

ROTTERDAM SCHOOL OF MANAGEMENT  
ERASMUS UNIVERSITY

ENHANCING HUMAN RIGHTS PROTECTION:  
A COMPANY LAWYER'S BUSINESS

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*Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current which can sweep down the mightiest walls of oppression and resistance.*

Robert F. Kennedy (1925-1968), University of Cape Town, South Africa, N.U.S.A.S. "Day of Affirmation" Speech, 6 June 1966



Stichting Vredeswetenschappen

# **Enhancing Human Rights Protection:** a Company Lawyer's Business

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**Mijnheer de Rector Magnificus!**  
**Ladies and Gentlemen!**

## 1. Tea time

It's just past four o'clock. In England, this means: it's teatime. At this time of the day the quintessential English question is: 'How would you like your tea?' And I often answer: I prefer it without blood and tears.

A report published by the Columbia Law School last year revealed inhumane and abusive working and living conditions throughout the tea industry.<sup>1</sup> Last week, the BBC published the shocking results of an investigation into the working and living conditions on tea estates in Assam, India.<sup>2</sup> Houses on the estates are in terrible disrepair, with leaking roofs and damp and cracked walls. Many families don't have a toilet. Workers earn around two-thirds of the minimum wage and the levels of malnutrition are very high, even by India's woeful standards. This is often the cause of fatal diseases, such as diarrhoea, tuberculosis and meningitis. Workers spray chemicals without protection, and on some estates evidence of child labour was found.

How did the industry respond to the BBC report? The owner of the estates said it was working hard to improve living and working conditions. It also said its membership of the Ethical Tea Partnership demonstrated its commitment to improving conditions in the tea industry.<sup>3</sup>

- 1 Human Rights Institute, *The More Things Change. The World Bank, Tata and Enduring Abuses on India's Tea Plantations* (New York: Columbia Law School, January 2014). The report, based on visits to 17 out of 24 plantations, describes pervasive violations of workers' rights on the plantations owned by Amalgamated Plantations Private Ltd. (APPL) in the states of Assam and West Bengal, in India: [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/tea\\_report\\_final\\_draft\\_smallpdf.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/tea_report_final_draft_smallpdf.pdf). The report also found that poorly paid plantation workers and their destitute families are a major source for human traffickers who lure away mainly women and children with promises of a new life, but who end up enslaved in factories and households where wages are paid mostly to the traffickers and not to the individual. For more details about this problem, see Stop the Traffik, *Not my cup of tea* (London, 2015) ([www.stophetraffik.org/download.php?type=resource&id=833](http://www.stophetraffik.org/download.php?type=resource&id=833)).
- 2 Justin Rowlatt and Jane Deith, 'The bitter story behind the UK's national drink', BBC 8 December 2015: <http://www.bbc.co.uk/news/world-asia-india-34173532>. See also FIAN International, *A life without dignity - the price of your cup of tea. Abuses and violations of human rights in tea plantations in India* (Heidelberg: Global Network for the Right to Food and Nutrition, 2016): [www.fian.org/en/library/publication/a\\_life\\_without\\_dignity\\_the\\_price\\_of\\_your\\_cup\\_of\\_tea](http://www.fian.org/en/library/publication/a_life_without_dignity_the_price_of_your_cup_of_tea)
- 3 Justin Rowlatt and Jane Deith, 'The bitter story behind the UK's national drink', BBC 8 December 2015: <http://www.bbc.co.uk/news/world-asia-india-34173532>.

The Rainforest Alliance, the ethical certification organisation, provided tea from these estates with a frog seal, assuring that the tea was produced using environmentally and socially responsible practices. In response to the BBC report, the Rainforest Alliance admitted: 'Our auditing process rests on an annual inspection so it is not going to be perfect'.<sup>4</sup> A local NGO campaigning to improve conditions on the tea estates told the BBC that he believes the Rainforest Alliance's logo 'is more about selling tea than about empowering workers'.<sup>5</sup>

Unilever also sourced (and still sources) tea from these estates for its Lipton brand. It said it was taking the issues seriously, that progress had been made and that it was working with its suppliers to achieve responsible and sustainable practices.<sup>6</sup>

The Assam tea estates were not included in the 200 projects that were reported in Unilever's corporate 2015 Human Rights report.<sup>7</sup> This is quite remarkable, as problematic labour conditions and labour rights violations at Kenyan and Indian tea plants supplying Unilever had been reported in an in-depth study by SOMO in 2011, also for tea certified by the Rainforest Alliance.<sup>8</sup> A follow-up study in 2016 by the ICN provided evidence that working conditions at two Rainforest Alliance (RA) certified Indian tea estates providing tea to Unilever had improved, but were still not 'up to standard', in particular for casual workers.<sup>9</sup>

The industry responses to the BBC report all sounded like something had suddenly gone wrong on the tea estates.<sup>10</sup> In fact, the poor living and working conditions on tea estates

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

7 *Unilever, Enhancing Livelihoods, Advancing Human Rights, Human Rights Report 2015* (London/Rotterdam, 2015).

8 Sanne van der Wal, *Certified Unilever Tea. Small Cup, Big Difference?* (Amsterdam/Utrecht: Stichting Onderzoek Multinationale Ondernemingen ((SOMO)/India Committee of the Netherlands (ICN), 2011): <http://www.indianet.nl/CertifiedUnileverTea.html>.

