



Teaching Business and Human Rights Workshop

Discussion Summary

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Overview

While the number of universities worldwide offering business and human rights courses has steadily grown over the past few years, individuals teaching business and human rights continue to face challenges. It remains difficult to find the right place in the traditional university curriculum for a relatively new, multi-disciplinary subject. A dynamic and evolving field makes identifying materials and structuring the course an ongoing task. Those teaching in business and international affairs schools must determine how to teach human rights to non-lawyers. New topics emerge and instructors continuously experiment with the best ways to teach them.

As demand for business and human rights education grows, the network of individuals teaching the subject is expanding. Inaugurated at a workshop in May 2011, The Columbia University Teaching Business and Human Rights Forum has grown to include today more than 150 individuals teaching business and human rights at 97 institutions in 25 countries on 5 continents. Outside of annual Workshops, members exchange ideas and share resources year-round through an Online Forum.

The third annual Columbia University Teaching Business and Human Rights Workshop took place on May 30-31, 2013, again on Columbia University's campus in New York. Spanning two days, this year's Workshop began with an opening film screening and discussion on mediating community-business disputes, and a presentation by Michael Posner on "Teaching Human Rights in a Business School."

The Workshop agenda on the following day reflected common interests and challenges faced by those teaching business and human rights at the university level, including:

- Crafting a Business and Human Rights Course;
- Translating "Business and Human Rights" for Managers and Policymakers;
- Access to Capital
- The Future of Corporate Legal Accountability.

This Discussion Summary captures the Workshop's key points and themes.

Acknowledgements

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We are grateful to all Workshop participants, the Columbia University Institute for the Study of Human Rights and the Columbia Law School Human Rights Institute, for supporting the Workshop, and to UN PRME (Principles for Responsible Management Education) for funding the dinner on May 30. Connecting with other teachers has strengthened our own courses. We hope that the discussion captured here will spark further contributions as the field of business and human rights continues to evolve.

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Opening Session

Film screening and Discussion with the Director: “Corporate-Community Conflicts, an Introduction”

The workshop began with a film screening of “Corporate-Community Conflicts, An Introduction,” produced by the Corporate Social Responsibility Initiative at Harvard University as part of the Ruggie mandate and directed by Peter Phillips. Phillips, who is President of Business Conflict Management LLC and Adjunct Professor at New York Law School, was on hand to introduce and discuss the film with workshop participants.

The film is a compilation of three separate films¹ that weaves together the stories of a company-community conflict in each of three countries: the Philippines, Peru and Nigeria. According to Phillips, the experiences portrayed can give companies confidence that entering mediation is both possible and beneficial to all parties involved. In all three cases, the opposition of the communities to the corporate presence – sometimes leading to violence or the threat of it– was a shock factor for the companies that forced them to reevaluate the business risk and to find another way of community engagement.

The film gives an overview of what the mediation process looked like in each case, with a trusted, third-party mediator being the critical ingredient for success. The mediators worked to level out the disparities of information through a comprehensive capacity-building process for all parties that would enable them to articulate their priorities and understand the tradeoffs. In each case, the company understood that it was necessary for the community to organize itself in order to effectively participate in the negotiation. As the mediation proceeded, the companies came to see that it was not a conventional business negotiation in which each party seeks a comparative advantage over the other party. Instead, they understood that they cannot win unless *everyone* wins. As Caroline Rees, the film’s narrator, explains, mediation processes can build a sense of dignity and of being respected, values that lie at the heart of human rights.

The discussion following the film was framed by the question of how best to use these films and these experiences in business and human rights courses. Participants remarked that the films can be used to trigger class debate over the role of human rights in mediation, the empowerment of communities, the most effective forms of remedy, and the dynamics of multi-stakeholder and third-party negotiation.

Several participants noted that exploring the triggers for mediation and the factors that militate against it could be a useful approach in the classroom. Participants also identified some of the circumstances that would make mediation difficult. For example, there may not be incentives for actors to enter into mediation. It appears that a basic pre-requisite is that a company has a long-term stake in the community. Texaco/Chevron’s involvement in the pollution of the Ecuadorian Amazon, and Trafigura’s dumping of untreated toxic waste in Abidjan, Ivory Coast, are two such examples. Moreover, mediation may not be suitable in cases of gross human rights violations or in very complex cases involving long-standing animosity. One participant noted the case of unsuccessful corporate-community dialogue between Shell Oil and an Irish village that was documented in the 2010 film, “The Pipe”. Mediation also may not address or help solve certain issues such as the extent of the responsibility of parent companies.

¹ See Appendix for a list of all resources mentioned in this report.

Participants also used the session as an opportunity to discuss the role of film in their courses. Some professors find film useful to stimulate discussions and show different viewpoints. Some opt for watching snippets in class and assigning the full movie to watch outside of class. Others require students to write reaction papers.

“Teaching Human Rights in a Business School: A View from the Inside”

Talk by Michael Posner

Clinical Professor, Business & Society Program Area, and Director, Center for Human Rights, NYU Stern School of Business and Director; Founding Executive Director and Former President, Human Rights First; and Former Assistant Secretary of State for Democracy, Human Rights, and Labor, U.S. Department of State.

Program Goals. When invited to join the NYU Stern School of Business faculty as the Founding Director of the Center, Posner and his colleague, Sarah Labowitz, knew they wanted the Center to be a place for business and human rights research and to create a safe space for convening different actors. With its large undergraduate student body, its executive programs and its strategic proximity to Wall Street, the Stern School is ideally positioned to do this. Since the financial crisis, the school has witnessed a change in its student body: students want to do well *and* do good.

Stern’s mission, “to develop people and ideas that transform the challenges of the 21st century into opportunities to create value for business and society,” triggers a number of interesting questions: How do we define and evaluate the challenges beyond the bottom line? How do we help companies respond to challenges they had not foreseen 20 years ago? What is possible? How do we go beyond simply identifying the challenges to developing the opportunities and creating value for business and society?

In Posner’s view, the current discussion on business and human rights is too inwardly focused. It needs to have a “public face” and involve a range of actors in order for it to be sustainable over time. The idea is to use the platform of a business school for holding public discussions.

Stern faculty have shown interest in the Center and have begun to ask what this approach means for the courses they teach and how the perspective of business and human rights can be incorporated into them.

Five thematic areas of the Center’s work will be:

- Manufacturing: supply chain, labor, working conditions
- Extractive industries, including security
- Information technology: issues of free expression, privacy
- Agriculture: child labor, forced labor
- ESG (environmental, social and governance) standards for investors

Challenges. Posner laid out the business and human rights challenges that will guide the Center’s agenda:

- Inadequate enforcement by local governments
- Reluctance of Western governments to look at questions of trade or export policy from a business and human rights point of view
- Companies are resistant to step up and do more

- International organizations, such as the ILO or the OECD, lack enforcement capability
- Reluctance of local courts to engage beyond their own borders, especially if their home governments are not encouraging them to do so
- Legislative bodies and executives are often more interested in promoting home companies' best interests and exports rather than putting new constraints on them.

Posner believes that a key question for business and human rights professors and researchers at this point in time is: How do we define the "rules of the road" for companies operating in the 21st century global economy? The UN Guiding Principles (UNGPs) are widely endorsed, but every company is deciding for itself which principles it will choose to obey, and how. Because there is no broad consensus on what the collective requirements are, it is critical that we give content to the UNGPs by identifying common standards in each industry, developing benchmarks of compliance, and improving the remedies for non-compliance.

A second set of challenges are for those in the law and public policy field: according to Posner, we need to think about these issues beyond a model based on litigation and home-state regulation. Particularly for those teaching in law or public policy schools, there needs to be a merging with the business reality. It simply won't succeed to have a discussion without the business community being part of it - and engaged in it.

For business schools, Posner believes that establishing a model based on a rights framework is critical. Even though it might incorporate elements from CSR, marketing and ethics, the field of business and human rights is a distinct one. The concept of human rights assumes core standards, a scheme of assessment and enforcement, and remedies. To begin to use this rights-based framework in a business school will entail a change in the discussion. It will be uncomfortable and difficult, but essential for moving forward.

