Applying Human Rights to Business: Identifying Business Best Practices to Address Human Rights Dilemmas in Complex Environments

Rebecca DeWinter-Schmitt
Director, Human Rights in Business Program
Center for Human Rights & Humanitarian Law
Washington College of Law, American University

Working paper presented at the ISA/IPSA/ECPR/APSA Joint Conference Human Rights in an Age of Ambiguity, Fordham University, New York City

Panel: TB06 Business, Trade, and Human Rights
Wednesday, Tuesday, June 14, 2:00pm-3:30pm

(DRAFT - Please do not circulate or cite without the authors’ permission.)
INTRODUCTION

Rivaling the influence and power of many states, multinational corporations (MNCs) are key global actors capable of significantly impacting on the enjoyment of human rights. While undoubtedly MNCs can be a force for good, among other things fostering economic growth, job creation, and technology transfer, contributing to peace and stability, and promoting the rule of law, in many cases home and host states are unwilling and unable to regulate the negative externalities associated with business activities. As aptly recognized by John Ruggie, former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, governance gaps are one of the root causes of human rights harms linked to business activities. Ruggie (United Nations Human Rights Council, 2008: 3) notes:

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”

It was Ruggie’s efforts to address those gaps that resulted in June 2011 in the UN Human Rights Council unanimously endorsing the UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (United Nations Human Rights Council, 2011). After a failed UN effort to develop a binding treaty framework elaborating norms on the responsibilities of business enterprises for human rights,¹ the UN Guiding Principles on Business and Human Rights (UNGPs) represent a significant step forward in affirming global, multi-stakeholder consensus that companies have a responsibility to do no harm when conducting business activities. The UNGPs are an international declaration and create no new international law. The UNGPs rest on the three pillars of the Protect, Respect, and Remedy framework.

Pillar I – Protect: Under international human rights law, states have the duty to protect people from human rights abuses by third parties, including corporate actors, through the appropriate policies, regulation, and legal means at their disposal.

Pillar II – Respect: Business enterprises should act with due diligence to avoid infringing on the rights of people, and should take steps to address adverse impacts linked to their operations.²

Pillar III – Remedy: Both states and businesses should work to ensure greater access to effective remedy, judicial and non-judicial, for victims of human rights abuses.

The UNGPs are proving to be very influential in establishing consensus on the corporate responsibility to respect human rights and shaping both soft and hard law initiatives. A number of existing standards for responsible corporate conduct are being updated to incorporate the principles of the UNGPs, such as the OECD Guidelines on Multinational Enterprises, International Finance Corporation’s Sustainability Framework and Performance Standards, and ISO 26000: Guidance on Social Responsibility. In addition, a number of countries are developing National Action Plans (NAP) to demonstrate and map their efforts to implement their commitment to the UNGPs; the United Kingdom just released its second NAP in May and the U.S. NAP is expected to be published in the very near future.³

A few MNCs are currently experimenting with implementing their corporate responsibility to respect human rights. As detailed in Principle 15 of the UNGPs, this entails three things: 1) a policy commitment to respect human rights; 2) “a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights”; and 3) a remediation process to address adverse human rights impacts (United National Human Rights Council, 2011: 15). In some cases, MNCs are working with non-governmental organizations (NGOs), some of which have staff who formerly worked for John Ruggie’s team (e.g. the SHIFT project), law firms, and consultants to test pilot UNGPs implementation. In other cases, MNCs are experimenting on their own. In the first instance, many of the business and human rights experts have a strong theoretical grasp of the UNGPs and international human rights law, but limited experience in actually managing a business. They themselves are experimenting with what it means to take human rights “from principles to practice” (Baumann-Pauly and Nolan, 2016). In the second instance, MNCs may not be drawing on the needed human rights expertise, but instead

² Ruggie describes this pillar as grounded in the “basic expectation society has of business” (United Nations Human Rights Council, 2008: 5). Commentary 11 to the UNGPs further elaborates that the corporate responsibility to respect human rights “exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations” (United Nations Human Rights Council, 2011:13).

³ Colombia, United Kingdom, Finland, Norway, Lithuania, Netherlands, Sweden, Denmark have already written NAPs, and approximately 28 more are in progress. See http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans, accessed on May 11, 2016.
passing the task of integrating their human rights commitment into their business operations to their
generals counsel and compliance officers. These senior level managers often view addressing human
rights risk as just one component of their larger risk management efforts, although the commentary to
UNGP Principle 17 clarifies that human rights due diligence can be embedded into other risk
management systems “provided that it goes beyond simply identifying and managing material risks to the
company itself, to include risks to rights-holders” (United Nations Human Rights Council, 2011: p. 16).

This paper reflects the beginning stage of conceptualizing a project to provide tools for that latter group
of senior level managers, who for whatever reasons – lack of financial resources, fear of potential
reputational risks and legal liabilities, inexperience or unwillingness to work with NGOs, etc. – must
implement their corporate commitment to respect human rights on their own and more often than not
with no, or limited, pre-existing knowledge of human rights. In particular, this project seeks to assist senior
level managers of MNCs operating in complex environments, since those environments pose inordinate
human rights challenges.

I use the term complex environments here, although in the business and human rights field a number of
terms are used interchangeably to describe such areas of operation – conflict and post-conflict, conflict-
affected, high risk, fragile or failed states, unstable, etc. – and a range of definitions are attached to those
terms (Schuit and van Dorp 2015, 2015). Although drafted with the private security industry in mind, the
International Code of Conduct for Private Security Service Providers (ICoC) defines complex environments
as:

“Any areas experiencing or recovering from unrest or instability, whether due to natural disasters
or armed conflicts, where the rule of law has been substantially undermined, and in which the
capacity of the state authority to handle the situation is diminished, limited, or non-existent.”