9 Wages between €3 and just over €4 are far less than a living wage of around €7.50. Casualisation of the workforce substantially increased, most of them migrants or retired permanent workers, and they did not receive the same social benefits as permanent workers: see Rosanne Hoefe, *Certified Unilever Tea - A Cup Half Empty. Follow-up study on working conditions in Rainforest Alliance certified tea plantations in India* (Hyderabad/Utrecht: Glocal Research/India Committee of the Netherlands, 2016): <http://www.indianet.nl/pdf/CertifiedUnileverTea-ACupHalfEmpty.pdf>.

10 An interesting study in this respect is Menno T. Kamminga, 'Company Responses to Human Rights Reports: An Empirical Analysis', *Business and Human Rights Journal* 1 (2016) 1, p. 95-110: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2559255](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559255). He found inter alia that, while the average corporate response rate to human rights reports is 70%, there are significant differences between companies, industrial sectors, and corporate home states. The least responsive are state-owned conglomerates and companies based in China, India, Israel and Russia. Companies based in Brazil and South Africa have a much higher response rate than companies headquartered in BRICS in the Northern hemisphere. Company responses containing references to international legal instruments or multi-stakeholder initiatives are rare. Responses also very rarely acknowledge that companies have a responsibility to respect human rights. However, purely quantitative analysis of responses may produce misleading results if only because companies may learn that pro forma responses can improve their response rate. Future research should therefore concentrate on improving methods of qualitative analysis of company responses.

are structural and have been known and documented for a long time.<sup>11</sup> In fact, nothing much has changed since colonial times.

This case illustrates the following:

- Company responses are almost identical: they all seem to come from the same PR do-it-yourself-kit.<sup>12</sup>
- Ethical partnerships of companies may not be as ethical as their name suggests.
- Certification of fair trade products may in fact be a sham.<sup>13</sup>

However, the case also illustrates something else. An increasing number of businesses understand that it is no longer enough to release a worn off PR statement - and that they need to develop and implement a proper human rights policy. Therefore, it is important to also look behind the facts of this story:

- Companies face challenges and dilemmas when implementing their human rights policies;
- Local government is not always willing to introduce and maintain a proper legal framework and may therefore part of the problem rather than the solution;
- Companies may be in the process of implementing a human rights policy: they are 'in transition'. We need to look at these learning companies differently than at companies that are unwilling to learn.

These are some challenges and dilemmas of international business and human rights in a nutshell. Or rather, in a teacup.

11 For example, Anna Morser and George Michuki, *A Bitter Cup. The exploitation of tea workers in India and Kenya supplying British Supermarkets* (London: War on Want/Unite, 2010): <http://www.waronwant.org/sites/default/files/A%20Bitter%20Cup.pdf>.

12 In the early days of business and human rights, some ten years ago, the tenor of the corporate PR response was to deny that anything was wrong. With increasing evidence of wrongdoing available, not least because of social media, this was no longer a credible approach. Today, the responses are very much like the ones mentioned in the main text: the company no longer denies that things have gone wrong, but plays down the extent of it, at the same time emphasising that it is working hard to get things right and that it is generally doing the right thing anyway. It is doubtful such worn off mantras are effective. Actually, they underestimate the public at large and run the risk of further contributing to the company's reputational damage. It takes off from the assumption that it is better to provide the public at large with untruths and whitewash stories than to tell them an inconvenient truth about the company. To a considerable extent, the latter may contribute more to the credibility and reputation of the company than the former. However, the classic approach may satisfy the corporate boardroom better. For some companies, depending on their markets, products, and the strengths of their brand, reputational risks are limited or short-lived anyway. For more about the factors influencing the level of reputational risk, see Rob van Tulder and Alex van der Zwart, *Reputaties op het spel* (Utrecht, Het Spectrum, 2008), p. 334 ff. For an insightful guide to corporate communication, see Joep Cornelissen, *Corporate Communication. A Guide to Theory and Practice*, 3<sup>rd</sup> edn. (Los Angeles: SAGE, 2011).

13 Certification of fair trade products goes back to 1988 when the Dutch Stichting Max Havelaar launched the world's first fair trade certification mark, an initiative of economist Nico Roozen, missionary Frans van der Hoff and the Dutch ecumenical development organisation Solidaridad. Fair trade certification marks have since seen an exponential growth and have developed into an industry of their own. However, the quality, rigour and reliability of these certifications differ considerably. This is linked with the costs of proper auditing and the financial interests certification companies may have in awarding certificates. See, for example, Raluca Dragusanu, Daniele Giovannucci and Nathan Nunn, 'The Economics of Fair Trade', *Journal of Economic Perspectives* 28 (2014) 3, p. 217-236, with further references ([http://scholar.harvard.edu/files/nunn/files/dragusanu\\_giovannucci\\_nunn\\_jep\\_2014.pdf](http://scholar.harvard.edu/files/nunn/files/dragusanu_giovannucci_nunn_jep_2014.pdf)).



## 2. An Englishman in New York

One of the challenges of this chair in international business and human rights is to work as a lawyer in a business school. Last year, I attended the annual conference of the European International Business Academy in Uppsala. Out of 400 participants, I was the only lawyer. I had landed in a community that spoke an academic language I had difficulty to understand. I felt like an Englishman in New York. I felt like an alien, a legal alien. So, to be sure this was not going to happen today, I invited a lot of my lawyer friends to this inaugural lecture. Thank you all so much for coming along.