What's next? Posner identified four immediate needs in the field:

1. For companies to realize that paying attention to these issues is part of doing business in the 21st century.
2. To move beyond litigation. A law-based frame is too narrow, putting businesses in a risk-avoidance, damage-limitation mode. Bangladesh is a perfect example of risk mitigation: most companies were primarily concerned with getting out of the country quietly instead of thinking of revising their sourcing model globally because it is unsustainable.
3. To recognize that businesses alone can't solve the problem. They are part of a larger constellation of forces that need to collectively discuss it.
4. For more research-oriented to practical outcomes. For example, there is a need to define what "responsibility to respect" means in each industry, and to create benchmarks and key performance indicators. This is a major challenge because companies may see this as losing control and are generally reluctant to engage if they see this resulting in either risk to their reputation or higher costs.

Discussion

The discussion following Posner's presentation touched upon the following themes:

Role of investors. There is a lot of work to do among pension funds and other institutional investors to create awareness of the issues in the field of business and human rights. A participant raised the example of Chevron's decision to sue the New York State Pension Fund for their inquiry on the case against Ecuador, as a way in which they are becoming engaged in these issues.

Communicating with colleagues. One participant said he encountered skepticism from his business school colleagues who allege that the subject lacks clear quantitative metrics. Posner agreed that these internal discussions – involving marketing, finance and accounting faculty – are important and will take time. His Center plans to start by exploring how business and human rights fits in the top six issues on their agenda.

The business case. Global companies have come to realize they cannot continue certain business practices, even if they might not want to deal with this realization. Our challenge as professors is to produce alternatives that will show business that they can make profit in a way that actually advances the public interest and also meets their financial goals.

Role of recruiters. Business recruiters have started to look for students that can articulate human rights challenges. In this way, they have an impact in the schools' curricula, because students and alumni demand that the subject gets taught.

Role of directors. A participant noted that we need to find a more systematic way of targeting and working with corporate directors because they can help turn attitudes around.

The human rights function within the company. Most companies come to the discussion on human rights in response to a crisis. When this happens, they look for someone within the company to take care of human rights issues. It is usually someone they trust, who has some vague connection to the subject, and they learn on the job. We need to be able to let businesses know that people coming out of business schools have actually studied how to deal with these issues, and are prepared to deal with them.

The future of the UNGPs. In response to a question about the future of the UNGPs, Posner said we have an affirmative duty to work on the next stage of interpreting them in a practical manner. Every company cannot interpret them in the way that is most convenient to them. Companies are reluctant to work with others and set standards that somebody else is evaluating. The challenge is to change that mentality.

Corporate attitudes towards human rights. In response to a question about changing corporate attitude, Posner noted that companies can be categorized into three types: 1) Companies that have come to recognize they have to do things differently, although they don't know how. There is a place right now for academics to provide them with empirical data and comparative studies; 2) Companies that agree there is a problem, but have decided to define the problem according to their own best interest. These companies need to be taken out of their comfort zone; 3) Companies that are still in a risk avoidance mode. This category constitutes the bulk of companies and the goal is to bring them into the first category of companies looking for guidance, research, and willing to build alliances to deal with the problem.

Evolution into customary principles. One participant suggested that over time, if we keep teaching companies that there is a set of operational principles they can follow, their practices will evolve into a mandatory set of rules that can be applied to companies. Posner agreed insofar a shared view of what the standards ought to be will

enable the development of metrics and benchmarks for each industry. He noted the example of western companies operating in the manufacturing sector in Asia that helped to end the discriminatory practice in factories of requiring women workers to sign a declaration saying they were not pregnant nor intended to become pregnant while on the job. Such practices begin to set a norm because it becomes impossible for other companies to refuse to imitate the practice.

Framing the problem. The public debate around these issues is often fragmented. It is necessary to move beyond the legalistic approach and encourage students to see the problem through a business lens. When the media raises a problem about a company, the company tends to let its public relations and marketing departments respond. Part of the challenge is to be good analysts and researchers to spell out in a more comprehensive way what the problem is. In designing a possible, realistic roadmap we should pay attention to the increasing number of reporting requirements by home governments.

I. Crafting a Business and Human Rights Course

During this session three participants shared their experiences putting together a business and human rights course for the first time, and shaping the course over time. Penny Collenette, Adjunct Professor at University of Ottawa Law School; Shane Darcy, who teaches at the National University of Ireland in Galway; and Antony Crockett, who trains practicing lawyers in the UK, discussed crafting their courses, as well as managing the rapid proliferation of potential course material.²

Penny Collenette, “A New International Reality – The Business of Human Rights,” University of Ottawa School of Law (Canada)

There is a Canadian slant to the course: it devotes significant time to sectors where Canadian firms are particularly prominent globally, including extractives as well as retail and banking, and draws on materials, such as the OECD Guidelines, that are familiar to Canadian students.

Content and course materials. The course has a broad scope blending law, business and public policy. Topics include:

- *Law:* constitutional law; regulatory fraud, extraterritoriality, conflict of laws, corporate law
- *Business:* corporate governance, corporate directors and their fiduciary duty, business organization, supply chain management, whistleblowing.
- *Public policy:* trade, children’s rights, environmental rights, state sovereignty

In addition, the course is divided into three parts:

- *Challenges.* (assignment: students read court decisions and identify challenges such as the difficulties for finding a forum)
- *Governance gaps*
- *Remedies and solutions:* (assignment: students draft their own law.)

² Syllabi for these and other courses taught by Teaching Forum members are available via a syllabi bank hosted by Columbia Law School. By consensus of the group, the submission of a syllabus is required in order to access the syllabi bank. To submit a syllabus contact, Greta Moseson at greta.moseson(at)law.columbia.edu.

Course materials include: OECD reports,³ Transparency International reports, UN Global Compact cases; materials from the Business & Human Rights Resource Centre; media reports; Michael Porter's article, "Creating Shared Value"; and policy and legal documents, including the Alien Torts Statute, the Dodd-Frank Act, and the Canadian Criminal Code.

What works. Guest speakers are a highlight for students. Speakers have included: the Canadian government's CSR counsel, a children's rights expert, and two Members of Parliament from different parties. Students tend to come up with very good questions and show they had prepared well for these sessions. Also, the title of the course, "A New International Reality –The Business of Human Rights," draws students from several disciplines, including business journalists.

What doesn't work. Role playing, as students were reluctant to play certain roles, in particular that of corporate counsel.

Shane Darcy, "Business and Human Rights," National University of Ireland in Galway

The subject of business and human rights is important in Ireland because of the country's heavy reliance on foreign direct investment. The Irish government takes pride in being the third most open economy in the world and offers big tax advantages to companies, which have in turn established their headquarters there.

Darcy's course is part of the law school's Masters in Human Rights Law program.

Content. The course is structured as follows:

- **Introduction, Part 1.** Why should human rights activists and scholars be concerned with business? Why should business be concerned with human rights? Discussions draw on case studies, newspaper articles, media reports and key cases.
- **Introduction, Part 2.** The basic terminology of business and corporations: e.g. companies as legal persons and the framing within a national legal system. .
- **Rights of workers.** ILO, human rights treaties.
- **The emerging framework.** CSR; corporate codes of conduct; multi-stakeholder initiatives; OECD; Global Compact; the Ruggie Framework. At the end of the discussions on CSR students usually voice their frustration at the insufficiency of that approach. They consider what international norms should look like, and what is wrong and right about the Guiding Principles
- **Accountability.** Available remedies; role of human rights treaty bodies, role of international law and criminal law; corporate criminal liability; individual criminal responsibility; domestic remedies, including truth commissions.
- **Trade and related issues.** The role of the IMF, the WTO, the World Bank, particularly concerning intellectual property.
- **Taxation** is not yet a topic, but Darcy is considering adding it.

Methods.

