

*Teach*  
**BHR** | Teaching Business and  
Human Rights Forum

**Discussion Summary**

**5<sup>th</sup> Annual**

*Teaching Business and Human Rights*

**Workshop**

May 18-19<sup>th</sup>, 2015

**Columbia University, New York**

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## Acknowledgements

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The Columbia University Institute for the Study of Human Rights and the Columbia Law School Human Rights Institute have provided indispensable support for the annual Teaching Business and Human Rights (BHR) Workshop.

Thanks to all Workshop participants for provoking a rich exchange of ideas, tools and viewpoints. Through collaboration, teachers are strengthening our emerging, multidisciplinary field of study and practice.

**Anthony Ewing**  
Lecturer in Law  
Columbia Law School

**Joanne Bauer**  
Adjunct Professor  
School of International and Public Affairs  
Columbia University

## Overview

Five years ago, a small group of individuals teaching business and human rights met at Columbia University in New York to share ideas, trade syllabi and discuss common challenges. That inaugural gathering led to the creation of the Teaching Business and Human Rights Forum, a platform for collaboration among individuals teaching business and human rights worldwide that now includes more than 220 members teaching business and human rights at 130 institutions in 31 countries on 5 continents.

The fifth annual **Teaching Business and Human Rights Workshop** (May 18-19, 2015) brought together 35 individuals teaching the subject at 24 universities – including schools of law, business and international affairs – in six countries. Common challenges identified by Workshop participants include:

- Determining which topics to include in a single business and human rights course;
- Making business and human rights a core part of university curricula;
- Promoting human rights courses in business schools;
- Choosing language to describe the field, such as “ethics” versus “risk,” and “corporate social responsibility” versus “business and human rights;”
- Teaching classes of students with different levels of exposure to human rights issues, and from different geographies and academic backgrounds;
- Finding practical teaching tools; and
- Balancing academic, advocacy, legal, policy and business approaches to the subject.

As the field of business and human rights evolves and grows, so does our teaching. This year’s Workshop Agenda blended both practical and thematic topics, providing an opportunity for teachers in various disciplines to share teaching strategies and methodologies for issues ranging from non-judicial grievance mechanisms to business and human rights in emerging economies.

## I. Non-Judicial Grievance Mechanisms: Teaching Strategies and Materials

The opening Workshop session considered teaching strategies and materials. How are participants teaching non-judicial grievance mechanisms? What are the most effective materials and methodologies to introduce corporate accountability mechanisms like the National Contact Point specific instances complaints under the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises?

**Karin Buhmann, Copenhagen Business School, DENMARK**

Buhmann teaches business students at Copenhagen Business School and is a member of the Danish National Contact Point (NCP). The Danish NCP, organized under the auspices of the Danish Ministry of Commerce, is a five-member committee comprising a Chairman and individuals representing labor unions, industry, civil society and academia, respectively.

In the absence of other grievance mechanisms, NCPs can play an important role in the field of business and human rights (BHR). The ability of NCPs to receive and comment upon individual cases alleging violations of the OECD Guidelines in countries without an NCP allows NCPs to address the extra-territorial human rights impacts of corporate activity. The United Kingdom (UK) NCP, for example, has assessed due diligence throughout a company's global supply chain. While formally established under the OECD Guidelines, NCPs also exist established in non-OECD countries that adhere to OECD's MNE Guidelines.<sup>1</sup>

Based on her teaching, Buhmann observed that while law students are often inherently positivistic, business students tend to believe international law is ineffective and a thing of the past. Business oriented students are interested in CSR and sustainability, and typically do not have much human rights insight. Explaining how respecting human rights can be a "risk-management tool" is one way to help business students appreciate the relevance of the subject matter. Student familiarity with the concept of due diligence can be a common denominator. Regardless of substantive interest in CSR, students can understand the connection between the United Nations (UN) Guiding Principles on Business and Human Rights and due diligence as an approach to identify, prevent, mitigate and remedy adverse societal impact caused by the firm. Buhmann noted that role-playing exercises can help to engage students.

NCP handle cases based on the procedural directives set out in OECD's MNE Guidelines. However, because NCPs differ in terms of organization, composition etc. there are some differences in the procedural approach to handling complaints. OECD Watch studies indicate that NCPs' rejection of complaints remains high and it has been suggested that this may be because they employ an overly legalistic approach, despite being a non-judicial and non-binding mechanism.

### *Discussion*

Discussion centered on how to teach NCPs effectively. Some participants said they use it as part of their session on government action, or to demonstrate the pros and cons of non-judicial and judicial grievance mechanisms. NCP cases that participants have used include the Vedanta (UK)

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<sup>1</sup> For a list of non-OECD (and OECD) countries with NCPs, see: <http://mneguidelines.oecd.org/ncps/>.

case, Nidera Holdings (Netherlands), Afrimex (UK), Gamma International (UK), Formula One (UK) and RAID vs. Das Air (UK).

