



sur

Human Rights in Motion

Themes

JANET LOVE

Are We Depoliticising Economic Power?:
Wilful Business Irresponsibility and Bureaucratic Response by
Human Rights Defenders

PHIL BLOOMER

Are Human Rights an Effective Tool for Social Change?:
A Perspective on Human Rights and Business

GONZALO BERRÓN

Economic Power, Democracy and Human Rights. A New
International Debate on Human Rights and Corporations

DIEGO LORENTE PÉREZ DE EULATE

Issues and Challenges Facing Networks and Organisations Working
in Migration and Human Rights in Mesoamerica

GLORIA CAREAGA PÉREZ

The Protection of LGBTI Rights: An Uncertain Outlook

ARVIND NARRAIN

Brazil, India, South Africa:
Transformative Constitutions and their Role in LGBT Struggles

SONIA CORRÊA

Emerging Powers: Can it be that Sexuality and Human Rights is a
Lateral Issue?

CLARA SANDOVAL

Transitional Justice and Social Change



JANET LOVE

Janet Love has been the National Director of the Legal Resources Centre (LRC) since January 2006 and a Commissioner on the South African Human Rights Commission since 2009. She has been an anti-apartheid activist since 1974 and was involved in the Trade Union movement and the African National Congress prior to and during the 10 years she spent in exile. She has studied at both the University of the Witwatersrand and of London and has post-graduate qualifications in public administration, development management and economics.

ABSTRACT

This article focuses on the international debate on business and human rights, in order to scrutinize whether the human rights language that is currently used is able to produce social change by remedying economic injustices. The author criticizes the current international guidelines in this area for their failure to result in greater business accountability in practice; the absence of remedy, restitution and reparation for victims and, in particular, the lack of state sanction; and the non-recognition of businesses as social actors with power which ought to be associated with primary human rights duties rather than voluntary good conduct. As a consequence, the author outlines some of the alternatives and/or additional mechanisms sought by human rights defenders and some states to deal with the tremendous growth in economic inequality, including recent proposals of a binding treaty. The author concludes the article with questions for the future of human rights defenders' work with business and human rights.

Original in English.

Received in July 2014.

KEYWORDS

Economic injustice – United Nations – African Commission – Business and human rights – Ruggie



This paper is published under the *creative commons* license.

This paper is available in digital format at <www.surjournal.org>.

ESSAY

ARE WE DEPOLITICISING ECONOMIC POWER?: WILFUL BUSINESS IRRESPONSIBILITY AND BUREAUCRATIC RESPONSE BY HUMAN RIGHTS DEFENDERS

Janet Love

The question of engaging business is clearly an issue that dominates the work of human rights organisations from the global south. Less clear is what some of the key issues that relate to this front of struggle involves. This article seeks to raise some of those issues, having especially in mind the international debate on standard setting in the area of business and human rights. Ultimately, this article scrutinizes whether human rights language, as used until now in this international debate, is able to produce social change by remedying current economic injustices.

To be clear, human rights defenders have a crucial role to play in promoting corporate respect for and realisation of human rights, including in exposing and seeking remedy for corporate human rights violations. Despite this, there is a worsening response from State and non-State actors that includes threats to forbid and/or restrict the work of civil society organizations (CSOs), failure to respect the rule of law and abide by court decisions, and threats and attacks against defenders who work on issues of business and human rights. With this scenario in mind, this article firstly sketches the international and regional framework regarding business and human rights. Secondly, it briefly outlines some of the challenges faced by human rights defenders in fighting against economic injustice. Finally, it reveals some of the alternatives proposed by human rights defenders and states to increase accountability of business.

1 International and regional human rights framework

the United Nations Guiding Principles on Business and Human Rights (UNGPs) state that they apply to all business enterprises, including trans-nationals, “regardless of their size, sector, location, ownership and structure” (UNITED NATIONS, 2011,

Notes to this text start on page 113.

principle 14). Yet the focus is to create a positive obligation on States – rather than on business – to implement those principles in a manner that pays attention to the rights and needs of individuals or groups that are at heightened risk of becoming vulnerable or marginalised due to business conduct. It urges businesses to avoid infringing on human rights as articulated in international law and to address adverse human rights impacts that they may be involved in. At no point is there any sense of clear obligation with possible sanction that is placed on business. And it is not as though international mechanisms are without possibilities to exercise sanctions against businesses as has been clearly demonstrated, for example, through the actions and decisions taken by the World Trade Organisation (WTO) and by financial institutions as part of the ‘global war against terror’.