Private security providers primarily operate in complex environments, alongside a number of MNCs from
other sectors, and this definition captures characteristics of those areas of operation that result in human
rights risks linked to business activities.

---

4 The ICoC can be found at http://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf, accessed on May
11, 2016.
Human rights risks are greater in complex environments for a number of reasons. For example, with regard to weak governance zones and active conflict zones the risks of gross human rights abuses are especially prevalent because of failed institutions of governance (OECD, 2006, United Nations Human Rights Council, 2011: p. 10-11; Schuit and van Dorp, 2015). According to a report by SOMO (Schuit and van Dorp, 2015: p. 1), such areas are particularly prone to the most egregious types of business-related human rights abuses, suffer from a lack of rule of law which makes providing victims of abuses access to effective remedy challenging, and MNCs in such areas may exacerbate conflict through their business activities for example by supporting particular sides in a conflict or increasing community tensions. More generally, weak governments enable conditions that hinder the internalization of negative externalities, for example through inadequate regulation and under-resourced regulatory bodies, and hamper corporate accountability through weakened rule of law. Corruption is often endemic and proceeds from foreign direct investment may disproportionately benefit the political elite relative to affected communities and may bolster repressive regimes.

Setting aside for a moment “bad actors,” who intentionally seek to profit from conflict or weakened governance, complex environments pose challenges to companies attempting to behave in a responsible, rights-respecting fashion. Respecting human rights in a complex environment can lead to dilemmas in terms of identifying the best course of action to respond to a negative human rights impact or a potential human rights risk in a complicated local setting. The next section describes the origins of this project, examines more closely what is meant with business dilemmas and their root causes, and provides some examples of re-occurring dilemmas in complex environments. The section thereafter describes principles and derived best practices for resolving human rights dilemmas in a rights-respecting fashion. It outlines problem-solving steps in an effort to begin fleshing out a practical set of guidelines to assist companies with taking principled human rights commitments and embedding them into business practices in situations where the best course of action is not always apparent. The final section applies this reasoning process to a human rights dilemma, respecting freedom of religion at the workplace in an area of operations characterized by religious tensions.

---

5 The OECD Investment Committee, which is home to the OECD Guidelines for Multinational Enterprises, uses the term weak governance zones. This is similar to the term complex environments, and is defined as “investment environments in which governments cannot or will not assume their roles in protecting rights (including property rights), providing basic public services (e.g. social programmes, infrastructure development, law enforcement and prudential surveillance) and ensuring that public sector management is efficient and effective” (OECD, 2006: p.11).
Business and Human Rights Dilemmas

The impetus for this project comes from my direct engagement with MNCs operating in complex environments which have made some type of formal commitment to respect human rights. The private security industry is quite evolved relative to other industries in agreeing to adhere to human rights and humanitarian law principles in their operations, as embedded in the ICoC and other national and international human rights risk management standards, and evidencing that adherence through various forms of governance and oversight, such as the multi-stakeholder ICoC Association and a framework for third-party certification to management standards (DeWinter-Schmitt, 2016). Despite strong commitments, at the annual summit of the U.S. private security industry’s trade association, the International Stability Operations Association (ISOA), a panelist, who provides auditing services to certification bodies, described some examples of the human rights issues with which private security companies (PSC) struggle.

Dilemma 1: A foreign PSC operating in Iraq promoted a local woman to a managing role, which placed her in charge of local men who were providing security services for the company. When the local men found this out, they went to her house and began to protest. The PSC decided that the best course of action was to change the woman’s title so as not to indicate that she was in a supervisory capacity, while allegedly still empowering her with managerial authority. While this solution “kept the peace,” the question arises whether or not it is a human rights conforming solution that ensures women’s right to freedom from discrimination at the workplace.

Dilemma 2: Shiite employees working for a foreign PSC in Iraq displayed flags on company vehicles representing two revered Shiite imams directly before an important Shiite holiday. An ex-pat employee of the PSC tore down the flags, which resulted in an angry mob violently beating him. The mob contained employees of the PSC and another PSC and bystanders. The PSC decided to change its policy and allow the display of religious symbols at the workplace. While this helped quell the immediate unrest related to this incident, the question remains as to whether allowing the display of religious symbols at an Iraqi

---

workplace, in a country characterized by long standing tensions related to the history of a Sunni minority dominating a Shiite majority, is a rights-conforming effort to ensure freedom of religion or a poor decision that could lead to future tensions, possibly even violence, at the workplace compared to other potential courses of action.

Naturally, other industries also often find themselves operating in complex environments, none more so than the extractives industry (MacDonald and McLaughlin, 2003). Oil, gas, and mining MNCs have come under scrutiny for some time now regarding the human and environmental impacts of their operations. These companies have also made a range of commitments to various human rights related standards (such as the Voluntary Principles on Security and Human Rights\(^7\)), are using oil and gas sector specific reporting requirements (see the Global Report Initiative’s oil and gas sector disclosures\(^8\) and the Extractives Industry Transparency Initiative\(^9\)), and sector specific tools produced by oil and gas (IPIECA\(^10\)) and mining (ICMM\(^11\)) trade associations to enable companies to undertake a human rights due diligence process. In 2002, British Petroleum (BP) became a frontrunner in undertaking the first comprehensive (and ongoing) human rights impact assessment of one of its projects, namely the Tangguh Liquefied Natural Gas Project located in Papua Barat province in Indonesia. BP set up a Tangguh Independent Advisory Panel (TIAP), which includes independent outside experts, to regularly review the project.\(^12\) At a recent briefing on the TIAP’s latest report, a senior level manager in BP’s Communication and External Affairs department elaborated on some of the human rights dilemmas that the company faced despite well over a decade and a half of efforts to conscientiously address its impacts on the local population. She noted in particular three challenges:

1. Public security forces in the area, with questionable intentions, are insisting on having a greater role in the project and surrounding communities, even though BP feels more secure with its own private security forces. While ideally it is the obligation of the state, and not corporate actors, to ensure


people’s right to security, what are the responsibilities of a MNC when state forces are known to be corrupt and prone to intimidation tactics and excessive use of force?