Related to the teaching of accountability is the question of how to assess corporate wrong doing in the first place. One participant noted that students believe human rights abuses cannot occur if corporate activity is covered by local government regulation. Students tend to confuse law and ethics, as in the payment of a minimum wage and a living wage, for instance. He prompts students to think more broadly by presenting fact patterns and asking students whether they believe an illegal act has been committed. He also asks his students to pick a country, among two dozen, and to discuss local laws. He challenges them to move beyond local law to focus on international human rights standards.

***Sarah Knuckey, Columbia Law School, New York, USA***

Sarah Knuckey leads the Columbia Law School Human Rights Clinic. Students attend seminars and small-group intensive discussions, which provide a space for critical reflection, and theoretical and skills learning about human rights advocacy. Students are also involved in human rights work around the world, often in partnership with the UN, other NGOs, and communities. Clinic work includes investigations of alleged rights violations, reporting and advocacy, litigation, and media work.

One focus of the Clinic's recent work is a business and human rights case from the extractive sector in Papua New Guinea, in which the security personnel of a Canadian mining company were alleged to have committed human rights violations against the local indigenous population, including large numbers of rapes and gang rapes. After many years of advocacy by a range of actors, in 2011, the company publicly acknowledged that its security guards had sexually assaulted local women. The company created a non-judicial remedy mechanism, explicitly referring to human rights and the right to remedy. The Clinic, working with the Harvard Law School Human Rights Clinic, studied the mechanism over a number of years, and produced a human rights assessment of the remedy mechanism in 2015.<sup>2</sup>

Clinical teaching opportunities and challenges in this context include:

1) *Teaching investigation skills*

The project has involved extensive interviewing, including of alleged victims and perpetrators, government officials, NGO actors, human rights experts and others. Skills taught include how to prepare for and carry out interviews, and how to assess testimonial evidence.

2) *Teaching advocacy*

Students must learn when to use different types of advocacy, when (if ever) to resort to litigation, and how to assess the appropriate content and scope of different advocacy strategies.

3) *Applying both "soft" and "hard law" frameworks to assess the validity of the remedy mechanism*

Challenges included assessing the company's mechanism without any ready-made assessment tools.

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<sup>2</sup> Human Rights Clinic (Columbia Law School) & International Human Rights Clinic (Harvard Law School), "Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned" (November 2015).

- 4) *Addressing the historical and political context in which human rights standards are applied*  
The local environment is very complex, and short and long-term human rights goals may also conflict.

### *Discussion*

One participant commented that access to remedy in this case was just a “tweak in language” to comply with the Guiding Principles, but that in reality the company is not providing authentic access to remedy. Knuckey noted that there have been definite, positive changes on the ground in terms of a reduction in public reporting of sexual assault cases at the mine site. Positive shifts by the company are very important to highlight. However, the Clinics had many concerns about the design and implementation of the remedy mechanism.

A participant commented on the inadequacy of non-judicial remedies, an observation based on her experience leading a student team researching dialogue-based accountability mechanisms, including those of the multilateral development banks and the NCPs. In their survey of cases, the research team noted that out of over 300 reviewed cases, only seven have resulted in an agreement with monitored implementation. Their fieldwork speaking with aggrieved parties at the sites of two of these cases reveals persistent power imbalances that impeded access and delivery of effective remedy. Victims are often reluctant to complain because they know that the little remedy they get is better than nothing.<sup>3</sup>

One participant noted a cultural difference between Anglo-American legal systems, which generally consider facts on a case-by-case basis, and civil law jurisdictions, in which broad principles guide the resolution of specific cases. Companies establishing operational-level grievance mechanisms have tended to follow the former model.

## **II. The State Duty to Protect Human Rights: National Action Plans, Legislative Developments**

Spurred by the call of the UN Working Group on Business and Human Rights for states to develop national action plans (NAPs) on business and human rights, European states have rolled out the first tranche of NAPs. Meanwhile in the Global South, some countries are taking concrete steps towards developing NAPs while others are actively engaging in debates about the viability and appetite for NAPs. Another notable development in terms of government action are legislative proposals, mainly in Europe, that would make corporate human rights due diligence mandatory. This session considered these recent developments around the state duty to protect human rights and how to integrate them into our teaching.