³ These include the Guidelines for Multinational Enterprises, the report of the "Global Forum on Responsible Business Conduct," "OECD and the Millennium Development Goals," and reports from OECD projects on anti-bribery, tax evasion, "Aid for Trade," and "Doing Better for Children."

- **Class discussion.** Students must come to class having read 60-70 pages of material and prepared to discuss it in class.
- **A 10,000 word paper** worth 90% of the final grade (the other 10% is class participation).
- **Negotiation exercise** at the end of the course, with assigned roles (NGO, government representative, trade union representative, IMF, etc.) over a development project. This is not part of the student evaluation, but a way to wrap up the course and bring together the contents.
- **Guest lectures**, a highlight of the course.
- **Film screenings**, on a weekly basis. These are not just on business and human rights, but on human rights issues generally as part of the Masters program. For example, some footage recorded by *The Guardian* was used to discuss fishing and slave labor.
- **Field trip.** For the past three years, the course has included a field trip to a village in northwest Mayo, where there is an ongoing dispute between Shell and Statoil over the building of a pipeline. Students get to meet with local residents and with company representatives, who are sometimes uncomfortable with the questions students ask. Back in the classroom students consider the human rights angle of the dispute.
- **Conference.** Last year, students were involved in the organization of a conference and in drafting reports and position papers for it. Hoping to get the government to incorporate their ideas into the UN report being prepared, they then published the reports on Business and Human Rights in Ireland, and also sent them to government representatives as well as the Chamber of Commerce. They received a response from the Irish government saying it would seek to implement the UN Guiding Principles.

Course materials. The course uses articles, case studies, policy documents, and other materials from the Business & Human Rights Resource Centre and its weekly e-mail newsletter, to which students subscribe. Darcy emphasized the real need for a business and human rights textbook that covers all of these areas, in the absence of which one must cobble together materials.

Student expectations. Students typically have no previous knowledge of the field. Many of them are activists and it is common that they express disappointment with the current state of affairs. Students are encouraged to bring to class a piece of “good” news from the field, but still some disappointment underlies.

Antony Crockett, “Legal Practice Course” (Advocates for International Development), Clifford Chance (UK)

Antony Crockett has practiced law at Clifford Chance since 2007. He became involved in the field when the International Finance Corporation (IFC) asked the firm to collaborate with Ruggie’s work on stabilization clauses. It became clear that the work produced by the UN mandate would have strategic implications for law firms and their clients, so the firm began considering the role of lawyers as advisors and the need for them to be knowledgeable about BHR.

Crockett’s role within the firm is heavily focused on training, and includes:

- Explaining to lawyers why business and human rights is relevant, and the issues that it raises for clients;
- Crafting courses for clients about particular issues.
- Teaching business and human rights to lawyers for Advocates for International Development (A4ID), an international development NGO in London. A4ID raising awareness and provides training on law and development issues for lawyers from a range of fields, with heavy participation from commercial lawyers. The training contributes to the dissemination of the Guiding Principles, and facilitates shared learning among law firms in London.

Business should not be reprimanded for the slow uptake of the UNGPs since most have not even heard of them. Upon first hearing about the UNGPs business managers typically think: Why have all these governments signed up to a set of standards that expose me to these processes, and I don't know about it about it?

The lawyer's role. Crockett believes that lawyers are a key “vector” for the dissemination of the UNGPs and raising awareness, and that they have started to see the opportunity for developing a field of practice.

A key focus of Crockett's courses is training on the role of lawyers. Key questions include: Is it the lawyer's role to lecture clients on human rights standards? How do we move from the view that a lawyer's role is to protect the client from risks of litigation, to a more proactive approach? Telling clients they might get sued has not worked, since even under the most robust law, the Alien Tort Statute (ATS), the chances of actually being sued have always been remote. The moment to intervene most constructively is when the operations are being structured and the human rights impacts assessed. This is work for transactional lawyers and they are a key target of the trainings.

Making the case to commercial law firms is a significant challenge. Crockett reckons that it may take as long as a decade for most law firms to grasp the importance of the field to their practice. But changes have already begun: some big international law firms are already competing among themselves to bring their clients business and human rights expertise, and the UK government has amended the Companies Act to require companies listed in the UK to report on human rights issues. Accounting firms have already started giving advice and assuring corporate responsibility reports for law firms.

Teaching within an NGO. At A4ID, Crockett teaches business and human rights in two programs:

1. **For practicing lawyers.** The training covers a wide range of subjects, including development, taxation, environmental law, and human rights. There has been a drop of students in this program because it is increasingly difficult for lawyers in the current economic climate to ask their firms to pay for their course.
2. **For future lawyers.** Funded by the UK government under a three-year grant, this course is offered to law students as a bar compulsory course. Law firms ought to be teaching this course, however, and there have been discussions about how to make business and human rights part of a more strategic teaching of law.

Challenges. There are several challenges to teaching lawyers:

- Lack of time for pre-reading.

- The pressure of private practice makes it difficult to get lawyers' attention for an extended period of time. The overall time available for teaching is limited to between 45 and 90 minutes.
- Lawyers become specialized very quickly when they go into private practice, especially in big law firms. The challenge is how to make the subject relevant to their area of practice.
- Getting the idealists among the students taking the bar to stay in big firms and make a difference there.

What works? Case studies of how a business can respect human rights, and what steps can be taken within a particular transaction. Sharing that experience can be difficult because of client confidentiality and proprietary information. This is not the case within law firms, where cases can be discussed freely and examples can be cited.

Discussion

The session discussion spanned the following topics:

Needs of the field driving the curriculum. In the same way that recruiters are looking for students who have taken courses on these issues, law firms will begin to look for this skill at the entry level, which will thus influence the curricula of law schools and bar courses. At Clifford Chance, for example, coming into the firm with this knowledge is of value because the firm has a human rights policy, and thus everyone within the firm must have had some training. It is much easier to hire people who have the training than to have to train all the lawyers in house.

Relationship with clients. It is an issue of professional responsibility to ask clients about human rights issues. Sometimes the larger and sophisticated clients have a lot of internal expertise on human rights, but can miss things along the way because of a lack of follow-through. Crockett shared the example of one company that had a very good human rights policy, but the policy had not been made public within the firm. There is also some reluctance to get engaged because of a preconceived notion that lawyers only get involved once problems surface. Participants noted the importance of training attorneys to become advocates for human rights in the corporate boardroom.

Dissemination of the Guiding Principles to businesses. There may be more going on than meets the eye. For example, Business & Human Rights Resource Centre does a lot of work behind the scenes to disseminate the UNGPs to companies. The organization points to them when they invite companies to respond to allegations, as well as when they write to inform companies about their running human rights policies list and to encourage them to develop a policy to submit to that list

Getting accounting firms on board. One participant picked up on Crockett's comment about the need to engage accounting firms. There is a tension, since much of their core business is dedicated to helping business avoid taxes.

Materials: the problem of sprawl. Because there is no comprehensive textbook instructors must rely on an array of existing articles, with some individual articles only serving to illustrate a single point. One participant remarked that policy documents and case studies typically lack the critical analysis of scholarship. A new textbook, possibly a collaborative project of the Teaching Forum, is needed to fill this gap. Another

participant encouraged Forum members to write journal articles to weave relevant aspects of these materials together and provide the analytic frame.

Participants referenced three books as having worked well in classes when select chapters were assigned: 1) Rebecca MacKinnon's *Consent of the Networked* (2012) can be used to replace a number of other articles regarding internet and communication companies and complicity issues; 2) Christine Bader's book, *The Evolution of a Corporate Idealist: When Girl Meets Oil* (forthcoming 2014). One participant has assigned the draft of chapter one about Bader's work to carry out human rights due diligence at BP's liquefied natural gas project in West Papua, which students found very useful in understanding the challenges of putting the standards into practice; and 3) John Ruggie's *Just Business* (2013).

Perspective of trade unions. A participant noted that trade unions are weighing in on how the UNGPs can contribute to the enforcement of workers' rights and what they can bring to the implementation of these rights that is different from the core ILO conventions.