2. BP had to determine which villages were directly affected by the project for purposes of compensation, social initiatives, and engagement. However, BP found drawing a geographical line challenging since often villages neighboring those that were determined to be project affected felt left out of the benefits of the project, which resulted in inter-community tensions. Ultimately, BP expanded its definition of project affected peoples to include 62 villages. This raises the challenge of how to define project affected populations and how to measure and delimit impact (since ultimately BP’s impacts extend up to the national level), and to what extent actual versus perceived impacts should be taken into account.

3. One of the social initiatives BP undertakes related to the Tangguh project is to offer local women micro-enterprise opportunities. However, at times BP encountered backlash from the women’s families because a woman leading a business challenged traditional notions of the role of women in family and society. As in the case described above, this raises the issue of the ability of the company to ensure non-discrimination against women, recognizing that the local cultural and societal context may make that challenging and in some instances may expose the impacted woman to potential second order risks.

These anecdotal stories exemplify the challenges companies face when trying to fulfill their responsibility to respect human rights. Codes and standards, which build on international human rights instruments, assurance frameworks, which seek to assess compliance with them, as well as human rights due diligence tools, which offer guidance on how to identify, address, and account for human rights risks and impacts, often do not adequately assist corporate managers with understanding how to realistically apply human rights principles in a messy and complicated local context. As noted above, many of the NGOs advocating for corporate adherence to the UNGPs have little experience in managing global business operations, nor do they always understand the complexities of the local operating environments. Unfortunately, some view the failure to fully implement a human rights principle as a simple excuse for not wanting to actually adhere to that principle. These anecdotes reveal real issues that can be barriers to the corporate responsibility to respect human rights. How do corporate responsibilities to respect human rights fit with state obligations to protect human rights, bearing in mind that the state is the ultimate guarantor of rights

---

13 This accusation was made by a convener at recent multi-stakeholder conference on measuring human rights impacts in response to a corporate participant expressing challenges in adhering to a human rights principle.
under international law? What opportunities and limitations are on companies operating in an environment where governments do not uphold or actively breach their human rights obligations? To what extent can companies implement human rights principles in a culturally sensitive fashion without slipping into cultural relativism? How should companies respond when efforts to implement a human rights principle conflict with the respect of other rights or have unintended second order effects?

Although resolving dilemmas is very much a part of human rights practice, dilemmas “often remain underdocumented and overlooked by writings on human rights, which frequently focus on the more abstract legal and philosophical analysis of human rights” (Dodai, 2014: p. 389). This seems somewhat surprising considering, as Dodai (2014: p. 389) rightly notes,

“the world of human rights practice is fraught with dilemmas. Across all aspects of human rights activity, tensions between absolutism and pragmatism, radical and gradual changes, long-term and short-term gains, or assistance to individuals versus collective changes, abound. Different policy goals often clash with each other: better protection for the rights of some may have negative effects for the rights of others; limited but immediate gains may hinder slower but broader change.”

Dodai (2014: p. 390) sees these dilemmas manifesting themselves in “tensions between different kinds of rights, contradictions in the way rights can be applied, constraints in the implementation of rights, and limits on what they can achieve.” As he remarks (2014: p. 390),

“[r]eal world dilemmas are structured on uneasy alternatives, based on the grammar of ‘on the one hand, on the other hand’, whereas human rights norms are often based on the grammar of absolute statements, of self-proclaimed ‘trumps’ (‘we have a right to’).”

The challenges of addressing human rights dilemmas are also discussed to some extent in practitioner oriented materials for companies seeking to respect human rights. Focused to MNCs operating in emerging markets, the Human Rights and Business Dilemmas Forum (HRBDF), which is funded by the GE Foundation and implemented by Verisk Maplecroft in conjunction with the UN Global Compact, describes the dilemma for responsible business as “how to respect and support human rights in complex social, ________________

14 The International Chamber of Commerce and International Organization of Employers were very keen throughout the Ruggie process to stress the difference between state obligations to protect human rights and the responsibilities of non-state actors. They stressed that business should not become “a surrogate government” and that ultimately national governments, working in conjunction with the international community, must create the legal frameworks to protect human rights (IOE, ICC, and BIAC, 2006, p.3).
political and economic contexts – particularly where these human rights are being violated.” According to HRBDF, dilemmas manifest themselves when:

- “[r]esponsible intervention carries the risk of negative or unforeseen consequences for the workers or local communities concerned;
- [w]here a responsible and intuitive upstream solution in an operating context may carry reputational risk in downstream consumer markets;
- [t]he full satisfaction of all stakeholder expectations is impractical given the commercial, political and legal realities faced by the companies and their technical competence;
- [q]uestions arise as to the extent to which company responsibility extends through different tiers of the supply chain, or with respect to government partners or local distributors; [and]
- [i]t is beyond the remit of companies to address some of the root causes of the human rights violations in question, such as resource security, poverty and lack of education.”15