### ***Sheldon Leader, University of Essex School of Law, UK***

Sheldon Leader began by stating that the general challenge in teaching due diligence – defined as “sufficiently responsible conduct” -- is to first identify the scope of the issue and the requisite duty of care. Corporate due diligence should require reporting to demonstrate that the company is

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<sup>3</sup> Taylor Fulton, et al., “What is Remedy for Corporate Human Rights Abuses? Listening to Community Voices, A Field Report.” (2015, New York: SIPA, Print).

sufficiently aware of its risks of causing or contributing to adverse human rights impacts. In Europe, some legislatures are beginning to hold parent companies liable for wrongs committed by their subsidiaries.

Leader contrasted evolving legal standards for the corporate duty of care in France versus the United Kingdom. In France, draft legislation applies to the largest French companies.<sup>4</sup> The law requires any parent company with supplier relationships to: 1) have a publicly available due diligence strategy/plan of supervision; and 2) publicly report environmental damage, health risks, anti-corruption efforts, and other risks applicable to subcontractors. In France, a duty of care is triggered by particular wrongs committed by company subsidiaries. If a listed violation takes place, the parent company's liability follows automatically. Violations can result in fines up to 10 million Euros.

In the United Kingdom, based on the ruling in *Chandler v. Cape Industries*,<sup>5</sup> the linkage between parent companies and wrongs committed by subsidiaries is much more narrow. To be held liable for the acts of their subsidiaries, four criteria must be met: 1) the business of the parent company and the subsidiary are substantially the same; 2) the parent company has specialized knowledge on which it can reasonably rely; 3) the subsidiary's actions are so unsafe that the parent would have or ought to have known; and 4) there is reliance on the expertise of the parent.

In France, there will be a body of experts to define "reasonableness". There is no such guidance in UK common law, under which the definitions of an appropriate standard of care, and of due diligence, are questions open for interpretation.

### *Discussion*

Participants raised the issue of the implications of extending the duty of care beyond subsidiaries to suppliers. To meet emerging due diligence expectations, companies must be prepared to know and report on the risks of adverse human rights impacts throughout their supply chains.

### ***Rachel Chambers, University of Essex School of Law, UK***

Rachel Chambers provided an update from Europe on national action plans on business and human rights (NAPs). The purpose of a NAP is to strengthen protection against human rights abuses by business enterprises through a government-led inclusive process that identifies policy and regulatory needs and gaps and recommends practical and actionable policy measures and goals. The European Union was the first institution to call for NAPs – it told EU Member States to develop action plans for the implementation of the UNGPs in separate pronouncements in 2011, 2012 and 2014.<sup>6</sup> Countries adopting NAPs to date include: the United Kingdom (2013), the Netherlands (2013), Denmark (2014), Finland (2014), and Lithuania (2015). A draft Spanish NAP has yet to be approved. Work on NAPs is underway in other European states including Germany and Italy.

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<sup>4</sup> <http://www.assemblee-nationale.fr/14/ta/ta0501.asp>

<sup>5</sup> <http://herbertsmithfreehills.com/-/media/HS/L17051211710.pdf>

<sup>6</sup> The European Commission, in its communication 'A renewed EU strategy 2011-14 for Corporate Social Responsibility' called on all European Union member states to develop action plans for the implementation of the UNGPs and to develop or update lists of national corporate social responsibility actions by the end of 2012. A second pronouncement on the subject came from the EU in 2012 in the form of Council Decision 11855/12, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (June 25, 2012) requiring all EU Member States to develop national action plans for UNGPs implementation by the end of 2013.



Reports on NAPs have been published by the UN Working Group on Business and Human Rights (UNWG) and the International Corporate Accountability Roundtable (ICAR). The latter undertook a detailed analysis of the first four NAPs, assessing these against criteria identified in its NAP Checklist, which was jointly created with the Danish Institute for Human Rights. Generally, NAPs have been criticized for lacking regulatory mechanisms, focusing on past rather than future actions; and seeming to be a national “wish list” more than concrete action plans. Access to remedy is the most neglected pillar of the UNGPs. Civil society groups are seeking greater transparency throughout the NAP processes. The overall trend however seems to show some progressive improvement in terms of planning for implementation of NAPs, Finland’s, for example, is praised for identifying the relevant ministry that will progress each of the actions and, for around half the actions, a year by which they should be completed.

The UK committed in its plan to update the NAP in 2015 and this process is under way. The leading government ministries, the Foreign and Commonwealth Office and the Department for Business, Innovation and Skills, held a day-long multi stakeholder consultation in April 2015. Certain commitments were made to improve the process from 2013 (when the plan was first published), based on experience acquired by other countries in developing NAPs, for example a number of baseline studies were promised. In terms of substantive content, see the UK “Systems Map of Business and Human Rights” slide; no firm commitments on this were made however.