The research to be carried out for this chair will be on the crossroads of human rights and international business. One of my focal points will be the role of the company's Legal Department with respect to the company's human rights policies and practices.<sup>14</sup> What is its perceived and what is its actual role? Does it take an inactive, a reactive, an active or a proactive approach? Does it resist human rights policies, does it accept human rights policies if they are unavoidable, does it actively endorse human rights policies or does it proactively shape and implement human rights policies? The views of Legal may deviate from other company departments, such as Strategy, Finance and CSR. This may cause tensions within the company, negatively affecting the company's internal alignment and the corporate human rights message it would like to get across to the outer world.

<sup>14</sup> In this lecture, I use the terms 'Legal Department', 'Legal', 'General Counsel' and 'company lawyer' as virtual synonyms.

### 3. Business and human rights: a mixed bag of self-regulation, soft law and hard law

The role of Legal is of particular importance because the legal environment of international business and human rights is changing. A decade ago, Corporate Social Responsibility could be seen as a purely voluntary activity, doing more than the law requires and primarily protecting the company's reputation. The company designed its own company code or adhered to an industry code. Their implementation and enforcement were not given priority or not taken seriously. The main responsibility for the CSR policy was usually with the PR department. In this framework, Legal could play a defensive role, remaining inactive or reactive and focus on whether the company's CSR policies created or increased legal risks. Over the past decade, this picture has changed considerably.

In 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights.<sup>15</sup> These Guiding Principles implemented the United Nations 'Protect, respect and remedy' Framework.<sup>16</sup> This Framework implies that States have a duty to protect human rights, that companies have a responsibility to respect human rights and that both have to provide for effective remedies for human rights violations.

The company's responsibility to respect human rights means that it conducts human rights due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts. Comparable processes are typically already embedded in companies because in many countries they are legally required to have information and control systems in place to assess and manage financial and related risks.<sup>17</sup>

The UN Framework and Guidelines do not contain legally binding rules. These rules are often called soft law because if a company does not comply with its responsibilities, a State cannot fine the company, and a victim suing the company cannot directly invoke these responsibilities in a court of law (however, also see section 6.2).

15 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31 (Geneva, 2011): [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf).

16 Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5 (Geneva, 2008): <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>. See inter alia Radu Mares, "Respect" human rights: Concept and convergence', in: Robert C. Bird, Daniel R. Cahoy and Jamie Darin Prenkert (eds.), *Law, Business and Human Rights. Bridging the Gap* (Cheltenham: Edward Elgar, 2014), p. 3-47. Ibid, no. 56.

17 Ibid, no. 56.

However, the fact that soft law rules are not legally binding does not mean they are legally harmless or irrelevant, on the contrary. First, there may be non-legal consequences for a company that does not comply with soft law obligations. I will come back to this in section 6.<sup>18</sup> Second, it is quite likely that soft law obligations will develop into hard law, particularly in the framework of tort law.<sup>19</sup> Tort law is the legal instrument to hold persons and companies liable for damage they cause to others. Basically, a tort claim can be successful if the defendant breaches a duty of care it owes with respect to the claimant's rights and interests. The courts establish this duty of care on the basis of facts of the case and perceived societal expectations. With respect to the latter, the court may consider the UN Guiding Principles as one of the elements shaping these expectations. In this way, the courts may gradually turn soft law into hard law.<sup>20</sup> This would strengthen the position of victims of human rights violations when litigating against multinational companies.<sup>21</sup>

18 See section 6.

19 A striking illustration of shaping the unwritten duty of care in this way is the decision of the The Hague District Court on the State's obligations to reduce greenhouse gas emissions to meet the targets for preventing dangerous levels of climate change: District Court The Hague 25 June 2015, ECLI:NL:RBDHA:2015:7196 (Urgenda/The Netherlands). Although this was not a business and human rights case, the decision is an important example of how courts may use soft law to shape hard law in a transnational law context.

20 See Cees van Dam, *European Tort Law* (Oxford: Oxford University Press, 2013), nos. 804-809 for more about this judicial technique of 'finding' the standard of care. See also Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence', *Business and Human Rights Journal* 1 (2016), p. 179-202. Cassel outlines the case for a business duty of care to exercise human rights due diligence, judicially enforceable in common law countries by tort suits for negligence brought by persons whose potential injuries were reasonably foreseeable. A parent company's duty of care would extend to the human rights impacts of all entities in the enterprise, including subsidiaries. A company would not be liable for breach of the duty of care if it proves that it reasonably exercised due diligence as set forth in the Guiding Principles on Business and Human Rights. On the other hand, a company's failure to exercise due diligence would create a rebuttable presumption of causation and hence liability. A company could then avoid liability only by carrying its burden to prove that the risk of the human rights violations was not reasonably foreseeable, or that the damages would have resulted even if the company had exercised due diligence. See also the conclusions of the Gubernance Project, funded by the European Union: Juan José Álvares Rubio and Katerina Yiannibas (ed.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, Executive Summary (2016), p. 23-25: [www.HumanRightsinBusiness.eu](http://www.HumanRightsinBusiness.eu).