The UNGPs recognise that businesses should consult with human rights defenders about the design and impact of projects. They also recognise that businesses should ensure that ‘the legitimate and peaceful activities of human rights defenders are not obstructed’ (UNITED NATIONS, 2011, commentary to principle 26).

The African Commission on Human and Peoples’ Rights (ACHPR) adopted a resolution in 2012 (THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, ACHPR/Res. 224, 2012), emphasising the impact of human rights abuses on the rural communities in Africa and called for maximum and effective participation of local communities in the development on their land. In 2013, the ACHPR also adopted a resolution (THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2013), noting in its preamble that illicit capital flight from Africa “leads to the loss of billions of US dollars every year” and called for a study on the impact of illicit capital flight on human rights in Africa.

Notwithstanding this, social conflicts involving the oil, gas and mining (or extractives) industries have led to calls by ACHPR – and the UN High Commissioner for Human Rights (UNHCR) – for interventions by government; but there appears to have been little or no effort to bring pressure to bear on businesses to fulfil their obligations (COLLINS; FLEISCHMAN, 2013). Instead, international discourse on business and human rights has focused primarily on understanding the obstacles that prevent victims from securing an effective remedy, rather than on removing such obstacles (AMNESTY INTERNATIONAL, 2014). The defenders of these communities against rights abuses are particularly vulnerable. In many instances, where victims have attempted to make use of both judicial and non-judicial mechanisms in seeking an effective remedy, they remain unsuccessful and, consequently, continue to suffer the abuse. Furthermore, the time that lapses results in access to a remedy becoming less likely.

2 Human rights defenders and economic power

The experiences of human rights defenders working on business and human rights and the obligations to promote and realize rights both by State and non-State actors, and the reports from international NGOs and UN experts, point to a worsening of abuses against them, increasing difficulties for their operations and increases in restrictions and reprisals against them.

These human rights defenders are framing issues within a rights context highlighting the disparities in access to justice, agency and voice. This disparity is brought about primarily through the increasing gap between rich and poor. The question of the extent to which human rights defenders can and/or should frame and situate human rights struggles as part of the struggles around the structures of economic power is something that needs further discussion. The current discourse around human rights and democracy enables broad alliances and does not necessarily require clarity about what would constitute economic justice and how this could come about. It thereby often fails to provide a basis for engagement by activists or to constitute a rallying call that encourages people to hope for an end to the disparities.

For example, mining has historically been the mainstay of the South African economy and has shaped both its social and environmental fabric. The urban and industrial landscape has been dramatically influenced according to the location of minerals. The mining industry remains important to the economy and has a critical role to play in supporting the aspirations of development and growth. However, notwithstanding the advent of democracy 20 years ago, in this period the sector has not only had negative impacts on the environment, but is also notorious for unequal, seemingly sacrosanct practices that have resulted in human rights violations (of communities and employees) and in the loss of lives. Instead of contributing to broad economic empowerment especially of the directly involved and affected workers and communities, it has enriched very few individuals.

Land ownership in South Africa has long been a source of conflict. Its history of conquest and dispossession, of forced removals and a racially skewed distribution, has left it with a complex and difficult legacy. Currently, the South African Government is obliged by the country's Constitution to implement land reform processes and enact and implement legislation to realise "the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources" (SOUTH AFRICA, 1996, Section 25(4)). A number of laws placing obligations on business to ensure sustainable environmental management, full participation in transparent planning processes by affected communities and safe, fair working conditions have been enacted. Companies fail to comply and the South African government fails to enforce. All of this has a direct bearing on issues pertaining to business and the economy and relate to the extent to which business actors perceive themselves as being primary 'duty bearers' as a consequence of their power. Very often business hides behind the absence of effective enforcement by the State for its failures but arguments of this nature appear predicated on the view that the problem lies not in the violation but only if and in being caught.