It is an interesting time in the evolution of NAPs in Europe: many countries are getting off the starting blocks (e.g. Germany) and conducting a more informed and thorough process building on the experience of others. The UK Update is also building on knowledge acquired from the experience of other countries and through the work of the UNWG and ICAR, evaluating NAPs and advising on how to improve them. Chambers noted that the key question is whether NAPs can achieve the goal of preventing and/or strengthening protection against human rights abuses by business enterprises.

### *Discussion*

A participant asked whether the NAP processes provoke national introspection as well as new laws and regulation. Chambers noted that governments are not employing NAPs as a means to create new laws. There does appear to be a certain amount of national introspection and this is a beneficial aspect of the NAP process.

Participants were also interested in whether there is a system to help companies comply with NAPs. Chambers replied that companies active in the field of business and human rights are very involved in the UK NAP process, for example, as part of the consultation on the NAP update. As far as she is aware, there has not been any specific system put in place to help companies to comply with provisions of NAPs addressing the corporate responsibility to protect.

### ***Joanne Bauer, School of International & Public Affairs, Columbia University, USA***

Joanne Bauer discussed the prospect of NAPs development and adoption in the Global South, based on her project work with Teaching Forum members Mahdev Mohan at Singapore Management University and Bonita Meyersfeld at the University of Witwatersrand (South Africa), as part of the CALS-SMU Coalition. Earlier in the year the Coalition held consultations in Bali and Pretoria, following over a year of stakeholder interviews and desk research.

NAPs are a key means for states to fill governance gaps identified by Ruggie. Yet there are different views about what the end game of a NAP should be. Is the purpose of a NAP to secure the State duty to protect in its own sphere, for example through human rights standards for procurement contracts, reigning in state owned enterprises, ensuring that export credit agencies follow human rights standards and so forth? Or is it also to make mandatory the second pillar by, for example, writing regulations and legislating corporate change, either through mandatory reporting, or by establishing a duty of care?

A key weakness of NAPs to date are the provisions with respect to the third pillar. Since it is the executive offices of government and not the parliamentary/legislative branches that are charged with developing a NAP, it is within the power of the NAP developers to improve access to remedy by strengthening their country's NCP. This is why the NCPs are an interesting space to watch.

There is an appetite for NAPs in the Global South. Some countries in Asia and Africa have begun to see NAPs as potentially the best defense against foreign economic exploitation. NAPs have a significant role to play in outlining a state's domestic regulatory space in bilateral investment treaties (BITs) and thus reversing the race to the bottom. If a NAP can be combined with development objectives, including poverty alleviation, IDPs and statelessness, empowerment of women, etc, that would be a positive thing. In both consultations, as we discussed NAPs the appetite for them grew.

Progressive business must play a role in promoting NAPs in the Global South. Nothing can or will be done without their consent, given their power within Asian and African countries. It is widely assumed that business would be opposed to NAPs. And yet that hasn't been the case. To the contrary, businesses in both the North and South see the advantages of NAPs that strengthen laws and judicial frameworks so as to "level the playing field." Progressive businesses in the Global South in particular show a willingness to champion NAPs in their countries so as to not be undercut by bad actors. Moreover in many parts of the Global South the idea that business must contribute to the social welfare, at least within their own national boundaries, is well-ingrained.

There is a high value for states in getting the process going. The start of the process creates opportunities for an on-going structured national dialogue on business and human rights. NAPs discussions in ASEAN and Africa are already leading to thinking around a regional dialogue to support a Regional Action Plan on BHR (RAPs), which themselves must be built upon NAPs processes.

The CALS-SMU Coalition identified the following issues as important for all NAPs, in the Global North as well as the Global South, to address.

- (a) Migrant labour rights are a key area of concern where Global South NAPs can and should take the lead. All NAPs should lay the foundation for binding obligations for better treatment of workers, particularly migrant labour.
- (b) NAPs should include respect for customary tenure to protect the land rights of indigenous peoples and other vulnerable groups.
- (c) NAPs should emphasize the need for policies that are gender-sensitive rather than gender-blind, including with respect to compensation schemes when people are forced to move off their lands to make way for business.
- (d) NAPs should make human rights due diligence mandatory, especially for companies operating in conflict zones.
- (e) NAPs should make mandatory the publishing of contracts and benefit-sharing agreements.

- (f) NAPs should be designed to implement the Sustainable Development Goals of the post-2015 development agenda.

### *Discussion*

Participants discussed the challenges inherent in which government agencies lead a NAP process (e.g. trade, labor or foreign affairs); the NAP process underway in the United States; whether there are adequate channels for input in the NAPs discussion; and how to bring NAPs into the classroom, for example by asking students to analyze and compare specific NAPs. One participant assigns specific countries to students, who must contrast national laws with the standards contained in the international bill of rights.

## **III. Using Simulations/Role Plays in the Classroom**

Teaching Forum members introduced simulations and role plays used successfully in the classroom.