21 See Liesbeth F.H. Enneking, *Foreign Direct Liability and Beyond. Exploring the role of tort law in promoting international corporate social responsibility and accountability* (The Hague: Eleven International Publishing, 2012); Marie-José van der Heijden, *Transnational Corporations and Human Rights Liabilities. Linking Standards of International Public Law to National Civil Litigation Procedures* (Cambridge: Intersentia, 2012); Cees van Dam, *Onderneming en mensenrechten* (Den Haag: Boom Juridische uitgevers, 2008); Richard Meeran, 'Tort Litigation Against Multinationals for Violation of Human Rights: An Overview of the Position Outside the US', *City University of Hong Kong Law Review* 3 (2011) 1, p. 1-41; Cees van Dam, 'Tort Law and Human Rights. On the role of tort law in the area of business and human rights', *2 Journal of European Tort Law* (2011), p. 221-254; Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case', *Utrecht Law Review* 10 (2014) 44-54. Litigation in the United States was mainly conducted under the Alien Tort Statute but the United States Supreme Court considerably limited this route in the *Kiobel* case: see, inter alia, Curtis A. Bradley, 'Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries', ASIL Insight, Volume 17, Issue 12, 18 April 2013 (<https://www.asil.org/insights/volume/17/issue/12/supreme-court-holds-alien-tort-statute-does-not-apply-conduct-foreign>); Anthony J. Colangelo, 'The Alien Tort Statute and the Law of Nations in *Kiobel* and *Beyond*', *Georgetown Journal of International Law* 44 (2013) 1329-1346; Julian G. Ku, 'Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute', *American Journal of International Law* 107 (2013) 835-841.

It was only more recently that legislators started to impose hard law human rights obligations on companies. These are obligations that **can** be legally enforced in a court of law. So far, the legislation mainly focuses on reporting and transparency obligations. Recently, the EU adopted the Directive on Non-Financial Reporting<sup>22</sup> and it is expected that a Regulation on conflict minerals will be adopted in 2017.<sup>23</sup> In 2015, the United Kingdom adopted its Modern Slavery Act,<sup>24</sup> in France a bill on a duty of vigilance is pending<sup>25</sup> and in Switzerland a popular initiative is being prepared on a statutory duty to conduct human rights due diligence.<sup>26</sup> In the Netherlands, the Minister of Economic Affairs announced legislation to make the CSR covenants that are currently being discussed and concluded for a dozen industries generally binding.<sup>27</sup> In the Dutch Parliament, also a private members bill is pending concerning a due diligence duty to prevent the delivery of goods and services that have come about with the help of child labour.<sup>28</sup> In the spring of 2016, representatives of eight national parliaments called upon the European Commission to consider legislation to implement a human rights due diligence duty of care for European companies.<sup>29</sup> Also outside Europe, particularly in the United States, legislation is clearly on the menu.<sup>30</sup>

- 22 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
- 23 Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas Brussels, 5.3.2014 COM(2014) 111 final 2014/0059 (COD). Council and Parliament reached political agreement in June 2016.
- 24 Modern Slavery Act 2015: <https://www.gov.uk/government/collections/modern-slavery-bill>. Under this Act all large companies are required to publish an annual statement setting out what steps they are taking to ensure that slave labour is not being used.
- 25 See <https://business-humanrights.org/en/france-natl-assembly-adopts-bill-on-corporate-duty-of-care-in-supply-chains-ngos-welcome-move>. See for an English translation of the Bill: [https://business-humanrights.org/sites/default/files/documents/Texte%20PPL\\_EN-US.docx](https://business-humanrights.org/sites/default/files/documents/Texte%20PPL_EN-US.docx).
- 26 The Responsible Business Initiative: protecting human rights and the environment: <http://konzerninitiative.ch/?lang=en>.
- 27 Brief minister van Economische Zaken aan de Tweede Kamer d.d. 23 juni 2016 betreffende Mededinging en Duurzaamheid (Letter of the Minister of Economic Affairs to the Second Chamber of the Dutch Parliament, dd. 23 June 2016 regarding Competition and Sustainability).
- 28 Voorstel van wet van het lid Van Laar houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen ('Wet zorgplicht kinderarbeid'): Kamerstukken 34506, nr. 1-3 (Private Members Bill of Van Laar (MP) on the introduction of a duty of care to prevent the delivery of goods and services that have come about with the help of child labour ('Act duty of care child labour')).
- 29 Parliaments of Estonia, Lithuania, Slovakia and Portugal, the UK House of Lords, the Dutch House of Representatives, the Italian Senate, and the French National Assembly. See European Coalition for Corporate Justice, Members of 8 European Parliaments support duty of care legislation for EU corporations, 18 May 2016: <http://corporatejustice.org/news/132-members-of-8-european-parliaments-support-duty-of-care-legislation-for-eu-corporations>. See <https://christophepremat.files.wordpress.com/2016/05/signature-statement.pdf> for the French text of the Declaration.

On top of this, the Human Rights Council of the United Nations has started discussions on a binding Treaty on business and human rights.<sup>31</sup> This is a highly disputed instrument, basically supported by the global South and human rights NGOs and contested by the global North and the corporate lobby.<sup>32</sup> It is expected that it may take up ten years or more before such a treaty can be concluded.<sup>33</sup>

Hard law - both legislation and case law - is crucial to deal with companies that do not take human rights seriously. And it is of pivotal importance that these instruments are further strengthened so that victims of human rights violations have easy access to an effective remedy.