Methods of evaluation. Participants shared their methods of student evaluation. Different approaches include:

- Class participation, 40%, and the major paper, 60%. The paper assignment is to draft a piece of legislation for the home country, and encourages student creativity in coming up with mechanisms and defining terms.
- 10,000 word written assignment, 90%; and class participation, 10%.
- Two short writing assignments and a final paper in the form of a Memo to a company CEO. Students choose what company they will research. One of the challenges is the limited availability of information for the company or case of choice. In this case the student is tasked with considering what the company ought to have done without assuming that just because they don't know about it, the company didn't take that step.
- Consultancy exercise on a company the student chooses to develop the students' professional legal skills. Students often contact the companies, and sometimes request a letter from the university to do so. In their evaluations, students appraised this exercise highly, with one student requesting a similar exercise on public policies.
- Papers and essays, plus a PowerPoint presentation (20/25 slides) on a business and human rights initiative, such as the UNGPs and the OECD Guidelines. Most students have professional experience and they are encouraged to make their presentation as if the classroom were a work environment.
- One participant who teaches in a law firm encourages students to explore the websites of law firms and their approach to the subject. At the students' initiative, the group visited a large Canadian law firm that advises mining companies. The students were surprised to see how uncomfortable the lawyers of the practice were discussing human rights issues.

Challenges teaching the course within a business school. One participant who struggled to get his business school to approve his business and human rights course approved said it is a challenge to overcome skepticism within a business school regarding the need for such a course in the first place. Colleagues regard it as a "soft skills" course that students don't need. Also for this reason, one participant teaching within a business-oriented law school markets her course as "Corporate Social Responsibility" even though the course is in fact a business and human rights course that also incorporates sustainability topics. This issue of sometimes needing to avoid

the term “human rights” in the course title echoes the discussion of the two previous Columbia University workshops.

Certification. One participant said that his students have requested the course be extended to two-semester, combining different approaches to the subject. At the end, a certification could be given out to the student attesting that he or she has received training on business and human rights, which would be a plus on their résumé.

Providing basic understanding of international law. A participant commented on the challenge of providing foundational knowledge in international public law. JD students and American LL.Ms typically do not know this material, whereas international LL.Ms often have it in their curriculum. This means that course time must be dedicated to providing a quick overview of international law and the different fields that comprise it.

II. Translating “Business and Human Rights” for Managers and Policymakers

In this session participants focused on the challenges of training non-lawyers in business and human rights, picking up on some of the themes of the previous sessions. It began with a presentation via Skype by Elizabeth Umlas, a political scientist who teaches graduate students at the University of Fribourg and the University of Geneva. Chris Marsden followed (also via Skype); for many years Marsden has taught business school students at Cranfield University and recently developed a teaching module consisting of two 70-minute sessions designed to fit into any business school course. Ronald Berenbeim, who teaches at NYU Stern School of Business and is the co-facilitator of the Corruption working group of the UN Global Compact’s Principles for Responsible Management Education PRME, and Florencia Librizzi, Relationship Manager at the PRME Secretariat, also presented.

Elizabeth Umlas, University of Fribourg and University of Geneva (Switzerland)

In Switzerland, where Umlas teaches business and human rights, the government is active in the field of business and human rights, but is under pressure from NGOs, who demand that the government hold Swiss companies accountable for misconduct abroad. This is one reason why Swiss universities are beginning to show interest in providing business and human rights courses for future managers

There is growing demand among non-law students for a business and human rights course. Umlas’ students include many non-lawyers, often coming from a political science, history or political economy background. In addition her classes include students who: come from all parts of the world; have no human rights experience, but often some knowledge of CSR; have worked for Geneva-based international organizations; and have little private sector experience, yet are looking to transition into the private sector. Umlas noted that the fact that most students do not have a legal background makes it a particular challenge to cover all the issues in a one-semester survey course.

The limits of the business case. A message Umlas endeavors to convey to her students is that the business case is not the whole story, as Sir Geoffrey Chandler

often put it. The course discusses the risks to which companies are exposed, but in doing so underscores that the human rights risks apply to affected populations, not just to the company. This was a conceptual breakthrough of the UNGPs but so far it has not had its anticipated impact.

Legalistic tendencies. Umlas remarked that increasingly there is a legalistic approach to business and human rights, including implementation of the UNGPs. As a result, there is growing gap between the field as it is developing and the lack of a legal background of those who want to study it. To address this gap, materials are needed that are accessible in a context of increasing specialization.

Course structure. The first part of the course explores the emergence of the field of business and human rights, and in doing so touches upon the distinction between business and human rights and CSR. Umlas then explains how the law fits into the larger business and human rights picture, how to use it as a tool, advantages and disadvantages of that strategy, how BHR fits into the framework of international human rights law, and how national law compares with that.

Students explore specific legal issues: complicity; extraterritoriality; the Alien Tort Statute and other corporate legal accountability mechanisms (e.g. the *Monterrico Metals* case that made it to the UK High Court); the pros and cons of following the litigation path; legal issues specific to the extractive industries; and international labor standards, particularly as they relate to supply chains.

A political science approach. Umlas draws on her political science background in designing and teaching the course. A political science approach is fitted to business and human rights as it helps explain the complexity of the field through concepts specific to political science: power relations, power imbalance, network analysis, organizational behavior, coalitions, soft law, NGOs, and campaigning strategies. These concepts are accessible to students without a legal background and could be useful to those with a legal background looking to assume a position as in-house counsel.

Educating a non-academic audience. Umlas echoed Antony Crockett in her final point about the need for training in business and human rights to go beyond formal teaching in academic contexts. It also needs to reach other audiences, such as socially-responsible investors and their service providers, since they have the power to influence corporate behavior. Umlas has been involved in some of this training.

Chris Marsden, Cranfield University School of Management (UK)

Chris Marsden designed his business and human rights module, available through Case Place,⁴ to fit in a variety of courses, including courses on globalization, sustainable business, corporate governance, and business ethics. The goal of this module is to expose as many students as possible to the field and its debates.

The module assumes that the teachers using it are well-informed, but not specialists. It also assumes that they have had no previous engagement with the debate on the evolving role of business and society, beyond the goal of maximizing profits.

⁴ "Teaching Business and Human Rights: A Teaching Module for Business School Tutors," available at: <http://www.caseplace.org/d.asp?d=6975> (sign in required).

The 2-3 hour module combines lecture and discussion. Discussions on specific cases are assigned to “buzz” groups, sometimes using a video or audio clip as a trigger.

Objectives. The module aims to provide students with an understanding of: how business impacts human rights; why human rights is a business issue and why managers have a responsibility to address it; the implications of that responsibility for business strategy and management; and where to go for more information on the subject.

Structure. The module consists of five parts:

1. **The purpose of a company**, including the difference between the shareholder vs. the stakeholder view. It is generally understood that a company’s purpose is creating value, but for whom? What is it responsible for? This leads to the discussion of governance deficits in the context of globalization. There follows an inevitable discussion on the business case: risk, reputation, employee motivation.
2. **Content of human rights**: a quick overview is given on the Universal Declaration and other basic human rights instruments. Discussions on enforcement follow.
3. **Corporate human rights impacts**: impact of companies upon its workers, the supply chain, customers (e.g. the case of Vodafone in Egypt during the Arab Spring), local communities, the wider society (such as the impact of financial institutions on people’s ability to earn a living).
4. **The UNGPs and the “hardening” of soft law**. The meaning of due diligence, discussions on the sphere of influence and the issue of complicity.
5. **How business can respect human rights**. Marsden uses a 7-step model borrowed from his colleague, David Grayson: identification of triggers, commitment to action endorsed by the directors of the company, harnessing of company resources, stakeholder analysis and engagement (critical and difficult to achieve), partnership building with NGOs and other companies, ethical dilemmas.

Ronald Berenbeim, NYU Stern School of Business (USA)

Context. Ronald Berenbeim teaches a required course on markets, ethics and law at NYU Stern School of Business. The course was developed in 1995 by a group of professors from various academic specialties, including marketing, finance, IT, and statistics. The team also included practitioners from most of these areas.