### **Mark Wielga, University of Denver, Sturm College of Law, Colorado, USA**

Mark Wielga described three types of role-playing exercises using extractive industry cases he has employed with law students. Role plays succeed by triggering students to engage the topic directly and in small groups.

#### 1) *Town Hall*

Students are divided into defined stakeholder groups and presented with a problem. Each group adopts a position and seeks to negotiate a solution during a “Town Hall” meeting moderated by the instructor. For example: should Shell be allowed to return to its operations in Ogoniland, Nigeria and if so, under what conditions? Stakeholder groups could include: the local community, Shell, the national government, an international NGO, the World Bank, and the local state government. Each group can be given a hidden agenda (e.g., the national government’s goal is to maintain a military presence in the region) to guide their negotiations. There are incentives in the hidden agenda for most groups to find a common solution.

#### 2) *Ask Me Anything (or Group Investigation)*

Students are given a fact situation in outline form and the speaker is presented as an expert on the situation. The class is asked to decide on a course of action or to provide advice. They then inquire of the speaker and build on each other’s questions and her answers. This can work particular well when there are semi-hidden salient facts that radically change the analysis. For example the class is asked to conduct a risk assessment, collectively, as consultants to the company involved. The instructor plays the role of the client company/expert. Students must interview the instructor to determine the appropriate scope and emphasis for the risk assessment. The company’s risk exposure and corporate agenda become apparent through the instructor’s responses to student questions, but the corporate project has clear challenges that the client will reluctantly, admit if the students ask the right question.

#### 3) *Sequenced Case Study*

A more extensive role-play presents students with background on a detailed case study. Students are then asked, in groups, to perform a sequence of tasks based on the background scenario. Additional information is given after they perform each task, forcing the students to react to events as they unfold. Such tasks might include:

- Drafting a human rights policy and/or strategy for the company;
- Drafting a letter responding to civil society demands; and
- Developing an action plan responding to subsequent developments.

Each step presents an opportunity to discuss key issues (e.g. the meaning of “free, prior and informed consent”), produce written work, and provide feedback to students. Ideally the exercise is structured so that the student’s work in each step of the work constrains his work on the later steps. In the example above, the ambitious human rights policy drafted in the first step is impossible for the company to comply with in the third step.

### **Lisa Laplante, New England School of Law, Boston, USA**

Lisa Laplante conducts a role-play using the current debates surrounding a binding business and human rights treaty. The role-play class comprises 20 minutes of lecture, 20 minutes of debate/discussion among the students themselves, and 20 minutes to debrief. Students are assigned country roles, and must consider the pros and cons of that country’s actual position on a binding treaty. Through the debriefing, students begin to appreciate both sides of the treaty argument. The instructor asks students, “How does it feel to play your country role?” By answering this question, students gain a deeper understanding of the relevant issues.

### **Meg Roggensack, Georgetown University Law Center, USA**

Meg Roggensack’s course, co-taught with Teaching Forum members Eric Biel and Sarah Altschuller, is divided into two parts. The first is focused on orienting students to the evolving business and human rights framework and the UN Guiding Principles, the toolbox of approaches used by governments and companies to address human rights impacts, and issues of transparency and disclosure, the right to remedy, and stakeholder engagement. The second half focuses on specific challenges – e.g., from labor standards in global supply chains to conflicts with communities over land and water rights.

Students are assigned one of three stakeholder perspectives – government, business or civil society - and prepare weekly comments on the readings from that assigned perspective. Over the length of the course students rotate through the different stakeholder categories,

Guest speakers, representing the different stakeholder groups, help Roggensack and her co professors further orient students to stakeholders’ differing approaches and objectives.

Students are required to prepare a mid-term and final paper addressing a current challenge in the field and focused on integrating and synthesizing course materials.

Over the course of the semester, Roggensack and her co-professors utilize in class exercises and simulations to advance students’ understanding and hone presentation skills. These exercises might come from existing NGO advocacy efforts – e.g., regarding government development of national action plans to implement the Guiding Principles, corporate initiatives – e.g., comparing and contrasting different responses to a regulatory requirement, or new government initiatives to address an emerging issue, e.g. the Myanmar reporting requirements.

Tips for conducting simulations:

- Consider assigning different stakeholder perspectives to each class group, or alternatively, break down the assignment into complementary parts.