Hard law will inevitably become more important in the area of business and human rights. However, it would be too simplistic to say that there is a process from voluntary self-regulation, through soft law to hard law. It is unlikely that hard law can effectively replace voluntary self-regulation and soft law rules anytime soon - if at all. Not only because it will take a long time to have the legislation in place (and human rights victims cannot wait that long), but also because legislation and litigation often do not really solve the actual problem between the company and the victim(s), let alone solve the underlying structural problems that are often complex and wide-ranging. Despite rumours in the legal profession, lawyers and the law are not always of the greatest value when it comes to resolving conflicts and making a difference in the lives of victims (see in particular section 9). They provide important means but they rarely provide the results.

- 30 Some examples: Sections 1502-1504 Dodd Frank Wall Street Reform and Consumer Protection Act, holding disclosure requirements for companies with respect to the sourcing of conflict minerals from the Democratic Republic of the Congo (to which the EU responded with the Regulation mentioned in footnote 23): <https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>. The US Trade Facilitation and Trade Enforcement Act of 2015 entered into force in February 2016, prohibiting the import of goods made with forced labour or child labour: <https://www.congress.gov/bill/114th-congress/house-bill/1907>; the US Department of Labor has prepared a list of products from certain countries which are known to have possible forced and child labour in the production process. California Transparency in Supply Chains Act 2010, requiring certain businesses to disclose their efforts, if any, to eradicate human trafficking and slavery from their supply chains: <http://www.state.gov/documents/organization/164934.pdf>.
- 31 UN Document A/HRC/26/L.22/Rev. 1 (24 June 2014): <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement>.
- 32 It is as interesting as it is remarkable that the US and the EU, on one hand, strongly oppose any legally binding instrument to globally protect human rights against corporate conduct but, on the other, are champions when it comes to protecting free trade in extensive agreements with numerous binding obligations for states and effective remedies for companies, such as CETA between the EU and Canada, and TTIP between the EU and US.
- 33 At this initial stage, the preparatory work is carried out by the 'open-ended inter-governmental working group on transnational corporations and other business enterprises with respect to human rights': <http://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx>. See, inter alia, Oliver de Schutter, 'Towards a New Treaty on Business and Human Rights', *Business and Human Rights Journal* 1 (2016) 1, p. 41-67; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty', *Business and Human Rights Journal* 1 (2016) 2, p. 203-227; SSRN 2015: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2562760](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562760); Anita Ramasastry and Doug Cassel, 'White Paper: Options for a Treaty on Business and Human Rights', *Notre Dame Journal of International and Comparative Law* 6 (2015) 1, p. 1-50: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2695505](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695505).

This means we need a varied regulatory framework of voluntary self-regulation, soft law and hard law in business and human rights. The content and mix of this framework will continue to change with an increasing emphasis on hard law instruments.

**Table 1:** Features of self-regulation, soft law and hard law

	<b>Voluntary self-regulation</b>	<b>Soft law</b>	<b>Hard law</b>
Who makes the rules?	Companies and industry associations	International organisations and states	Legislators and judges
Application of the rules	Rules apply to company or sector	Rules apply globally	Rules apply regionally (EU) or domestically
Who controls compliance?	Company	Government, NGOs and individuals (non-legal enforcement)	State, NGOs and individuals (legal enforcement)
Character of the rules	Specific rules for company activities	Abstract and general rules	Specific and occasional rules
Sustainability and human rights	Sustainably, later human rights	Human rights include sustainability	Human rights include sustainability
Company advisors	Consultancy firms	Consultancy firms and law firms	Law firms
Company departments	PR and CSR	CSR and Legal	Legal

## **4. Legal's engagement with company's human rights policies: four transition phases**

### **4.1 Introduction**

Every lawyer will agree that human rights are a company lawyer's business. But the key question is: how does the company lawyer engage with the company's human rights policy, provided it exists at all? Does he resist, obstruct, control, facilitate, create, implement or support? These approaches are linked with the way the company lawyer looks at the law in general and at legal rules in particular. He can use the law as an instrument to yield power for the company and he can consider it as an expression of binding ethical behaviour in the interest of a balanced society.

The law, also hard law, is usually a flexible instrument that can be narrowly and broadly interpreted in the interest of the beholder. By interpreting black letter law in its own interest, companies create space and freedom to act in their own interests, regardless of the legitimate interests of others. Many companies consider this to be legitimate. Some may even knowingly misinterpret the law, evade or even ignore it. This is possible as long as the company is not legally challenged. And because challenging a company is a costly and time consuming affair, many companies can get away with acting in such a way or can calculate whether the expected gain would offset the expected loss of sanctions or damages.

In heavily regulated and enforced industries, such as in financial services, things may be different. But today we are talking about business and human rights where this approach is still not uncommon.

### **4.2 Taking rights and legitimate interests of others into account**

Legal rules are often an expression of a legal principle. Rules hardly have a function in themselves but flesh out an objective that needs to be achieved. By interpreting black letter law, these aims and principles are ignored. An important principle in civil law is that people have to take the legitimate interests of others into account when deciding about their behaviour. This is not very surprising, as a society cannot properly function if everyone solely pursues his own interests.