Generally, transnational corporations generate and provide foreign direct investment to the host State. This frequently results in businesses exerting an inordinate amount of influence on public policy thereby influencing the independent decision-making authority of the State. Often host countries lack the capacity for effectively dealing with these issues. In addition, the impact of business involvement in public policy is seldom transparent and therefore creates

an environment where companies are not held accountable for the human rights impact of subsequent economic policy choices. The lack of transparency and accountability measures contributes to the growth of corruption and impunity which, in turn, undermine the very fabric of democracy and human rights.

The potential impact of the State's relationship on transnational corporations is mainly viewed on the basis of the location of the company's domicile. However, the activities of companies, based throughout Africa, yet domiciled in South Africa, reveal that such companies opportunistically take advantage of undemocratic, weak regimes to further burden poor and oppressed people in these countries. Currently, there are no extraterritorial mechanisms in place to hold these companies accountable for human rights abuses perpetrated in such host countries¹.

Coupled with this, corporate legal principles such as 'separate legal personality', which effectively separate the legal personalities between parent companies (often situated in the Global North) and their subsidiaries (situated in the Global South), means that parent companies will not be held liable for violations caused by their subsidiaries despite amassing significant profits from their conduct. This becomes of grave concern when victims are unable to prosecute subsidiaries in their own jurisdiction due to weak judicial mechanisms governing their countries.

(INTERNATIONAL COORDINATING COMMITTEE
OF NATIONAL HUMAN RIGHTS INSTITUTIONS'
WORKING GROUP OF BUSINESS AND HUMAN
RIGHTS, 2014).

Notwithstanding the willingness with which businesses are comfortable to capitalise on their status as having 'separate legal personality' when it comes to accountability and tax avoidance, it is virtually impossible to engage either States or businesses about the duties that go with legal personality and, in particular, creating opportunities to pursue criminal liability charges and claims against business through international criminal court mechanisms in the event that local remedies are exhausted or unavailable.

While the UNGPs assert that States are neither required nor prohibited to regulate extraterritorial activities of businesses, it also recognises that the extraterritorial state duty to protect remains unsettled in international law (BILCHITZ, 2013). Although victims may have had access to legal avenues which allow for civil claims such as the Alien Tort Claims Act (ATCA) of the United States, the recent judgment of *Kiobel v. Royal Dutch Petroleum Co.* (UNITED STATES, 2013) that effectively restricts the application of the ATCA in cases involving allegations of abuse outside of the jurisdiction of the United States, is a setback for holding businesses that are either directly or indirectly complicit in the commission of human rights violations accountable.

3 Searching for alternatives

the failure of the UNGPs to result in greater business accountability in practice
- notwithstanding the fact that they have been picked up in various plans and

agreements (RUGGIE, 2014); the absence of remedy, restitution, reparation for victims and, in particular, the lack of State sanction; and the non-recognition of businesses as social actors with power which ought to be associated with primary human rights duties rather than voluntary good conduct – are the key drivers of the search for alternatives and/or additional mechanisms and for finding other approaches to deal with what is seen as having driven the tremendous growth in inequality.

It is in this context that a number of developing countries have given their support to calls within the United National Human Rights Council (UNHRC) for the development of a binding treaty to hold businesses accountable for human rights violations at an international level. During its June 2014 session in Geneva, the UNHRC adopted three resolutions around business and human rights. One resolution (UNITED NATIONS, 2014a), led by Norway, Argentina, Ghana and Russia, focuses on national implementation of the UNGPs, renewing the mandate of the UN Working Group on Business and Human Rights. That resolution was adopted by consensus. In addition there was a further consensus decision to extend the mandate of the Expert Working Group which the Council established in 2011 to promote and build on the UNGPs, and it requests the High Commissioner for Human Rights to facilitate a consultative process with states, experts and other stakeholders to explore “the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses” (UNITED NATIONS, 2014a, para. 7).

The other resolution (UNITED NATIONS, 2014b), led by Ecuador and co-sponsored by Bolivia, Cuba, South Africa and Venezuela, establishes an inter-governmental process to begin the development of a treaty ‘to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’. The resolution was adopted by 20 votes (including a majority of African members and China, India, and Russia) to 14, with 13 abstentions. Apart from the co-sponsors, other Latin American countries, notably Brazil, abstained. The EU and the US indicated that they will not participate in the treaty negotiating process. Critics of this resolution are quick to characterise it as neither innovative nor constructive because of ‘being divisive’.