The causes of human rights dilemmas are manifold. Drawing on Slim (1997), Dodai (2014: p. 389) identifies the sources of dilemmas in having to act in the face of “uncertain evidence”; making choices when there are diverging considerations based on competing moral and non-moral objectives; and taking action based on determinations of what is the greatest good, when there are multiple goods to be pursued, or alternatively what is the lesser wrong when there is no course of action that would not in some way violate a human rights principle. Specific to companies operating in conflict zones, two frequently cited root causes are conflicts between international human rights standards and local norms and competing claims of stakeholders, which is particularly relevant in areas suffering from ongoing or recent communal conflict (Roling and Koenen, 2010).16 In addition, unintended consequences and second order effects, not only in relation to project-affected stakeholders, but also with regard to effects on social and familial relationships, interactions with government authorities, and business partners and stakeholders within the supply chain can lead to challenges. This reflects what Dodai (2014: p. 390) describes as the messiness of human rights in the “real world,” where the “neat corpus of abstract human rights norms meets the messy political, social and personal reality in which diverse actors claim those rights.” Operationalizing “universal, deontological principles” brings with it “contextualized political realities and trade-offs” and

16 As Slim (1997: p. 247) remarks in relation to humanitarian organizations operating in the same environments, they often find themselves in a context where there is an “already uneven moral playing-field” and a “lawless environment in which there are few mutually respected and enforced [human rights and humanitarian law] norms.” In such contexts, third parties are likely to be exposed to “more extreme moral choices.”
courses of action that “may look appropriate or even essential in terms of normative principles in the abstract” lead to “unintended negative consequences” in practice (Dodai, 2014: p. 390). Ultimately, those seeking to ensure respect for human rights must recognize that human rights norms “do not always provide a clear recipe as to how to advocate for them in practice, and that considerations beyond the human rights corpus – political, social, financial, technical, personal – always have to be factored in” (Dodai, 2014: p. 391). Slim (1997) concurs and notes that in particular organizations seeking to respect human rights are often faced on the ground with situations that force them to prioritize a particular right; human rights principles, despite claims of universalism and indivisibility, often stand in competition with each other.

I should note that for purposes of this paper I understand human rights dilemmas to reflect challenges arising out of corporate efforts to implement their responsibility to respect human rights, and not the gamut of challenges generally associated with operations or investments in complex environments per se. Of particular interest are instances where corporate efforts to respect one party’s human rights may compete with respecting the rights of another party, or may pose second order risks to the company and its stakeholders (Buhmann, 2012). In other words, what should a company do if efforts to avoid violating one right lead to the violation of another right? Examples of some of most frequently cited human rights dilemmas associated with working in complex environments featured in the academic and practitioner literature include the following (see for example International Alert, 2005; Rolig and Koenen, 2010; HRBDF):

- A non-discrimination employment policy runs counter to traditional female roles in society or exacerbates long-standing inter-group rivalries between ethnic, religious, or tribal groups.
- Granting freedom of speech or rights to freedom of association and collective bargaining creates conflict with the local regime and endangers employees and labor leaders.
- Recognizing freedom of religion in an area suffering from religious strife leads to escalation of tensions within the workplace or local community.
- Efforts to provide compensation or remediate harms caused to affected communities create inter- and intra-community tensions between those who have received compensation and those who have not, and may re-surface existing disputes over ownership of land and other resources.
- Efforts to engage with local communities reinforces structures of dominance and hierarchy and exclude already marginalized populations.
• Efforts to implement human rights norms run afoul of local laws which do not give full recognition to those rights.
• The creation of project-related employment opportunities leads to a large influx of outsiders that overtakes local infrastructure and resources and leads to tensions between locals and newcomers.
• Social investment initiatives meant to offer sustainable development opportunities can worsen relationships between the company and community and groups within the community if they do not take into account historical group relations, inequities, and distribution of power and wealth.
• MNCs seeking to rid their supply chains of labor rights abuses, such as forced and child labor, are accused of eliminating jobs for those most in need.

**Business Best Practices: Rights-Respecting Problem Solving of Dilemmas**

Putting in place measures to meet the corporate responsibility to respect human rights is the first step a company must take to prevent becoming entangled in a human rights dilemma by identifying and acting on human rights risks before they occur. Pillar II of the UNGPs is divided between five Foundational Principles captured in Principles 11-15, which are elaborated on in the Operational Principles 16-22 (United Nations Human Rights Council, 2011). As touched on above, the Foundational Principles establish that companies should avoid infringing on human rights and address adverse impacts; the responsibility to respect human rights refers to all internationally recognized human rights; companies should avoid causing or contributing to adverse human rights impacts either through their own activities or through their business relationships; the responsibility to respect applies to all companies, although factors such as size, sector, and operational context may influence the scale and complexity of the means through which they do so; and to meet the responsibility to respect companies must create policies and processes including a human rights policy commitment, human rights due diligence process, and corporate-level mechanism for remedy.

Without going into too much detail, the operationalization of these principles is further broken down into policy commitment, human rights due diligence, remediation, and issues of context. The human rights

---

18 There are numerous resources available to companies in terms of helping them understand their UNGPs responsibilities and providing tools for developing human rights policies, conducting human rights risk and impact assessments, developing grievance mechanisms, engaging with stakeholders, and human rights reporting. See in
policy commitment is to be made and approved by senior level management, draw on internal and external expertise as needed, stipulate the company’s expectations of its personnel, and be communicated to internal and external stakeholders. In addition, the commitment must find its way into operational policies and procedures. Companies operating in conflict zones may find it valuable to look to the SOMO guide on *Multinationals and Conflict: International Principles and Guidelines for Corporate Responsibility in Conflict-Affected Areas* to understand the types of existing principles and guidelines that elaborate the widely accepted human rights expectations placed on them.¹⁹

The HRBDF site provides a concise summary of the five operational principles addressing the human rights due diligence process in more depth.²⁰ The components of the due diligence process entail:

- **“Periodic assessment of actual and potential human rights impacts of company activities and relationships:** Human rights due diligence will vary in scope and complexity according to the size of a company, the severity of its human rights risks and the context of its operations. Impact assessment must be continuous, recognising that human rights risks may change over time as companies' operations and operating contexts evolve. The process should draw on internal and external human rights experts and resources. Furthermore, it should involve meaningful engagement with potentially affected individuals and groups, as well as other relevant stakeholders.