Approach. The premise of the course is twofold: 1) today’s business professional is judged by corporate conduct as well as performance; and 2) business transactions are not solely governed by contracts. There are also externalities, information asymmetries, market failure, monopoly, labor-buying power in developing countries, free-riding of public goods, misaligned incentives. The course focuses on the essential point that markets fail all the time, and money is made out of that. But when markets fail and affect human rights, there emerges an ethical dilemma which the manager needs to confront.

Content. This course includes a session on moral standards across borders, a rights-based discussion that is specifically linked to the UDHR. Additional relevant topics include economics and market failure, bribery and corruption, global social responsibility, privacy, discrimination. Relevant legal concepts and institutions such as

the Foreign Corrupt Practices Act and the Equal Employment Opportunity Commission are also introduced in the course.

Berenbeim believes that Stern's approach of separately teaching ethics has worked better than the integration of ethics into all courses, a debate that was reopened by a recent Bloomberg op-ed by University of Chicago Booth School of Business professor, Luigi Zingales, entitled "Do Business Schools Incubate Criminals?"

Berenbeim turned to his work at PRME and its working group on anticorruption, which he co-leads. The group has designed a global anticorruption curriculum, initially geared to an MBA program, but with a view to extending it to undergraduate, and other graduate and executive education. The curriculum focuses on market failure, supply chain, international standards, global anticorruption measures. There are a number of pilot sites implementing the programs, including in strategic places like BRIC countries.

Florencia Librizzi addressed the need to build capacity for business and human rights education. She discussed the Principles for Responsible Management Education (PRME), a UN-backed initiative to change the curriculum, research and learning methods of management education consistent with the UN Global Compact Principles. Participating academic institutions commit to engage six principles.⁵ Librizzi noted an "Open Letter to Academic Institutions" drafted by the PRME Secretariat and the UN Global Compact Office that calls for the education of future managers and leaders on business and human rights. The Open Letter intends to: 1) raise awareness of the need for business and human rights education; 2) prompt academic institutions worldwide to develop new courses and curricula; and 3) allow companies to declare the importance of business and human rights education within their own organizations. The Open Letter, which includes a list of teaching resources on managing the human rights impact of business, is currently open for signature by individual companies and organizations. PRME is also seeking to develop a human rights work stream similar to the efforts of its other thematic working groups.⁶

Discussion

Education of institutional investors. Picking up on Umlas' remarks, one participant asked what approach could be taken to make human rights issues relevant to institutional investors. Umlas acknowledged that with few exceptions, most institutional investors do not have an interest in human rights. One answer is to put them in touch with different stakeholders, for instance with unions and people whose rights are being violated. Another option is to send them testimonies, court cases and documents that can have an impact on how they understand a conflict. It is a challenge to choose the documents because people in the financial sector tend not to read long documents about social and environmental issues, and yet it is difficult to explain complex issues in only a couple of pages.

⁵ UN PRME, Principles for Responsible Management Education, available at: <http://www.unprme.org/the-6-principles/index.php>.

⁶ UN PRME Secretariat and UN Global Compact Office, "Open Letter to Academic Institutions". Available in English at: http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/Letter_to_Academia/Open_Letter_EN.pdf. Translations to French, Spanish and Portuguese available at: http://unglobalcompact.org/NewsAndEvents/UNGC_bulletin/2013_02_01.html.

One participant said there is a need to reach out to the group of investment and commercial bankers struggling with the application of the UNGPs. Umlas noted some encouraging developments at the international level, for instance that a number of OECD National Contact Points, as well as the OHCHR, have published statements saying that the OECD Guidelines apply to financial institutions and institutional investors, including minority shareholders. Yet in Switzerland the finance industry is seen as almost “sacred”. Berenbeim agreed that the finance sector has been persistently difficult to engage, whether as sponsors, as participants of working groups, or even at conferences.

Multidisciplinary approaches. Several participants welcomed the mix of law and social science in Umlas’ course, noting that the approach is useful for law-based courses as well. The BHR field should be seen as a continuum of law and political science, and efforts should be made to achieve interdisciplinarity despite the pressures of academia that resist that.

One participant spoke of her plans to develop a new BHR course that will integrate multidisciplinary and multi-stakeholder approaches in order to help bridge the gap between theory and practice for students. The course will consist almost entirely of guest speakers from different sectors invited to teach a different class, and in doing so to express the views of their constituencies. Another participant thought that practitioners should be brought into a course on the basis of their experience, and not their constituency. Guest speakers can also provide students with an example of a career path they might follow.

Leveraging government. One participant asked how to approach the issue of leveraging governments to achieve BHR goals. This is an important part in the UNGPs and it makes companies nervous. Umlas noted that people are starting to ask critical questions, such as, what is responsible lobbying, and underscored that NGOs and the SRI community have for several years tried to call attention to the disjuncture between corporate lobby that has negative consequences for human rights and their public CSR programs. An important point to get across to students is that the basic principles of transparency and consistency are essential to the discussion.

Positive impact of companies. Marsden expressed the need to focus class discussion not only on the negative impact of companies, but also their positive impact. As part of that discussion, students must be made mindful of the fact that the question of how much companies should be involved in communities through social investment entails both normative and capacity questions. In response to a question about the responsibility of business to use their leverage with governments to push for positive policy change, Umlas noted that the role of business in realizing rights is another “wave of the future” question that BHR teachers will have to grapple with.

Hardening of soft law. When asked about how to demonstrate the hardening of soft law, Marsden recommended the case of the conflict in Turkey over the Baku-Tbilisi-Ceyhan (BTC) pipeline, which was being built by BP. In response to Amnesty International’s intervention, which published a widely publicized critical report, BP committed itself to respect the human rights of the people living by the pipeline. The experience motivated the International Finance Committee (IFC) which funded the project, to incorporate human rights concerns into their rules.

III. Access to Capital

This session was a deep dive into the issue of access to capital, with attention to the following questions: What standards are followed by capital providers – including international financial institutions, export credit agencies, and both socially responsible and traditional investors – to ensure that they are not funding human rights abuses? How has this concern evolved over time? Where does this topic fit into a business and human rights course? What materials and strategies to introduce the topic work best?

Nina Gardner, who teaches BHR at American University and Johns Hopkins School of Advanced International Studies (SAIS), and consults to companies on socially responsible investment, led with a presentation on the central place the subject occupies in her courses. Sheldon Leader of University of Essex followed with a discussion of his recent research and writing on project finance. Rachel Davis of Shift then spoke about her work training social and environmental specialists at various financial institutions, as well as Shift's work the IFC, on business and human rights.

Nina Gardner, American University and Johns Hopkins SAIS (USA)

Course structure. The role of investors serves as a leitmotif throughout Gardner's course. The course explores the different "pressure points" on companies, first, through the role of NGOs, and then through the role of finance, investment and shareholder engagement. Topics include: the UN Principles for Responsible Investment; the Equator Principles; US Sustainable and Responsible Investment Funds; the incorporation of Environmental, Social, Governance (ESG) considerations into the decisions of institutional investors; the value of integrative reporting in underscoring the materiality of ESG issues; and the role of pension funds, sustainable stock exchanges, and the Sustainability Accounting Standards Board (SASB). Throughout, the class examines the subject in the context of different sectors, including manufacturing and extractives.

The premise of Gardner's course is that there is a slow shift in the understanding of directors' fiduciary duty to take into account ESG factors in investment decisions. The field will change dramatically when that happens. An interesting development is that the Norwegian Sovereign Fund (the world's biggest pension fund) is asking Exxon Mobil whether they have violated fundamental ethical norms in Equatorial Guinea. Another noteworthy development was a recent UBS investor call on worker safety in Bangladesh.⁷

Methods of evaluation

- **Final paper.** The final paper takes the form of a memo to the CEO of a company. Gardner insists that students make the case throughout, including in the executive summary that the human rights challenges the company is facing should be a business risk. Students are encouraged to look at SEC filings, attend hearings, refer to the Dow Jones Sustainability Index, and follow debates on their subject. For American University students, who tend to be human rights-oriented, grasping the

⁷ <http://www.efinancialnews.com/story/2013-07-16/investor-bangladesh-factory-reform-allianz-aviva-threadneedle?ea9c8a2de0ee111045601ab04d673622> .

importance of finance can be hard at first and they sometimes struggle to incorporate that perspective in their memos. SAIS students, on the other hand, tend to be less well-versed in human rights and more familiar with shareholder engagement. They have produced some outstanding memos that Gardner has sent to the respective companies.