The implicit assumption that innovation and/or consensus have constituted motive forces of the work of the UNHRC is highly questionable.² However there are a number of issues and concerns with this resolution. Negotiations are expected to convene sometime next year but the resolution does not stipulate any timeframes and stipulates a wide mandate with a very varied range of actors and activities that consequently is unlikely to realise its objective of a formulating a single, binding treaty. The fact that the US and the EU have excluded themselves is a concern – but not surprising given the nexus of political and financial power that resides in these jurisdictions. On the other hand, knowing that China and Russia are on board does not suggest any certainty that the debate will be robust or that the outcome will advance even discreet instruments to address particularly egregious violations by business – let alone that with their presence there will be progress towards a wider legislative framework.

In the debate, there were suggestions that business is somehow open only to the force of national legislation and ‘rule of law’. Why this should be the case any more than migration or trade and investment, for example, is not clear as noted by Ruggie:

But if national law and domestic courts sufficed, then why do TNCs [transnational corporations] not rely on them to resolve investment disputes with states? Why is binding international arbitration necessary, enabled by 3,000 bilateral investment treaties and investment chapters in free trade agreements? The justification for this has always been that national laws and domestic courts are not adequate and need to be supplemented by international instruments.

(RUGGIE, 2014).

However, they are mainly the motive force behind the importance of generating further scope for debate.

Issues relating to State procurement processes also highlight the problems of non-competitive behaviour and collusion (in addition to violation of environmental, health and other rights) which, at times, are domestic but in the case of large-scale developments (arms deals; nuclear power facilities; fracking) and mega-events (such as FIFA World Cup) are replicated in different parts of the world and involve transnational business interests. Clearly the arena of ‘social safeguards’ and ‘social licence to operate’ relate to investment decisions and related risk. The problem in the context of democracy and human rights that surrounds much of State procurement does not only relate to corruption in government but also to the rampant greed and individual enrichment that occurs benefitting those in business at the expense of the taxpayers and to the detriment of those most vulnerable and marginalised in society.

The potential and actual involvement of business in the abuse of its power to the detriment of human rights is undeniable – and yet it is not met with a response that is able to relate to this power within a political discourse without being cast into the realm of polemics. The direct involvement of business in slavery and forced labour generate public outcry often without any action being taken by either the State or civil society. Areas of private security and the production, distribution and use of mass surveillance equipment are areas of non-State actor power wielded by business, which can be and are used in direct violation of human rights of citizens and, in many instances, are used in trans-boundary interventions. From a consumer perspective, the destructive impact of the financial sector in promoting reckless lending and spending is part of a number of violations that have been widely documented – such as Nestle products that relate to baby food – and a range of ways in which health rights and food security is undermined by producers has received attention such as in relation to intellectual property rights and the pharmaceutical industry. In this regard, the absence of human rights engagement with and by those involved in the negotiations around trade and investment such as the WTO is clearly a problem.

4 Conclusion

Human rights defenders who engage around issues of business and human rights in the global arena have tended to place primary emphasis on engaging around the questions of human rights and business in a manner that places undue emphasis on legislative instruments including “hard” and “soft” law. While there is recognition and use of other tools – including social movement mobilisation such as ‘Occupy Wall Street’, boycotts of products and naming-and-shaming – business and human rights constitutes our soft underbelly. Our thinking lacks coherence and strategy. We are reliant on old concepts of business which have not been renewed within the framework of today. For example, social media is one part of the current reality that has challenged the structure of industrial relations organisation and bargaining and there are huge questions around the future of these mechanisms which have long provided a focus and a basis for the mobilisation of workers into unions. Add to this, the complexity of a rapidly changing ‘world of work’ and the related challenges for inclusion of the ‘informal sector’ and the realisation of the right to work. The legislative instruments represent an opportunity to formalise and create some degree of certainty: false comfort when it is about a mercurial socio-economic and political realm.

Engaging around policy, convention, agreement and domestic legislation is clearly something that human rights organisations like the LRC are involved with both nationality and beyond their borders. But a number of questions arise when focusing on the issues relating to business and human rights which are less certain:

1. Tackling a business in one jurisdiction: does it have automatic impact on related businesses in the sector and/or parts of the same company elsewhere? Is it necessary for any broader impact to involve similar actions being mounted in other jurisdictions?
2. To what extent does the interplay and interconnectedness of state power and business need to become the focus of actions by human rights civil society organisations? How can issues of transparency and accountability that arise in one jurisdiction be tackled from another vantage point?
3. How do human rights organisations move the battles waged against human rights violations perpetrated by business from the level of elite/boardroom to popular movement/street mobilisation? Without the latter, the impact is destined to be stunted.