- **Integration of these commitments into internal control and oversight systems:** Effective integration requires responsibility for addressing such impacts to be assigned to the appropriate level and function. It also requires appropriate internal decision-making mechanisms, budget allocation and oversight processes.

- **Tracking of performance:** Tracking of performance should be based on appropriate qualitative and quantitative metrics and should draw on feedback from both internal and external stakeholders. In addition, it should inform and support continuous improvement.

- **Public and regular reporting on performance:** When reporting, companies should take into account the risks the communication of certain information may pose to stakeholders themselves, or to company personnel. In addition the content of the reports should be subject to the legitimate requirements of commercial confidentiality.”

---


²⁰ See [www.hrbdf.org](http://www.hrbdf.org), accessed on May 18, 2016.
Regarding remediation, companies must remediate any harms they have caused or contributed to through a legitimate process.

Finally, the UNGPs address, to a limited extent, how issues of context affect the corporate responsibility to respect, which is relevant for human rights dilemmas associated with the peculiarities of specific operating environments. Principle 23 states that companies should both comply with local laws and respect human rights, but where the two conflict, companies should find ways to uphold internationally recognized human rights principles. This idea is bolstered by the recommendation that companies treat the risk of violating human rights as a legal compliance issue, even if the risk posed by not doing so may actually be non-legal in nature. However, exactly how a company is to navigate the tightrope between respect for local laws and human rights when the two stand in contradiction to each other is not detailed. Principle 24 also addresses competing human rights claims to the extent that it recommends prioritizing dealing with adverse human rights impacts based on their severity (scale and scope of impacts) and whether delaying response would affect their remediability. However, as Dodai (2014: p. 392) notes, “[t]he seemingly mundane issue of ‘prioritizing’ is a context where human rights organizations often face some of their most important dilemmas.” And unfortunately, the UNGPs do not provide explicit guidance on how to deal with human rights dilemmas. As Buhmann (2012: p. 216) notes, “despite the considerable, important, and laudable efforts made by the SRSG [John Ruggie] and his team to spell out the UN Framework into the Guiding Principles, significant dilemmas in relation to the corporate responsibility to respect human rights remain to be identified, described, understood, and provided with guidance for companies and stakeholders.”

Assuming that companies undertake a thorough effort to meet the human rights due diligence recommendations detailed in Pillar II of the UNGPs, this should go a long way in preventing and mitigating any negative human rights impacts. However, there are still likely to remain situations where there is not one clear optimal course of action and multiple possible ‘least-best’ courses of action, which may potentially have unintended and unforeseen second order effects, must be weighed against each other.

---

21 Buhmann’s (2012) case study looks at a Danish pharmaceutical company, Lundbeck, which had to decide whether to stop selling a drug in the U.S. to treat severe epilepsy because correctional facilities in death penalty states have been using it as part of the lethal injection drug cocktail. The dilemma is “the responsibility of a company not to be complicit in violations of the right to life and/or the right to freedom from torture and cruel, degrading and inhuman treatment, versus the right to the highest attainable standard of health, particularly through access to medicine for individuals suffering from severe epilepsy” (Buhmann, 2012: p. 212).
What are steps that a company can take to determine the most appropriate course of action – i.e. the most human rights conforming course of action with the least amount of residual risk to the company and stakeholders?

Step 1: Understand the nature of the potential or actual human rights impacts

If a company has undertaken a human rights risk and impact assessment (HRRIA) as part of its due diligence process, it will already have accomplished a number of items:

- It will have created a mapping of internal and external stakeholders whose rights may be, or are being, impacted by its operations.
- The company will have established a process to engage with those stakeholders to gather information on the actual and perceived human rights impacts they are experiencing and more broadly to understand their interests, needs, and concerns.
- The company will have created a risk register detailing the actual and potential human rights being impacted, rated the severity of those impacts to the rights-holders, and identified the affected stakeholders.
- Finally, the company will have assessed the effect of those potential risks and actual impacts on the company in terms of associated risks and liabilities (e.g. financial, operational, reputational, and legal).

The remaining steps focus on addressing a human rights impact when responding poses a dilemma.

Step 2: Understand the dilemma

Assuming the company has identified a human right that is being particularly severely impacted, and recognized that addressing the harm will be challenging, the next step will be to better understand the nature of the right, the affected stakeholders, and the local context.

- **The nature of the right**: Human rights are high level articulations of norms. However, there are numerous sources to understand the precedent of how those rights have been interpreted and applied in real world situations. For example, the treaty bodies of major human rights treaties publish general comments interpreting the provisions of their respective treaties and various regional human rights commissions and courts publish opinions and judicial decisions. The Castan Center for Human Rights, in conjunction with the UN Office of the High Commissioner of Human
Rights and the UN Global Compact, has also published a reference guide for companies, *Human Rights Translated*, that interprets rights in the business context.\(^{22}\)

Furthermore, although human rights are recognized as inalienable, indivisible, and interdependent, one could justifiably argue that there are some “basic rights,” as initially conceptualized by Henry Shue (1996), which must first be respected if other rights are to be enjoyed as well. This would include recognized non-derogable human rights, which often are under threat in complex environments.\(^{23}\)

If a human rights dilemma arises in which a non-derogable right stands in tension with a derogable right, efforts to protect the non-derogable right should take precedence.