Let me give a few examples. If parties enter into a contract, they enter into a legal relationship with each other. The same holds if one party is liable for the damage of the other. In such a legal relationship, parties have mutual obligations that may follow from the contractual terms and conditions and from legislation. However, the overarching rules that govern parties in such a legal relationship are the requirements of

reasonableness and fairness (good faith) (Article 6:2 Dutch Civil Code). This means that each must take into account the other party's legitimate interests.<sup>34</sup>

If such a legal relationship does not exist, someone must act in accordance with the care society requires him to exercise in the circumstances of the case vis-à-vis other people's rights and interests.<sup>35</sup> It is assumed that the two concepts (reasonableness and fairness, and societal care) do not differ substantially.

A similar concept is known in English common law in the neighbour principle, as expressed by Lord Atkin in **Donoghue v Stevenson** in 1932:

'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'<sup>36</sup>

Many company lawyers focus on the black letter law and on the open norms because these are the areas where they can yield their power. In areas where they are hardly challenged, they can often get away with it even if their interpretations are wrong. This approach ignores the fact that the law is an instrument to balance all legitimate societal and individual interests. This is reflected in rules of societal care, fairness and reasonableness, and the neighbour principle. It illustrates that Legal can actually choose to adhere to the letter of the law and consider justice as 'justice for the company only', ignoring the legitimate interests of others. However, it can also adhere to the soul of the law, consider justice along the lines of reasonableness and fairness as 'justice for all stakeholders', taking their legitimate interests generously into account.

34 Compare Hoge Raad (Dutch Supreme Court) 15 November 1957, *Nederlandse Jurisprudentie* 1958/67, note L.E.H. Rutten (Baris/Riezenkamp).

35 Compare Hoge Raad (Dutch Supreme Court) 31 January 1919, *Nederlandse Jurisprudentie* 1919/161, note E.M. Meijers (Lindenbaum/Cohen).

36 *Donoghue v Stevenson* [1932] AC 562.



### 4.3 Power imbalances between companies and individuals

An important aspect that is particularly apparent in business and human rights cases, is Legal's attitude towards the power imbalance between the company, often a major multinational company with a multibillion euro turnover, and the individual or individuals that are negatively affected by the company's activities. Company lawyers differ in how they perceive this power imbalance. They can either perceive it as a feature to be used in favour of the company, or as a feature that needs to be corrected when dealing with stakeholders that can be potentially affected.

**Table 2:** Power imbalance between company and its stakeholders

	<b>Equal power balance</b> Individual ↔ Individual Company ↔ Company Company ↔ State	<b>High power imbalance</b> Individual ↔ Company Individual ↔ State SME ↔ MNC
<b>Limited financial loss</b>	Low need for correcting power balance	Medium need for correcting power balance
<b>Personal injury / Human rights violation</b>	Medium need for correcting power balance	High need for correcting power balance

Table 2 shows the power imbalance between the company and its stakeholders. The rows show the type of harm that may be caused by the company: from financial harm of a limited nature to violation of a person's human right. The columns show situations in which the power between the parties is (virtually) equal and situations of a high power imbalance. The power balance can be equal or virtually equal when an individual has a dispute with another individual, a company with another company, or a company with the State. A high power imbalance usually occurs when there is a dispute between an individual and a company (as is typical in a business and human rights context), between an individual and the state, or between an SME and an MNC.<sup>37</sup>

If there is a bigger power difference or if the stakeholder's right or interest is of more weight, the company's corporate social responsibility will be greater. The Legal Department should therefore adopt a different approach when dealing with disputes among individuals than when dealing with companies or governmental bodies.

<sup>37</sup> See Rob van Tulder, 'With Great Power Comes Great Responsibility', *Max Havelaar Lectures* (Lecture Series in Management), p. 17-58. Rotterdam: RSM Erasmus University-Max Havelaar Foundation, 2010.

## 4.4 Legal's inactive, reactive, active and proactive phases

In order to make the options for the company more visible, I have developed features belonging to various levels of engagement. For this purpose, I have extended Rob van Tulder's transition phase model.<sup>38</sup> This model distinguishes four phases in the process towards sustainable development: an inactive, a reactive, an active and a proactive phase. Each of these phases is characterised by a different business view on sustainability.<sup>39</sup>

This model can be viewed both from a static and a dynamic point of view. In its static function, it shows how companies that perform with respect to sustainability and human rights can be compared. In the dynamic function, it shows how companies have developed and how they may develop in the future by taking concrete steps in the direction of an active or proactive approach.

The question for research is how these various phases could play out vis-à-vis the company's Legal Department. In the table below, the first and second line summarise the business orientation and the business attitude as set out in Van Tulder's model. The third and the fourth line indicate the role of Legal in general and its role with respect to the company's human rights policy.

38 Rob van Tulder, Rob van Tilburg, Mara Francken, and Andrea da Rosa, *Managing the transition to a sustainable enterprise: lessons from frontrunner companies* (New York: Routledge, 2014). This model was partly based on Simon Zadek, 'The Path to Corporate Responsibility', *Harvard Business Review* 2004/12 in which he set out five stages of organizational learning. Rob van Tulder & Alex van der Zwart, *Reputaties op het spel. Maatschappelijk verantwoord ondernemen in een onderhandelingsamenleving* (Utrecht: Het Spectrum, 2008).