- Ensure sufficient time for students to work together, even for just 30 minutes, and make clear that they will be responsible for reporting back as a group to the class as a whole.
- Professors should help jump start or facilitate group discussions, e.g. with issue spotting, or framing
- To the extent possible, put a human face on the challenge, to make it easier for students more readily to understand and relate to the simulation

### **Nina Gardner, John Hopkins, School of Advanced International Studies, USA**

Nina Gardner asks her students to produce three-minute advocacy videos, based on the short advocacy/op-ed papers they complete in the early part of the semester on a topic of their choice which has a business and human rights element and makes the case from a fictitious or real NGO's point of view. Students have employed their considerable computer skills to create professional-quality videos. Students can view each other's work on Blackboard and Gardner sometimes uses the videos in class when a relevant topic is covered. Some NGOs have made use of the videos produced by the students.

#### *Discussion*

Participants universally endorsed the value of role-play exercises, but many instructors have difficulty finding the necessary time to conduct them. One participant noted that when role-playing is used earlier in a course, students become more engaged in subsequent course discussions and readings. Participants noted that students have to be careful about copyright issues when using corporate materials to produce advocacy videos, and that if the materials are published or circulated they may need to be concerned about libel suits.

## **IV. Public Lecture: The Shareholder Value Myth and Corporate Responsibility - Lynn Stout**

Lynn Stout, Distinguished Professor of Corporate and Business Law at Cornell Law School, delivered a public lecture on the themes of her 2012 book, [\*The Shareholder Value Myth\*](#). (A video recording of Prof. Stout's remarks is available here: <http://teachbhr.wikischolars.columbia.edu/Resources>)

## V. Business and Human Rights in Emerging Economies

With an emphasis on developments in China, this session explored how multinational companies and states in emerging markets are engaging business and human rights. The session considered new areas for research as well as how to bring a focus on emerging economies to the classroom.

### **Liang Xiaohui, Peking University Law School, China**

Liang Xiaohui began by noting that CSR has been a hot topic in China for the past decade, where human rights are considered to be part of CSR. Examples include China voting to approve ISO 26000 Guidance on Social Responsibility (2010) and China's draft National Social Responsibility Standard (2014-15), both containing a human rights chapter. China participates actively in the UN Global Compact, having established a strong local network of participating companies. The Chinese representative to the UN Human Rights Council, in 2008 and 2011, has noted the "privatization" of human rights in China. Human rights are mentioned in recent industrial CSR guidance issued by Chinese business associations including China International Contractors' Association (2010), China Electronic Standardization Association (2012), and Small and Medium-sized Enterprises Council (2013).

Overseas investment regulations have shifted from protecting Chinese investment and personnel to guaranteeing a social license to operate based on social due diligence. Traditionally, the business and private sectors have had no standing in formulating China's human rights policies, however, the corporate responsibility to respect human rights contained in the second pillar of the UN Guiding Principles is making human rights more than an exclusively governmental issue. Unprecedented new rules and agreements on environmental issues and labor rights are included in bilateral free-trade agreements (FTAs), such as the FTA between China and Switzerland.

Social stability-oriented due diligence to protect people's rights and interests has also emerged as a concern for Chinese companies investing domestically. The Chinese National Human Rights Action Plan (2010-15) provides for human rights education for businesses. New sectoral guidance on CSR containing rights-based due diligence requirement is currently being drafted by business associations including the Chinese Chamber of Commerce of Minerals and Chemicals Exporters and Importers (CCCMC), and China National Textile and Apparel Council (CNTAC).

The current direction of business and human rights in China is collaboration between government and business. Human rights is an increasingly common buzz word in CSR and sustainability reports. CSR has developed in China as a result of lobbying by business groups. Human rights impact assessments and due diligence have become a starting point for Chinese companies' to consider social challenges. Unfortunately, there is a double standard issue. When Chinese companies operate outside China, they seek to comply with international human rights standards. When operating inside China, however, human rights issues seldom arise in corporate operations. Liang predicts a push back against this double standard in the future.

Finally, Liang shared the results of a survey of Peking University students who had studied business and human rights. Most respondents were between 24 and 30 years old and were graduate students with a legal background, 60% of whom were male. Students are most interested in labor rights topics, applying BHR in the national context, and understanding relevant business cases. Students would like more case studies and practical exercises employed in the classroom.

## **Sarah Seck, Western University, Canada**

Sara Seck began by noting the public backlash against MNCs that do not comply with international standards and the ongoing challenge for home states to hold companies accountable. Western MNCs now compete with Chinese companies and other MNEs from emerging markets when investing around the world. She referred to Canada's 2014 revised CSR strategy entitled "Doing Business the Canadian Way: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad,"<sup>7</sup> which provides that Canadian companies are expected to respect human rights when operating overseas and to comply with international standards that to differing degrees embed business responsibilities to respect human rights, including the OECD MNE Guidelines, the Voluntary Principles on Security and Human Rights, and the IFC Performance Standards.<sup>8</sup> However, the only consequence for failing to comply with these standards and international human rights norms is a threatened withdrawal of home state support, whether financial or from missions abroad. In a recent paper Seck examined whether Canada's 2009 CSR strategy was something that emerging market multinational home states might consider useful and legitimate to emulate.<sup>9</sup>

