage” means in practice, with some company representatives expressing

the view that the amount of “leverage” that companies have in reality is often overestimated. Others said that, for very complex organisations, prioritising the relationships and supply chains to focus on can be a real challenge. Nevertheless, there is broad agreement about the value of participation in multi-stakeholder initiatives to raise standards and increase corporate leverage in relation to human rights issues.

Risks or rights?

Most, if not all, companies will already have policies that cover human rights issues; policies on employment, non-discrimination, health and safety, environmental issues, and legal compliance are all potentially relevant. However, for many companies the UNGPs have not only provided a basis for more cross-functional discussion and problem-solving, they have also helped to provide fresh perspectives on corporate risk. There is growing appreciation of the different ways in which a “rights-centred” (as well as the more traditional “risks-centred”) approach can help to make corporate risk management strategies more holistic, coherent, forward-looking and robust. *“One example would be that of land access for large projects and resettlement,”* says Ed O’Keefe of human rights consulting firm Synergy. *“Most companies will ensure that they are legally compliant, but the legal requirements for compensation are rarely adequate to restore livelihoods or reflect the true replacement costs of crops and so on. So companies can be legally compliant, but if they are controlling access to land on a large scale, and affecting vulnerable groups, this could lead to accusations of involvement in serious human rights abuses.”*

THE UN GUIDING PRINCIPLES: “PROTECT, RESPECT AND REMEDY”

The UN Guiding Principles (UNGPs) on Business and Human Rights were adopted by the UN Human Rights Council in June 2011. This set of principles remains the only global standard relating to preventing and addressing human rights impacts arising in a business context and has been widely endorsed and referenced in other contexts and international instruments, including the OECD Guidelines for Multinational Enterprises.

The UNGPs rest on a “three pillar” framework:

Pillar I:

The State Duty to Protect against human rights abuses by third parties, including business enterprises, through appropriate policies, legislation and adjudication.

Pillar II:

The Corporate Responsibility to Respect human rights, which means that companies should act with due diligence to avoid infringing the human rights of others and take steps to address adverse human rights impacts arising both directly and indirectly from their business activities.

Pillar III:

Access to Remedy, which addresses the need for victims of human rights impacts arising from business activities to have access to an effective remedy for the harm they have suffered.



Know and show

Much of the content of the “second pillar” of the UNGPs is still, legally speaking, non-binding. To a large extent, these provisions reflect “societal expectations” rather than legal requirements. However, this is not likely to remain the case for long. Key concepts in the UNGPs – due diligence, performance tracking and human rights reporting – are gradually finding their way into domestic initiatives on procurement and export finance, as well as company law reforms. *“People now want to know how the companies they invest in, buy from, and work for, impact other human beings,”* says Anna Triponel of independent business and human rights think tank Shift. *“These demands, combined with tragic events such as Rana Plaza, are spurring a wave of regulatory and stock exchange developments around the world. Companies, wherever they are incorporated and wherever they operate, are increasingly expected to be more transparent, and share how they know that they respect human rights – not on paper, but in practice.”* In the UK, listed companies are now explicitly required to report on human rights issues to the extent that this is necessary for an understanding by shareholders of the company’s “future development, performance and position”. As mandatory narrative reporting is comparatively new – and human rights reporting even newer – most companies will be on a steep learning curve when it comes to deciding what, how, and how much to disclose on human rights risks and risk management. At what level of seriousness does a risk or impact become one which must be reported under mandatory disclosure requirements? And, without a

crystal ball, is it possible to distinguish those risks that are likely to have an impact on shareholder value from those that are not? There is a clear need for further guidance for companies. The Financial Reporting Council is presently preparing generic guidance on the various components of the “strategic report”. In addition, it is expected that sector-specific approaches will emerge, not just in relation to the “showing” but also to help companies do a thorough job of “knowing”.

Delving deeper

Currently, the oil and gas industry is one of the better served when it comes to tools and guidance relating to human rights due diligence and reporting. The European Union has recently published comprehensive guidance for the upstream sector, developed jointly by the Institute for Human Rights and Business and Shift. Last year, IPIECA (International Petroleum Industry Environmental Conservation Association, the global oil and gas industry association for environmental and social issues) published its own guide on integrating human rights into environmental, social and health impact assessments. The Global Reporting Initiative sector supplements for the oil and gas sector and the mining and metals sector have also become important reference points. These include example key performance indicators, as well as additional guidance about structuring sustainability disclosures and the complex issue of materiality. Finally, in view of recent regulatory developments, the launch last year of the Reporting and Assurance Frameworks Initiative is timely.

The aim of this initiative is to clarify what high-quality human rights reporting, aligned to the requirements of the UNGPs, looks like in practice.

A new legal and moral landscape

It is important to remember that the UNGPs are not a solution in themselves but a framework for getting there. While many new corporate initiatives are already having positive results, it will take time for a lot of the groundwork that is presently underway in many organisations to translate into real improvements on the ground. There is also, sadly, plenty of poor practice still out there. But it is clear that the UNGPs have transformed the ethical landscape in which conversations about corporate human rights responsibilities are taking place and are now beginning to have an impact on the legal landscape too.

Resources

- European Commission, *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*.
http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-oag-hr-business_en.pdf
- IPIECA, *Integrating human rights into environmental, social and health impact assessments*.
<http://www.ipieca.org/news/20131206/integrating-human-rights-environmental-social-and-health-impact-assessments>
- Global Reporting Initiative
<http://www.globalreporting.org>
- Reporting and Assurance Frameworks Initiative
<http://www.business-humanrights.org/Documents/RAFI>

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