39 In this lecture, the terminological focus is on human rights but this includes sustainability, as these topics are strongly intertwined: sustainability cannot be achieved without human rights protection and human rights cannot be protected without a sustainable present and future. For example, whilst climate change is currently the most pressing sustainability problem, it is at the same time also the most pressing human rights problem (see also District Court The Hague 25 June 2015, ECLI:NL:RBDHA:2015:7196 (Urgenda/Staat)). Hence, for the area of business and human rights the 17 Sustainability Development Goals adopted by the United Nations General Assembly in 2015 are also relevant (<https://sustainabledevelopment.un.org/post2015/transformingourworld>). Businesses pursuing an active or proactive human rights agenda can add value by contributing to bringing these pledges into practice. For a detailed analysis see Institute for Human Rights and Business, *Business and the Sustainable Development Goals: Mind the Gap - Challenges for Implementation*, IHRB State of Play Series, Volume Four (London, 2015) (<http://www.ihrb.org/pdf/state-of-play/Business-and-the-SDGs.pdf>). The 17 SDGs are: (1) End poverty in all its forms everywhere; (2) End hunger, achieve food security and improved nutrition and promote sustainable agriculture; (3) Ensure healthy lives and promote well-being for all at all ages; (4) Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; (5) Achieve gender equality and empower all women and girls; (6) Ensure availability and sustainable management of water and sanitation for all; (7) Ensure access to affordable, reliable, sustainable and modern energy for all; (8) Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all (9) Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation; (10) Reduce inequality within and among countries; (11) Make cities and human settlements inclusive, safe, resilient and sustainable; (12) Ensure sustainable consumption and production patterns; (13) Take urgent action to combat climate change and its impacts; (14) Conserve and sustainably use the oceans, seas and marine resources for sustainable development; (15) Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; (16) Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; (17) Strengthen the means of implementation and revitalize the global partnership for sustainable development.

**Table 3:** Transition phases for Legal

	Inactive phase	Reactive phase	Active phase	Proactive phase
Orientation	Internally oriented  No stakeholder engagement, unless it contributes to profits	Reactive attitude to external stakeholders  Stakeholder engagement if inevitable to avoid damage to the company	Active, internally oriented attitude  Consultation with stakeholders to test and look for support for human rights policies	Active, externally oriented attitude  Cooperation with stakeholders as equal partners to implement human rights policies
Business attitude	Legal licence to operate  Ignoring other people's rights and interests	Legal licence to operate  Respecting other people's rights and interests if inevitable	Social licence to operate  Respecting other people's rights and interests beyond legal obligations in non-structural way	Social licence to operate  Protecting other people's rights and interests beyond legal obligations in structural way
Human rights policy	No policy  Human rights violations as collateral damage	Policy follows external triggers  Including UNGP, OECD, Global Compact	Implemented autonomous policy  Respecting human rights is leading	Implemented autonomous policy  Protecting human rights is leading
Role of Legal	Avoid liability  Instrumental to resist change to respect human rights	Avoid liability  Assists in adapting to unavoidable change to respect human rights	Take responsibility  Actively endorses human rights policies and their implementation in consultation with stakeholders	Take responsibility  Proactively shapes and implements human rights policies in eyelevel cooperation with stakeholders
Vision of Legal	Facilitates company activities as long as the company can get away with them: justice for the company	Facilitates company activities as long as these are not explicitly forbidden: justice for the company	Leads company in active, partially ethically driven, approach: societal justice	Leads company in proactive, ethically driven approach: societal justice

## 4.5 How independent is Legal within the company?

The role of the Legal Department within the company, particularly its level of independence, is subject to much debate. If the company lawyer is also a member of the bar, he is, to a large extent, considered to be independent in many jurisdictions. However, the European Court of Justice begged to differ. In *AM&S*, the European Court of Justice defined the concept of independence in negative terms by stipulating that the company lawyer should not be bound to his client (the company) by a relationship of employment. The fact that the company lawyer is also a member of a Bar or a Law Society and subject to professional discipline and ethics is not enough to guarantee his independence. For this reason, the Court held that correspondence exchanged between a company lawyer and his employer is not covered by legal professional privilege.<sup>40</sup> In 2010, the ECJ confirmed its decision in *Akzo Nobel*: an employment relationship between the company lawyer and the company is an obstacle for an independent exercising of his profession.<sup>41</sup>

The employment contract between the company lawyer and the company is indeed a substantial factor in assessing his independence. However, even if the company lawyer is not admitted to the Bar and provides purely partial advice, the question is, what his role exactly is: is he the lawyer facilitating the profit and revenue maximisation the company pursues, without asking critical questions? Or is he the towering figure of corporate morality who sees his remit as going way beyond compliance with the rules, moving the company to an active or proactive attitude?<sup>42</sup>

I will now briefly explain these four phases, based on the work of Van Tulder et al. ('Key' and 'General') and then describe the role of the Legal Department in each of these phases, first with respect to its place in the company organisation and then with respect to its vision on legal issues in general and the company's human rights policy (if any) in particular. In my future research, I aim to further develop the features of these four phases.