- **A short advocacy paper** from an NGO perspective
- **Two-minute “elevator pitch”** that students must record on the subject of their advocacy paper. The presentations get posted on Blackboard for all students to access. In some case presentations may be assigned to illustrate certain issues dealt with in class.

Teaching tools

- Institute for Human Rights and Business (IHRB) report, “Investing the Rights Way”, and CalPERS, “ESG Investing Guidelines,” which shows students what a pension fund is looking for when investing.
- The creation of a Google group for sharing links on issues that will be discussed in the upcoming class. Each week two students are assigned to lead these discussions based on the readings and their participation becomes part of the class participation grade (25%). The group is also used to share views on current events in the field.
- In the future, possible field trips, for example, to Calvert Investments.

Jobs. Gardner has been successful in finding summer jobs for her students, either summer internships with SRIs or pension funds, who are eager to hire young people for research or with companies with strong CSR departments.

Sheldon Leader, University of Essex (UK)

Sheldon Leader began talking about his research on human rights and project finance by laying out the issue and why it is so difficult.

Project finance is a method of funding in which the lender calculates the credit of the borrower based on the projected revenues of the operation of a single facility rather than on the creditworthiness of the parent company. The banks do not lend to the parent company but to the “special-purpose” company set up to own the project’s assets. In the case of the building of a pipeline, for example, the loan will be backed solely by the pipeline’s assets. The separation of the parent company was assured by the fact that between the two a “corporate veil” is drawn preventing (unless there are exceptional circumstances) liability from reaching the parent.

The scheme exerts different pressures on the parties that put human rights at risk:

- The borrower (special purpose company) will be faced with a heightened demand for predictable revenue flow by the lender, which is more worried about the amounts of repayment coming back in a steady stream, and on schedule. Otherwise, the lender knows the backing of the assets won’t really cover the amounts of loan they made.
- Pressure is also on the home state, through a heightened demand for regulatory stability. Lenders, wanting to discourage a host state from changing investment laws in ways that are seen to negatively impact project revenue, including providing enhanced human rights protections, pressure the state into signing *stabilization clauses*. Governments are also pressured into suspending existing law. In

Azerbaijan, for example, a company is exempt from ordinary negligence laws, making it immune to potential damages claims that might impede the project's progress.

- There is even the possibility that parent companies abandon a project if the numbers don't add up at the subsidiary level, with no responsibility accruing back to their level. This creates increased risk of harms caused by a lack of capacity to compensate locals following, for example, and major accident.

Deadlines. Often projects are faced with tight completion deadlines because, aware of the fragility of the scheme, banks want to start the revenue flowing in as soon as possible. Contractors and engineering firms, in particular, risk raising the potential for labor-related accidents when they chose to subcontract with local firms under tight deadlines.

Lessons. The challenge is making sure that weight will be given to human rights when rights compete with commercial objectives. A human rights-friendly approach requires that 1) there is least damage to the right in question; and that 2) preventative measures are pursued, rather than reliance on post-hoc compensation. The IFC standards push for this approach. These issues need to be dealt with not only from the standpoint of human rights law, but also from company and investment law. The call for legal coherence is a challenge to the field of business and human rights.

Implications for teaching. The issues of project finance and socially responsible investment weave into Leader's business and human rights course in the following ways:

- While there is increasing agreement about the relevance of human rights to business, the banking sector assigns different meanings to those rights than do human rights treaty bodies.
- Rights sometime compete. What are the right tradeoffs and how do different parties, including the financial sector, understand them?

Rachel Davis, Shift (USA)

Davis described Shift's work training finance practitioners -- from governments, development banks, investment agencies, and export credit agencies - on human rights due diligence. The reference points for these practitioners are the Equator Principles and the IFC performance standards, which have been revised to take account of the UNGPs.

Key issues addressed in these trainings are:

- **Human rights language.** For many finance practitioners, "human rights" carries baggage: they often think of "human rights" as the term external stakeholders use when they want to criticize the decisions of their institution. Instead, these institutions use "social impact" or "social due diligence". Shift's approach is to introduce the concept of human rights through discussions about existing approaches to social due diligence, explore their overlap and difference from human rights due diligence, and what it means in practical terms to integrate human rights into their existing due diligence processes in line with the UNGPs. It is helpful to

explain that social impacts and human rights impacts are part of the same spectrum – with human rights impacts typically being more severe in nature.

- **Human rights due diligence.** There is a tendency for finance practitioners to equate human rights impact assessments (HRIAs) with human rights due diligence. Shift emphasizes that assessing human rights impacts is just the front end of a bigger picture that includes integrating and acting on identified impacts, tracking performance, communicating about efforts to address impacts, and remediation.
- **Human rights and risk assessments.** Shift emphasizes that the focus must be on the risk to *affected individuals*. Then practitioners must consider how this risk assessment can be meaningfully integrated into the company's internal decision-making processes.
- **Cause, contribution, linkage.** "Complicity" can be a confusing term because it blends contribution and linkage, and it has both legal and non-legal meanings. This is why the UNGPs instead differentiate among cause, contribution and linkage as the different ways a company can be connected to negative impacts.
- **Prioritization.** The UNGPs are clear: in a situation where a company has limited capacity and resources, how are you going to prioritize? Companies are still working out how to relate their business risk matrix that measures risks to the company with their understanding of risks to stakeholders, a relationship that lies at the heart of the UNGPs. Shift uses case studies to help practitioners identify the gaps between these different assessment processes.
- **IFC standards.** In the 2011 revision of the IFC Performance Standards, human rights due diligence is only briefly mentioned in a footnote.⁸ Recognizing that clients want guidance on this point, the IFC is working with Shift to develop guidance on this footnote. Shift's work has elements of retrofitting the UNGPs to the Performance Standards, identifying where the UNGPs require particular attention by companies implementing Performance Standards, such as the question of business relationships and the UNGPs focus on leverage.
- **Reporting and assurance standards.** Shift is involved in a project to explore the need for global reporting and assurance frameworks aligned with the Guiding Principles.⁹ The project recognizes the need for open and deep consultation with all interested stakeholders and reports of the various consultations will be made publicly available on Shift's website.

Discussion

The discussion touched upon a number of related issues:

Vice funds. Vice funds are potentially good counterpoints to SRI for classroom discussion, raising the issue of engagement versus divestment. A vice fund is one that

⁸ Footnote 12 in IFC Performance Standard #1. International Finance Corporation, World Bank Group. "Performance Standards on Environmental and Social Sustainability," 2012. Available at: http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.

⁹ See <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>

deliberately invests in industries of “vice” (tobacco, arms manufacturing, gaming, etc.) in order to secure leverage within the company.

Human rights language. One participant asserted that “human rights due diligence” and “political risk analysis” are essentially the same; since businesses grasp better the term “political risk analysis” it may be better to use it. Davis agreed that political risk analysis is very relevant, especially for analyzing context, but is distinct from human rights due diligence. The critical difference is that political risk analysis emphasizes the risks to the *company* rather than the risks to affected *stakeholders*.

Teaching the UNGPs in context. A participant welcomed Leader’s teaching emphasis on the fact of stakeholder agreement on general aspects of human rights, while at the same time disagreeing on their application to particular situations. Leader added that this approach can be used to analyze trade union rights. Despite international conventions on freedom of association, there are disagreements over whether there should be separate representation for vulnerable parts of the workforce that don’t have the same interests as the majority union. Companies, backed by states, prefer single unions they can manipulate and with whom they can negotiate effective collective agreements.