- **The affected stakeholders:** Affected stakeholders include all those stakeholders that are (or perceive themselves to be experiencing) a loss of their rights due to some direct activity of the company or activity associated with its business relationships. Affected stakeholders may also include stakeholders potentially impacted in the wake of a course of action a company takes to address a human rights abuse. The HRRIA should have resulted in a mapping of all internal and external stakeholders, in this step the company hones in on those stakeholders affected by the particular human rights dilemma. It should continue to deepen engagement with those stakeholders through an ongoing and iterative process to understand their grievances and to learn about their needs, interests, and priorities. The company may want to draw on local expertise and civil society organizations during the engagement process to ensure that it is indeed soliciting a nuanced, local perspective from those who understand the particular cultural, social, political, and economic context. Those directly impacted by a business activity may also be valuable “moral role models” (Slim, 1997: p. 255) in terms of the perspective they offer when vetting courses of action in response to a dilemma. Finally, the company should identify possible opportunities as well as second order effects and risks of meeting each stakeholder groups’ interests. This should assist in capturing any potential rights trade-offs between stakeholders.


\(^{23}\) For example, the security operations management system standard ANSI/ASIS PSC.1 – see footnote 6 – lists non-derogable rights particularly under threat in complex environments, including right to life; freedom from genocide and crimes against humanity; freedom from torture, cruel, inhuman, or degrading treatment and punishment; freedom from slavery, slave trade, and servitude; rights to due process, equal treatment before the law, and a fair trial; right to freedom of thought, conscience, and religion; and freedom from discrimination.
• **The local context:** As noted above, one of the causes of human rights dilemmas are tensions between international human rights norms and local laws and customs. The company must seek to understand the local context and the enablers and inhibitors to respecting a right. For example, is a particular right protected under local law? Are the local laws upheld and enforced? If the right is protected under local law, but not enforced, it should offer the company greater leeway in using its own influence to push for greater respect of that right. Do cultural traditions enable or hinder respect of a right? Deep-seated cultural traditions are probably some of the most intransigent causes of human rights dilemmas. However, if a company considers which other stakeholders or institutions (e.g. government, families, places of worship, schools) are implicated in the protection, promotion, and enjoyment of a right, they may be in a position to assist with working around that dilemma even under seemingly intransigent circumstances. What is the ideal state which would ensure that the stakeholder could enjoy a particular right? Does that ideal state differ from the baseline at which the stakeholder was before the rights abuse occurred? This kind of information will help scope the types of solutions that may be realistic given the local context and starting conditions, and may aid in charting a course for change over a certain time frame.

*Step 3: Identify possible courses of action*

Next the company should draw up possible courses of action to address the abuse. Assuming that severe risks and impacts are prioritized, it may be necessary to differentiate between short term actions to immediately stop the abuse, versus medium and long term actions to address root causes and create enabling conditions to ensure that the right is protected and promoted over time. The courses of action may run the gamut from doing little more than remaining compliant with local law and respecting local customs to identifying means to respect and promote the international human rights norm at stake, even if this runs counter to local practices. As detailed in UNGPs Principle 19, when identifying courses of action, the company should consider the “leverage” it has to address an adverse impact, its available resources, and how it might be able to use its influence over other stakeholders to address the abuse in a collaborative fashion. More often than not, ensuring respect for human rights is a shared responsibility among multiple stakeholders. For each identified course of action the company should contemplate the opportunities and risks that course of action poses for both rights-holders and the company itself, the resources involved in executing it, as well as the potential second order effects associated with addressing the abuse. Much like any other type of risk analysis, the company must choose what it perceives as the best course of action based on its risk evaluation, prioritization of risks, identification of risk treatments.
and controls, and justification for a certain degree of risk tolerance relative to its objectives as an organization and responsibilities vis-à-vis rights-holders.24

**Step 4: Mitigation and ongoing evaluation**

Once a particular course of action has been taken – or courses of action if both longer and shorter term in nature – the company must track its responses to assess whether or not they were effective and had the desired outcomes. Should harms result either from the course of action not taken, assuming some responsibility on the part of the company for those harms, or the course of action taken, then the company should take measures to mitigate those effects (Slim 1997). Evaluation of the outcomes of a course of action should ideally be accomplished through measurable indicators that can be tracked over time, although monitoring will also be facilitated by on ongoing engagement and consultation with stakeholders. Courses of action may need to be adjusted as a result of the monitoring and evaluation.

**Vignette: Freedom of Religion at the Workplace**

*Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

(Article 18, International Covenant on Civil and Political Rights)

I will use Dilemma 2 – the story conveyed by a consultant about a PSC employee attacked by an angry mob in response to the removal of religious symbols – to briefly exemplify the reasoning process a company would go through when trying to identify the best policy regarding dilemmas around ensuring freedom of religion at the workplace in a complex environment. Although not stated by the consultant, this story is likely based on an event that took place in November 2013 in Iraq. A British security consultant working for G4S, which had been hired by the oil services company Schlumberger at the Rumaila oil field, was dragged from his car and beaten by a crowd of other local security contractors and bystanders after he apparently tore down flags representing an important Shiite imam (Imam Hussain, the 7th century imam and grandson of Prophet Mohammed) from a company vehicle. According to one report, the security consultant fired a gun at some point during the dispute injuring an Iraqi worker. The incident