Seck further noted what she describes as the "inside-outside" problem and the challenge of accounting for the "south" within the "north." Many mining companies investing in Canada are MNCs, including some Chinese MNCs. Canadian jurisprudence seeks to protect indigenous rights, but does not recognize rights to free, prior and informed consent (FPIC) if understood to mean that aboriginal peoples have complete freedom to veto resource development on indigenous lands. It is curious, then, that while China does not recognize indigenous peoples within its territories, the Chinese CCCMC CSR guidance explicitly endorses FPIC, yet the Canadian CSR guidance does not. This leads to some interesting questions. Is the interpretation of indigenous rights in the domestic legal frameworks applied to companies operating in Canada the same as the interpretation of indigenous rights found in the CSR guidance that the state would apply to its companies operating outside of Canada? Similarly, are the rights recognized in China's CSR guidance for outbound investment also rights that are recognized within China?

The Canadian approach to CSR has always been shaped by external influences, such as the human rights and environmental issues of the mining sector in the Global South. There is also a need to focus on problems in the Global North. Denmark, for instance, has sovereignty over Greenland, where there are proposed extractive projects. The Global North can learn from experiences in the Global South.

### *Discussion*

Participants questioned the relevance of the OECD Guidelines in emerging markets. Liang confirmed that there is still no discussion about NCPs in China, but China is coordinating with the OECD in developing its BHR policies. There could be a temporary arrangement with similar

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<sup>7</sup> "Canada's 2014 CSR Strategy", online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

<sup>8</sup> Sara L Seck, "Business, Human Rights, and Canadian Mining Lawyers" (2015) 56 Canadian Business Law Journal 208-237.

<sup>9</sup> Sara L Seck, "[Emerging-Market Multinational Enterprises, Human Rights, and Sustainable Development: Lessons from the Canadian Experience](#)", (2013) 22 Transnational Corporations 73-100.

functions as the NCPs. This would probably be more of an information platform or would serve the function of a liaison office, but would not be open to formal complaints.

Participants noted a distinction between official Chinese government positions and actual Chinese practices. Whether voluntary standards are perceived as Western or as internationally-recognized is an important factor. A participant noted that China employs a “testing errors” philosophy regarding sensitive topics like human rights. Different approaches are proposed to see what works best, before committing to firm policy positions.

A key driver behind China’s approach to recognizing BHR principles is to support Chinese exports by promoting a sustainable environment for investment. The wage level has tripled in the last seven years. China is no longer an export-oriented industry. In 2014, for example, only 15% of overall textile production was for the international market.

One participant noted the lack of social insurance is the principal labor problem in China. The younger generation is more informed on how to protect their rights through collective consultation (China does not use the term “bargaining”). For industry sustainability, China knows that labor rights must be protected.

A participant emphasized the importance of teaching how political processes, dynamics and drivers inform, create and legitimize standards. Practical reasons may affect the development of operational principles.

## **VI. Civil Society and Community-led Initiatives**

Researchers and advocates have begun to consider how to improve corporate human rights due diligence through civil society and community monitoring, assessment and grievance mechanisms. This session explored these new initiatives and their implications for teaching human rights due diligence.

### **Tyler Giannini, Harvard Law School, USA**

Tyler Giannini, who co-directs the Harvard Law School International Human Rights Clinic, is exploring ways to develop a community-driven set of principles that express their priorities in the field of business and human rights. The effort will develop workshops that will eventually reach 70 communities around the globe. He discussed the challenges of authentic community engagement. For example, practitioners need to differentiate between human rights advocates and communities, and principles for community-led monitoring for example that emerge from the bottom up by engaging communities themselves may look different from those developed by advocates themselves. In this way, human rights principles can be particularly relevant to bring rights holders to the table and to help communities develop their own solutions.

Key issues include:

- Community perspectives on negotiation,
- The capacity of rights holders to negotiate with other stakeholders,
- The capacity of states and businesses to negotiate with rights holders,
- Benefit sharing,
- Power dynamics,
- Defining community



- Capturing community practice, and
- The role of lawyers in increasing the agency and power of communities they do not represent.

### **Larry Catá Backer, Pennsylvania State University, USA**

Larry Catá Backer outlined a critique of the legal and power frameworks in which business and human rights problems are typically understood. The human rights project is an elitist enterprise focused on upstream MNCs and Western states (MNC home states) that mirrors dominant global governance structures. Effective implementation of human rights governance, including the UNGPs, requires the empowerment of stakeholders down the supply chain.