Company resilience to investor pressure. The topic of freedom of association also arose with respect for the potential for investors to change corporate behavior. One participant working on freedom of association said they have found that when investors ask companies questions about their approaches to trade unions in their companies and supply chains, company managers are often reluctant to answer even the most general questions, such as what they do when they are operating where freedom of association is not protected by local law or when their suppliers don’t uphold them, how much of their workforce is unionized, and how many collective agreements they have around the world and how they measure their implementation.

Who performs the impact assessment – and how? One participant voiced concern over financial institutions passing on the responsibility of monitoring human rights impacts to the borrowers. Typically done for capacity reasons, as often banks don’t have the resources internally to perform the assessments themselves, the practice raises the question of how a lender knows whether the impact assessment is thorough.

Leader pointed out the French approach to the matter in the case of labor rights, by which the labor law mandates separating the question of who chooses the consultant, which is often the enterprise committee, from who pays for it, typically the employer. This legal requirement avoids a potential conflict of interests: consultants do not have the worry about getting rehired because they are not chosen by those who pay.

Regarding how assessments are carried out, increasingly lenders, investors and insurance providers are sending staff to the site themselves before making a decision to support the project. According to Davis, such is the case with Norway’s export credit agency (ECA), GIEK, which has just released a new Human Rights Policy and Procedure. If there is no capacity to do more than a desk-based review, the investor or ECA needs to be prepared with a set of questions to ask companies that can help the ECA understand whether the client has systems in place to conduct adequate human rights due diligence.

Reporting. Companies do not understand how to communicate meaningfully on their internal processes, in terms of measurement and reporting. Large companies must be subject to formal reporting requirements, but smaller companies must nevertheless be able to communicate, too. The GRI has its limitations, which are well known, including

a lack of consistency in company reporting on policies, implementation and outcome and in the standards adopted and a generally onerous framework.

Transparency. One participant pointed out that absent a financial model to provide the context for the information, it is difficult to understand what is being disclosed. This can in turn lead to more requests for information, which can cause the problem of managing massive information. Also, companies and banks will insist for exceptions and ask for confidentiality, which conflicts with the transparency principle.

IV. The Future of Extraterritorial Jurisdiction

The US Supreme Court significantly narrowed the scope of the Alien Tort Statute (ATS) in its April 2013 *Kiobel* decision¹⁰ affirming the dismissal of a lawsuit brought against Royal Dutch Petroleum (Shell). The Court held, *inter alia*, that a “presumption against extraterritoriality applies to claims under the ATS.” During this session, participants discussed the impact of the *Kiobel* decision on accountability for corporate misconduct abroad. Key questions underlying discussions were: 1) What is the comparative status of extraterritorial jurisdiction over companies worldwide? 2) In light of *Kiobel*, how should we teach legal tools for corporate accountability going forward?

Nadia Bernaz, Middlesex University (UK)

In her presentation, Bernaz drew from her recently published paper “Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?,”¹¹ which examines what Ruggie has called “measures with extraterritorial implications” – in other words, measures states can and perhaps should adopt to control what business do when they operate abroad. Her overview included: stock exchange listing requirements, such as those adopted a few years ago by the Hong Kong Stock Exchange; and the adoption of a stakeholder input process in export credit agency investment decisions, such as that adopted by the UK export credit agency.

Human rights treaty bodies. There is a growing body of commentary from UN human rights treaty bodies on the state duty to protect against abuses by companies. The UN Committee on Economic, Social and Cultural Rights (CESCR) has either implied or more clearly declared in a number of General Comments¹² that states need to monitor what companies registered in their territories do in their home states and also abroad. The Committee on the Elimination of Racial Discrimination (CERD) has also made similar remarks, for example in their concluding observations, especially on Canada and the UK because of mining companies. Most recently, a General Comment from the Committee on the Rights of the Child¹³ (March 2013) addresses how business may

¹⁰ *Kiobel v. Royal Dutch Petroleum Co.* 569 U.S. _____. No. 10-1491 (April 17, 2013). The suit alleged corporate complicity in human rights violations committed by the Nigerian Government.

¹¹ *Journal of Business Ethics*, Nov. 2012.

¹² Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, Para 39; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003, para. 33; General Comment No. 17 on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), E/C.12/GC/17, 12 January 2006, para. 55; and General Comment No. 19 on the right to social security (Article 9 of the Covenant), E/C.12/GC/19, 4 February 2008, para. 54.

¹³ Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights. Available at <http://www2.ohchr.org/english/bodies/crc/comments.htm>

affect child rights around the world, and spells out when a “reasonable link between the state and the conduct concerned” can be found (domicile, registration, main place of business, substantial business activities, etc.). Whether there is an obligation under international human rights law to prevent and punish corporate human rights violations committed abroad is a key question.

Scarcity of cases. Bernaz participates in the Access to Judicial Remedy Project piloted by the UN Special Rapporteur on the Right to Food, Olivier De Schutter and other experts.¹⁴ The project seeks to map the obstacles for more litigation in the area of business and human rights in the US, UK and Europe. The driving question is why there are not more cases in the field. The instinctive answer is because of issues of jurisdiction, access, and cost. The Project will explore those problems and elaborate on possible remedies and policy suggestions for governments.

Sara Seck, Western University (Canada)

Sara Seck spoke about the problematic language of “extraterritoriality” or, as she refers to it, the “E word”. The “E word”, in her view, is too narrow to represent the range of transnational duties that governments can and, in fact, do have in other domains, such as international environmental law. Underlying “extraterritoriality” is the notion of infringing national sovereignty, which is frequently used as pretext by those who oppose regulation, and is notably not part of how affected peoples see the problem. “Extraterritorial,” in Seck’s view, should therefore be replaced with “transnational” regulation, including both legislation and adjudication, the aim being to use words that highlight responsibility for existing economic relationships across borders, rather than words that reinforce sovereign boundaries.

Seck argues that the business and human rights debate over transnational state duties could profit from applying those same standards that apply to the international environment regime. The Rio Declaration, for example, reaffirms that states have the right to exploit their resources in accordance with their own policies *as long as they do not impact environments and areas outside of their jurisdiction*. This approach goes beyond a simplistic notion of “inside” or “outside” territories that “extraterritoriality” implies, and takes into account the different relationships that states have with different spaces around the world. Why then is the issue of extraterritoriality raised so extensively in relation to human rights and not everything else?

Implications for teaching. Constructivist international relations theory and related approaches to international legal analysis are useful for teaching about the process through which international law builds acceptance of laws with transnational dimensions. A good example is the Foreign Corrupt Practices Act (FCPA), its initial introduction in the United States as unilateral legislation, its adoption in the form of an OECD convention and then a UN convention. Another useful approach to international legal analysis is Third World Approaches to International Law, which illuminates the problematic nature of the common critique that unilateral regulation to address transnational human rights harms is an imperialist violation of host state sovereignty.¹⁵

¹⁴ More information at <http://accountabilityroundtable.org/analysis/launch-of-the-access-to-judicial-remedy-project/>

¹⁵ For more on Seck’s approach to the subject see: “Law at the End of the Day,” blog by Larry Catá Backer, “Sara Seck on the Possibilities and Limits of Extraterritoriality in a Corporate Social Responsibility and Human Rights Context” (September 6, 2012): <http://lbackerblog.blogspot.ca/2012/09/sara-seck-on-possibilities-and-limits.html>.

In her course, Seck begins with an overview of the public international law rules of jurisdiction, noting that there is an absence of international rules on “extraterritorial” jurisdiction. In introducing the UNGPs, Seck demonstrates how the narrower scope of international corporate law is overcome with the responsibility to respect, which extends to contractual supply chain relationships. This approach can be carried into the analysis of the third pillar of remedy and the need to provide judicial and non-judicial remedies to victims of human rights abuse related to corporate activity.

Discussion

After Kiobel. Participants generally agreed that Kiobel does not necessarily represent an overwhelming defeat for corporate legal accountability. In addition to the availability of alternatives to the ATS (discussed below) participants noted that the case had the positive effect of giving greater public visibility to the issue corporate liability.