---

24 The ANSI/ASIS PSC.1 standard for private security operations in complex environments details a risk assessment and treatment process, see footnote 6 above.
happened in the lead up to one of the holiest Shiite holidays, Ashura. Shiites had been banned under the Sunni regime of Saddam Hussein from practicing their religious rituals. Apparently this incident followed another where an Egyptian worker, hired by oil services firm Baker Hughes to work on a drilling rig, also tore down flags representing Imam Hussain and Imam Ali. In the wake of these incidents, protestors stormed Schlumberger’s offices and the company suspended operations. The Iraqi police and army intervened and expelled the protestors. The Iraqi government requested that the security consultant be deported.25

Based on a recent article examining 13 PSCs certified to a human rights risk management standard (Sebestead 2016),26 it is fairly safe to assume that G4S did not adequately do its due diligence in assessing its actual and potential human rights impacts on workers and the community surrounding the Rumaila oil field. G4S ranked a score of 1.25 out of 3 on a number of key transparency and human rights requirements of that standard, to include communication of human rights risk assessment. But for the sake of argument, assuming that G4S had done a human rights risk assessment and identified the dilemma of ensuring religious freedom at the workplace, what are the nuances of that dilemma? Since complete information is not available, I will fill in the blanks for the purposes of this thought experiment. First, let us assume that G4S has personnel that are non-Muslim (primarily likely the ex-pats and third country nationals) and Muslim Shiites and Sunnis. Second, let us also assume that the employee had removed the flag from the workplace because G4S has a policy of no religious symbols at the workplace. Based on this information, and taking into account the long-standing religious tensions between Shiites and Sunnis, the human rights trade-off appears to be between granting employees the freedom to observe their religion but potentially escalating religious tensions that could threaten other employees and bystanders’ right to security of person should violence erupt. One could also frame the dilemma as denying the right to religious freedom but securing the rights to life and security of person.

According to the Human Rights and Business Dilemmas Forum (HRBDF), freedom of religion or belief is an issue at the workplace in two ways.27 First, employees must be protected from religious discrimination, and second, employers must make reasonable accommodations to ensure freedom to observe and practice one’s faith. However, General Comment 22 on Article 18 of the International Covenant on Civil and Political Rights by the UN Human Rights Committee notes that the freedom to manifest religion can

25 I have found one CNN article describing this event, see http://www.cnn.com/2013/11/13/world/meast/iraq-uk-contractor-attacked/, accessed on May 26, 2016, and a Facebook post from an online group for bodyguards, see https://m.facebook.com/BodyguardSkills/, accessed on May 26, 2016.
26 The standard is the ANSI/ASIS PSC.1 standard mentioned in footnote 6.
be restricted if needed to protect public safety, order, health, morals, or the rights of other people.28 Under US law (Title VII of the Civil Rights Act), companies may limit freedom of religious expression at the workplace to the extent it results in undue hardship on the company, compromises the human rights of other employees, or increases health and safety risks. Furthermore, as HRBDF points out these two aspects of religious freedom are very closely linked. For example, the accommodation of one religion may lead employees of other faiths to feel that they are unduly being neglected or discriminated against. The other way around, forbidding any expression of religious belief at the workplace may lead to discrimination against those employees whose faith requires open expression, such as wearing head covering. That being said, while non-discrimination is a non-derogable right, religious expression is not, as evidenced by the ability to place restrictions on that right for delimited reasons. The right to life and security of person is obviously a non-derogable right. So if the trade-off involves the right to express one’s religion or belief versus one’s or another person’s physical security, the latter right trumps.

Regarding the local context, the Department of State’s International Religious Freedom Report states that the Iraqi constitution recognizes religious freedom and prohibits religious coercion, although the constitution also “recognizes Islam as the official religion, mandates Islam be considered a source of legislation, and states no law may be enacted contradicting the established provisions of Islam, though it does not differentiate between Sunni and Shia Islam.”29 In practice, however, there are contradictions between the constitution and other legal provisions; due to sectarian violence and the threat posed by ISIL the government does not have effective control over its territory and cannot always enforce religious freedom; Sunnis feel persecuted by the government and its security forces; and in particular regions dominated by religious groups, religious discrimination is pronounced to include in hiring practices. The Rumaila oil field is in Basra which has predominantly a Shiite population. Publicly the Iraqi government has called for religious tolerance. This reflects a situation where following national laws would not run counter to international human rights norms. Even if religious freedom is not always respected in practice, a company in Iraq has the leverage to respect religious freedom at the workplace without technically running afoul of the law.

Key stakeholders affected by this human rights dilemma are the employees of G4S (presumably made up of various religious affiliations), the surrounding community, the clients of the company (Schlumberger Oil Field Holdings), and government officials. It would seem reasonable to assume of the G4S employees and surrounding community that all are interested in being allowed to worship without experiencing any

---

28 See [http://www.hrbdf.org/dilemmas/freedom-religion/#.V0cTaZErKM8](http://www.hrbdf.org/dilemmas/freedom-religion/#.V0cTaZErKM8), accessed on May 26, 2016.

discrimination or threats of violence because of their beliefs. However, in practice Shiites feel they have been historically disadvantaged under the regime of Saddam Hussein, whereas Sunnis believe that they face retribution for their privileged status under Hussein as well as discrimination based on public perceptions that they sympathize with former regime and terrorist elements, such as ISIL. Under such circumstances, display of religious symbols at the workplace could be perceived as an effort by one group to express dominance over another or to discriminate. While ideally the government should be working to ensure religious tolerance, in practice local officials, who are predominantly Shiite, are likely to support hiring and workplace practices that in particular favor their Shiite brethren. Clients of G4S, like Schlumberger, are likely concerned with maintaining a peaceful workplace, as work stoppages related to violent tensions carry operational, reputational, and possibly legal risks. The company is also likely interested in ensuring consistency between its policy and G4S’s policy on non-discrimination and accommodation of religion at the workplace.