Two distinct but related activities are required:

- 1) Knowledge Production/Dissemination; and
- 2) Engagement/Development of remedial pathways beyond state-based judicial mechanisms.

Knowledge production should favor ideas from SMEs, rights holders and communities. Business and human rights discourse should center on client-based remedies and claims that can serve as the platform for more vigorous negotiation between upstream and downstream stakeholders. OECD National Contact Points are a positive development, in Backer's view, because while based on international law, there are flexible standing rules and NCP cases can be integrated with multi-jurisdictional domestic litigation strategies.

## **VII. Opportunities for Collaboration**

Participants considered opportunities for greater collaboration among teachers of business and human rights, including:

- Teaching BHR Forum resources (the Forum Discussion Board, the Syllabi Bank, the TBHR Forum Handbook Project (<http://tbhrforum.org>)) and the Forum website: <http://TeachBHR.org>);
- Publications (such as the new Cambridge *Business and Human Rights Journal*) and the forthcoming textbook of the Center for Business and Human Rights, Stern School of Business, New York University: Dorothee Baumann-Pauly and Justine Nolan, eds, *Business and Human Rights: From Principles to Practice*, Routledge, 2016
- In partnership with other initiatives, such as The UN Principles for Responsible Management Education (PRME).

## Appendix 1: Resources Mentioned

### Reports and articles

Backer, Larry Catá. "Realizing Socio-Economic Rights Under Emerging Global Regulatory Frameworks: The Potential Impact of Privatization and the Role of Companies in China and India" *The George Washington University International Law Review* 45:615-680 (2013).

Canada's 2014 CSR Strategy", online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>

CALS-SMU Coalition, "Asia & Africa National Action Plans Update to the UN Working Group on Business and Human Rights: Third Submission," October 2015. [http://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Coalition's%20Third%20Submission%20to%20the%20WG%2020151012%20\(FINAL\).pdf](http://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Coalition's%20Third%20Submission%20to%20the%20WG%2020151012%20(FINAL).pdf)

Fulton, Taylor, et al., "What is Remedy for Corporate Human Rights Abuses? Listening to Community Voices, A Field Report." (2015, New York: SIPA, Print), <http://accessfacility.org/sites/default/files/Listening%20to%20community%20voices%20on%20effective%20remedy.pdf>.

Human Rights Clinic (Columbia Law School) & International Human Rights Clinic (Harvard Law School), "Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned" (November 2015).

Seck, Sara L. "Business, Human Rights, and Canadian Mining Lawyers" (2015) *56 Canadian Business Law Journal* 208-237.

Seck, Sara L. "Emerging-Market Multinational Enterprises, Human Rights, and Sustainable Development: Lessons from the Canadian Experience", (2013) *22 Transnational Corporations* 73-100.

### Books

Stout, Lynn, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, Berrett-Koehler Publishers, 2012.

## Appendix 2: Participant List

Christine Bader	Columbia University
Joanne Bauer	Columbia University, School of International & Public Affairs
Dorothee Baumann Pauly	NYU Stern Center for Business and Human Rights
Karin Buhmann	Copenhagen Business School, DENMARK
Kadriye Bakirci	Hacettepe University, TURKEY
Larry Catá Backer	Pennsylvania State University
Rachel Chambers	University of Essex, UNITED KINGDOM
Joshua Cooper	University of Hawaii
Wayne Eastman	Rutgers Business School
Anthony Ewing	Columbia Law School
Nathan Fleisig	Baruch College
Alan Franklin	Athabasca University, CANADA
Bennett Freeman	Independent
Nina Gardner	Johns Hopkins Univ., School of Advanced International Studies
Erika George	University of Utah, S.J. Quinney College of Law
Tyler Giannini	Harvard Law School
Caroline Kaeb	University of Connecticut, School of Business
Sarah Knuckey	Columbia Law School
Lisa Laplante	New England School of Law
Sheldon Leader	University of Essex, School of Law, UNITED KINGDOM
Terry Nelidov	University of Michigan, Erb Institute
Carol Parkes	Aston University, UNITED KINGDOM
Jenik Radon	Columbia University, School of International & Public Affairs
John Richardson	American University, School of International Service
Eskil Riskaer	Copenhagen Business School, DENMARK
Meg Roggensack	Georgetown University Law Center
Michael Santoro	Rutgers Business School
Pam Saunders	Drexel University, Thomas R. Kline School of Law
Sara Seck	Western University, CANADA
Kathleen Simon	Principles for Responsible Management Education
Emily Smith Ewing	Fordham Law School
Lynn Stout	Cornell Law School
Mark Wielga	University of Denver, Sturm College of Law
Ursula Wynhoven	Fordham University School of Law
Liang Xiaohui	Peking University Law School, CHINA