REFERENCES

Bibliography and Other Sources

- AMNESTY INTERNATIONAL. 2014. **Injustice Incorporated: Corporate Abuses and the Human Right to Remedy**, 7 Mar. Available at: <<http://www.amnesty.org/en/library/asset/POL30/001/2014/en/33454c09-79af-4643-9e8e-1ee8c972e360/pol300012014en.pdf>> Last accessed on: 18 Aug. 2014.
- COLLINS, Ben; FLEISCHMAN, Lesley. 2013. **Human Rights and Social Conflict in the Oil, Gas and Mining Industries: policy Recommendations for National Human Rights Institutions**. Oxfam America Research Backgrounder Series. Available at: <<http://www.oxfamamerica.org/publications/national-HR-institutions-and-extractive-industries>>. Last accessed on: 18 Aug. 2014.
- BILCHITZ, David. 2013. The human rights obligations of business: a critical framework for the future, In: DEVA, Surya; BILCHITZ, David (Orgs.). **Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?** Cambridge: Cambridge University Press, pp. 271-294.
- INTERNATIONAL COORDINATING COMMITTEE OF NATIONAL HUMAN RIGHTS INSTITUTIONS' WORKING GROUP OF BUSINESS AND HUMAN RIGHTS. 2014. On file with the author.
- RUGGIE, John G. 2014. The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty. **IHBR Commentary**, 8 Jul. Available at: <<http://www.ihrb.org/commentary/board/past-as-prologue.html>>. Last accessed on: 20 Aug., 2014.
- SOUTH AFRICA. 1996. **Constitution of the Republic of South Africa**. Available at: <<http://www.constitutionalcourt.org.za/site/constitution/english-web/ch2.html>> Last accessed on: 18 Aug. 2014.
- THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (AFRICAN COMMISSION. 2012. **Resolution on a Human Rights-Based Approach to Natural Resources Governance**. Doc. ACHPR/Res. 224 (LI) 2012, 51st Ordinary Session. Available at <<http://www.achpr.org/sessions/51st/resolutions/224/>>. Last accessed on: 18 Aug. 2014.
- _____. 2013. **Resolution on Illicit Capital Flight from Africa**. Doc ACHPR/Res. 236 2013, 53rd Ordinary Session. Available at: <<http://www.achpr.org/sessions/53rd/resolutions/236/>>. Last accessed on: 18 Aug. 2014.
- UNITED NATIONS. 2010. Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. **Business and human rights: further steps toward the operationalization of the "protect, respect and remedy" framework**, UN Doc. A/HRC/14/27, Human Rights Council, 14th Session. Available at: <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>. Last accessed on: 18 Aug. 2014.
- _____. 2011. Special Representative to the Secretary-General on the issue of human

rights and transnational corporations and other business enterprises. **Guiding principles on Business and Human Rights – Implementing the United Nations ‘Protect, Respect and Remedy Framework’**, UN Doc. A/HRC/17/31, Human Rights Council, 17th Session. Available at: <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>. Last accessed on: 18 Aug. 2014.

_____. 2014a. Human Rights Council. **Human rights and transnational corporations and other business enterprises**, UN Doc. A/HRC/26/L. 1, Rev.1, 26th Session.

_____. 2014b. Human Rights Council. **Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights**, UN Doc. A/HRC/26/L.22/Rev.1, 26th Session.

Jurisprudence

UNITED STATES. 2013. Supreme Court. **Kiobel v. Royal Dutch Petroleum Co**, 133 S.Ct. 1659.

NOTES

1. As noted by the former UN Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “extraterritoriality is not simply the binary matter that it is often depicted as. It comprises a range of measures from public policies through to regulation and enforcement measures, which can be implemented through both domestic measures with

extraterritorial implications as well as exercises of direct extraterritorial jurisdiction” (UNITED NATIONS. 2010, paras 46 – 50).

2. When Ecuador first advocated the step in September 2013, it was supported by around 600 NGOs (with some of the larger international NGOs standing back) and this too is referred to in way that is designed to reflect negatively on the sector.