When deciding a course of action, G4S will want to consult with these stakeholders. What are the views of the employees regarding the display of religious symbols at the workplace? Do they feel it would disrupt the unity of the workplace? Turning to the surrounding community, are there civil society organizations focused on promoting religious tolerance? Are there religious or political leaders respected by all faiths who may be able to offer their perspective as a “moral role model” (Slim 1997)? Security providers like G4S enable oil companies to operate in unstable environments like Iraq; needless to say oil revenue is essential to the Iraqi economy. Could G4S together with its oil sector clients approach the local government for assistance in terms of formulating a policy that is in keeping with local laws while promoting greater religious awareness and tolerance? Should another violent outbreak occur, could G4S and Schlumberger discuss with Iraqi security forces how to deescalate the situation and to respond with the minimal amount of force necessary?

Based on this somewhat limited contextual information, it would appear that the two courses of action available to G4S are to either implement a policy equally applicable to all employees to completely forbid the display of religious symbols at the workplace or to allow for the display of religious symbols. Note that I am assuming that practices of Islam that cut across Sunni and Shiite faiths, such as regular prayers, will still be allowed to occur, so G4S would not be infringing on the right to manifest religious beliefs per se. In this case, it would appear that the first course of action is most appropriate given the politically charged climate in which allowing religious symbols could inflame religious tensions and lead to violence that could

---

infringe upon employees’ and the community’s right to physical security. Furthermore, the risks to G4S of allowing religious symbols that could incite violence seem to pose possible “undue hardships” on the company, as stipulated in the U.S. Civil Rights Act. For example, had the employee attacked by the mob been beaten to death the company would likely have faced a civil lawsuit as well as reputational damage. The policy of no religious symbols at the workplace would be shared with employees before they are hired and it should be communicated that employment is conditioned upon following the policy. G4S may also want to consider pursuing hiring practices that support a workforce that reflects the ethnic and religious make-up of Iraqi society at large. This would also evidence that the company is not seeking to disproportionately favor any one group. When employees receive their onboarding training, one component should be to review the policy, its implications for particular practices of worship, and reiterate the company’s complete lack of tolerance for religious discrimination at the workplace. When employees are located at the worksites of clients, the policy should be communicated to clients in advance. Any discrepancies between G4S’s and a client’s policy should be addressed. Admittedly, this course of action would offer an immediate solution that trades-off the right to freedom of religion in favor of the right to physical security. In the long term, it would be better if the threat of violence would dissipate in the face of religious tolerance, thereby making it possible for all faiths workplace to display religious symbols at the workplace on important holidays, as long as not disruptive in some other fashion to company operations. There are steps that G4S can take to enable such conditions. For example, it can work with civil society organizations, faith-based leaders, and government officials to raise awareness about different faiths, dispel prejudice and accommodate religious diversity, and promote tolerance and understanding. These dialogues can happen through workplace training, but ideally should be supported throughout the entire community. As suggested above, G4S should track, through appropriately designed metrics and ongoing dialogue with stakeholders, how the policy is unfolding, to include any unintended risks posed by it. In addition, the company should have a complaints mechanism in place, and employees should be encouraged to use it – anonymously if preferential – to report any instances of religious discrimination. The company should communicate to employees the process by which complaints will be adjudicated. The policy may need to be adjusted based on the information gathered from ongoing monitoring and the complaints process. The company should regularly report to employees and possibly other stakeholders on the progress being made. Hopefully with time, G4S will be able to move towards loosening the restriction as a culture of tolerance and understanding deepens.
Conclusion

Implementing the corporate responsibility to respect human rights in complex environments may be more challenging in practice than initially recognized by business and human rights advocates and companies who have committed to human rights standards. In a messy and complex “real world,” a course of action to redress a human rights harm may result in a human rights dilemma, where even the best of intentions leads to trade-offs between rights and second order effects, and can pose additional risks to both stakeholders and the company. While undertaking a human rights due diligence process as prescribed in the UNGPs is invaluable for preventing and avoiding human rights risks, they provide very little guidance on how a company should respond to a human rights dilemma. I have attempted here to outline some initial steps a company can take to address such dilemmas by gaining a deeper understanding of the nature of the affected right and precedence in terms of its interpretation and application; by developing a grasp of affected stakeholders’ needs, interests, and priorities and a more nuanced understanding of the local context, drawing on local expertise as appropriate; by formulating possible courses of action and identifying their associated risks; and by tracking and evaluating the effectiveness of those responses.

However, these practical steps, which ideally should be part of any thorough human rights due diligence process, seem in many ways to be a matter of nothing more than common sense reasoning through a risky situation based on a deep knowledge of an environment and the stakeholders in it. What remains ahead is to develop more specific guidance for working through a human rights dilemma – similar to the suggestion above that protecting a non-derogable right trumps protecting a derogable right. Further exploration of the literature on applied ethics may be valuable, as what companies are struggling with ultimately is the philosophical tension between deontology and utilitarianism. In other words, if human rights are something akin to first principles, then how does one go about deciding a potential trade-off between them to ensure the greatest good in a less than optimal situation? Having acted for the right reason in the face of a human rights harm will not fully protect a legally liable corporate actor. The practice of business and human rights has not yet found a way to adequately address such trade-offs and more research is needed, ideally in an inter-disciplinary, multi-stakeholder fashion to solicit the needed expertise from philosophers, who have studied moral dilemmas, and from human rights advocates and senior level managers, who struggle with human rights practice in a messy and imperfect world.
BIBLIOGRAPHY