In terms of future options for holding companies legally accountable, the following prospects were raised:

- The potential for litigation before US state courts, under different legal grounds.
- The International Criminal Court (ICC), where the issue of corporate liability has gained momentum.
- UN treaty bodies.
- The ATS itself, since the ruling did not foreclose future litigation against US companies.
- Suing corporate directors for misconduct, a practice seen in the area of environmental law (for instance in regard to BP officers in the case of the Deepwater Horizon).
- The *partie civile* in European law by which civil claims can be attached to criminal proceedings.
- The “Brussels I” regulation,¹⁶ especially article 5, paragraph 3 on jurisdiction over tort issues. The European Parliament has pushed EU member states to encourage the use of this regulation, including for when the damage occurs outside of the EU, as long as the event giving rise to the tort occurs within the EU.

Two participants, Caroline Kaeb (with David Scheffer) and Lucien Dhooge (with Robert Bird and Daniel Cahoy) have written forthcoming journal articles analyzing post-Kiobel options.¹⁷

Understanding the duty to protect. One participant remarked that there is real resistance from some states to the concept of the state duty to protect. The US government, for example, will not acknowledge it as a legal duty. Even though it endorsed the “Protect, Respect, Remedy” Framework, the US claims to recognize the individual rights emanating from the various human rights treaties, but not the comprehensive duty to protect. There is paradoxically more progress in the realm of practice than these statements suggest.

¹⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, “Brussels I”. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT>

¹⁷ Caroline Kaeb and David Scheffer, “The Paradox of Kiobel in Europe,” *American Journal of International Law* (forthcoming, Oct. 2013); Robert Bird, Daniel Cahoy, and Lucien Dhooge, *Corporate Voluntarism and Liability for Human Rights in a Post-Kiobel World*, 102 *Kentucky Law Journal* 1-55 (2013).

OECD National Contact Points (NCPs). In teaching about corporate accountability, some participants said they use the OECD NCPs. Although the NCPs were designed to be an alternative to litigation, NGOs who bring the cases often use them in conjunction with litigation, which frustrates many businesses. NGOs are also reluctant to support settlements because they want to prove that a company committed the alleged violation.

V. Brainstorm on Future Forum Activities

During the final abbreviated session, led by co-directors Joanne Bauer and Anthony Ewing, participants discussed activities they would like to see the Teaching Forum undertake. These include:

- Sharing more resources online, through a new website that can host larger amounts of data than the current Basecamp site;
- Sharing guest speakers either through Skype in real time or by posting videos of their presentations on a Forum website;
- Quarterly webinars to discuss developments in the field;
- More discussions during the workshops on teaching methods, what worked and what didn't;
- Putting students groups in touch with each other, for instance through LinkedIn; and
- Raising funds for the institutionalization of the Forum and a travel fund for participants to attend Forum workshops.

Appendix 1: Resources Mentioned

Film / Video

“The Pipe” (2010). Available at: <http://www.thepipethefilm.com/>

“Corporate-Community Conflicts, an Introduction”, Corporate Social Responsibility Initiative, Harvard Kennedy School. Available at: <http://www.shiftproject.org/video/corporate-community-dialogue-introduction>

“Fishing ship treat staff 'worse than the fish they catch',” *The Guardian*. Available at: <http://www.guardian.co.uk/environment/video/2010/sep/29/pirate-fishing-ship-treat-staff>

Books

Bader, Christine. *The Evolution of a Corporate Idealist: When Girl Meets Oil*, forthcoming, 2014

MacKinnon, Rebecca. *Consent of the Networked: The Worldwide Struggle For Internet Freedom*, Basic Books, 2013

Ruggie, John Gerard. *Just Business: Multinational Corporations and Human Rights*, Norton, W. W. & Company, 2013

Teaching module

Marsden, Chris. “Teaching Business and Human Rights: A Teaching Module for Business School Tutors”. Available at: <http://www.caseplace.org/d.asp?d=6975> (sign in required)

Reports and articles

Amnesty UK. *Human Rights on the Line, the Baku-Tbilisi-Ceyhan Pipeline Project*, 2003. Available at:

http://www.amnesty.org.uk/uploads/documents/doc_14538.pdf

Bernaz, Nadia, “Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?” *Journal of Business Ethics*, Nov 2012.

Bird, Robert, Daniel Cahoy, Lucien Dhooge, *Corporate Voluntarism and Liability for Human Rights in a Post-Kiobel World*, 102 Kentucky Law Journal 1-55, 2013.

CalPERS, Responsible Investment’s next decade: Developing CalPERS Total Fund process for ESG integration, 2011. Available at: <http://www.calpers.ca.gov/eip-docs/investments/video-center/view-video/mercer-report-next-decade.pdf>

Catá Backer, Larry, “Sara Seck on the Possibilities and Limits of Extraterritoriality in a Corporate Social Responsibility and Human Rights Context”, *Law at the End of the Day* (blog), September 6, 2012. Available at

<http://lcbackerblog.blogspot.ca/2012/09/sara-seck-on-possibilities-and-limits.html>

Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000

- Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11, 20 January 2003
- Committee on Economic, Social and Cultural Rights, General Comment No. 17 on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), E/C.12/GC/17, 12 January 2006
- Committee on Economic, Social and Cultural Rights, General Comment No. 19 on the right to social security (Article 9 of the Covenant), E/C.12/GC/19, 4 February 2008
- Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights. Available at: <http://www2.ohchr.org/english/bodies/crc/comments.htm>
- Institute for Human Rights and Business, *Investing the Rights Way: A Guide for Investors on Business and Human Rights*, 2013. Available at <http://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf>
- International Corporate Accountability Roundtable (ICAR), *Access to Judicial Remedy Project*. For more information on the initiative, see: <http://accountabilityroundtable.org/analysis/launch-of-the-access-to-judicial-remedy-project/>
- International Finance Corporation, World Bank Group. "Performance Standards on Environmental and Social Sustainability", 2012. Available at: http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.
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- Kramer, Mark and Michael Porter, "Creating Shared Value," *Harvard Business Review*. Jan/Feb 2011, Vol. 89 Issue 1/2, p 62-77.
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- OECD, "Guidelines for Multinational Enterprises". Available at: <http://mneguidelines.oecd.org/text/>
- OECD Initiative, "Aid for Trade". Available at: <http://www.oecd.org/dac/aft/>
- OECD Initiative, "Doing Better for Children." Available at: <http://www.oecd.org/els/family/doingbetterforchildren.htm>
- OECD, Global Forum on Responsible Business Conduct. Available at: <http://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/>
- Shift and Mazars, *Developing Global Standards for the Reporting and Assurance of Company Alignment with the UN Guiding Principles on Business and Human Rights: A Discussion Paper*, 2013. Available at: <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>
- UN PRME, Principles for Responsible Management Education. Available at: <http://www.unprme.org/the-6-principles/index.php>
- UN PRME Secretariat and UN Global Compact Office, "Open Letter to Academic Institutions." Available in English at: http://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/Letter_to_Academia/Open_Letter_EN.pdf. Translations to

French, Spanish and Portuguese available at:
http://unglobalcompact.org/NewsAndEvents/UNGC_bulletin/2013_02_01.html
Zingales, Luigi, "Do Business Schools Incubate Criminals?" *Bloomberg News*, Jul 16, 2012. Available at: <http://www.bloomberg.com/news/2012-07-16/do-business-schools-incubate-criminals-.html>

Cases

Monterrico Metals re Peru. For a case profile, see: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/MonterricoMetalslawsuitrePeru>

Kiobel v. Royal Dutch Petroleum Co. 569 U.S. _____. No. 10-1491 (April 17, 2013).

Vodafone in Egypt during the Arab Spring, for reports on the subject see:
<http://www.business-humanrights.org/Links/Repository/1007707>

Corporate Legal Accountability Portal, Business and Human Rights Resource Center:
<http://www.business-humanrights.org/LegalPortal/Home>

Appendix 2: Participant List

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