40 ECJ 18 May 1982, Case C-155/79 (*AM & S Europe Limited/Commission*).

41 ECJ 14 September 2010, Case C-550/07 P (*Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd/Commission*).

42 See Philippe Coen & Pr. Christoph Roquilly (ed.), *Company Lawyers: Independent by Design*, White Paper European Company Lawyers Association (Paris: Edhec Business School/LexisNexis, 2012: <http://www.ecla.org/files/files/Profession/document1.pdf>).

## 4.6 Inactive phase

- **Key:** Inactive companies are internally oriented and aim to avoid liability (risk orientation and calculation). In this phase, CSR means Corporate Self Responsibility.
- **General:** This approach reflects the classical notion of Friedman that the only responsibility of companies is to generate profits. Basically, the business has an inward-looking perspective, aimed at efficiency and competitiveness in the immediate market environment. In this approach, CSR is conditioned by a mix of profit, sales maximisation, return on investment and shareholder maximisation. Consultation with societal organisations is rare, unless there is a direct business interest. Communication often works as a monologue; the company explains why it acts as it does.<sup>43</sup>
- **Role of legal in the company:** Legal's main aim in an inactive company is to avoid the company being liable. Its focus is on limiting legal risk and reputational risk, thus supporting the company's responsibility to maximise profits and return on investments. Legal is instrumental in helping the company to resist change with respect to other factors than profit and return on investment. In case of issues, Legal substantiates the arguments that the company did nothing wrong. If something is not legally forbidden, it is the right thing to do.
- **Vision of legal on legal matters:** Legal does not initiate or endorse a human rights policy. If there is one, it is mainly there for keeping up appearances whilst the policy is not or hardly implemented and enforced. Legal ensures the policy does not create legal risks. Legal does not take rights and interests of external parties into account. Legal duties are interpreted in the narrowest possible way, they are the bottom line but the company only complies if there is no other choice and the company cannot possibly get away with its non compliance. For example, the company can factually ignore third parties' rights and interests by considering the limited chances that a claimant will pursue its claim in court.

<sup>43</sup> *Ibid.* This approach reflects the *classic business case*: sustainability and human rights as a direct motivation for concrete, quantifiable financial profit, such as by raising standards among employees, product innovation or environmental savings.

## 4.7 Reactive phase

- **Key:** Reactive companies respond to external stakeholders reactively and also aim to avoid liability. In this phase, CSR means Corporate Social Responsiveness.
- **General:** Like in the inactive phase, the focus is on efficiency (such as short term returns and productivity) and on avoiding mistakes. Companies monitor their environment and manage their primary stakeholders to keep possible problems in check, but do not allow these to lead to fundamental changes in the business philosophy and primary production processes. Companies respond specifically to the actions of external actors that could damage their reputation. Dialogues are used to justify their actions, they do not ask questions or listen. Relationships with societal and community stakeholders are relatively involuntary; external stakeholders are unlikely to be approached. The motivation for CSR is primarily grounded in negative duties, where firms are compelled to conform to norms of behaviour defined by stakeholders. They also share the concept of 'conditional morality', i.e. the sense that managers only react when competitors do the same.).<sup>44</sup>
- **Role of legal in the company:** Legal's main aim is to avoid liability for the company. Responses to incidents and problems are primarily to justify actions; they do not allow for fundamental changes in the business code of conduct, unless changes are unavoidable. Legal serves the company in adapting to unavoidable change. Legal is defensive and an active attitude is mainly limited to responding to changes in legislation and stakeholder interventions that cannot be avoided, such as those by governments, banks and investors. Legal is a follower of fashion and only reacts when competitors do the same.
- **Vision of Legal on legal matters:** The reactive company has a human rights policy only if this is considered to be unavoidable. For this reason, the UN Guiding Principles and the OECD Guidelines may be followed, but implementation and enforcement is usually weak and minimalistic. If the company has a CSR department, it is subordinate to Legal both in its scope and its policies. The reactive company only takes rights and interests of stakeholders into account if this is unavoidable due to legal obligations or pressure from government policy, banks and investors.

<sup>44</sup> *Ibid.* This approach reflects the *defensive business case*: sustainability as a means of avoiding financial loss (such as by building and protecting the company's reputation, or avoiding stricter legislation).

## 4.8 Active phase

- **Key:** Active companies have an active, internally oriented attitude, taking responsibility for societal issues. In this phase, CSR means Corporate Social Responsibility.
- **General:** In the active phase, the company is explicitly inspired by ethical values and these are the basis of the company's objectives. The company pursues these objectives in a socially responsible manner and independent of actual or potential social pressure by stakeholders. It shares a strong orientation towards justice, such as striving for a healthy and clean environment, social equity, social progress, etc. The company is set on doing 'the right thing'. The approach with stakeholders includes more dialogue, questioning and exchange of ideas and in some cases operational collaboration. By doing this and by having an excellent relationship with NGOs, they run the risk of neglecting business efficiency and jeopardising the continuity of the company (which as such can be regarded as socially irresponsible).<sup>45</sup>
- **Role of legal in the company:** The remit of Legal in an active company goes over and beyond the company's legal obligations and the company's reputation. Legal, like the company in general, is explicitly inspired by ethical values, which are the basis of the company's code of conduct. Legal is instrumental and leading in helping the company to pursue these objectives in a socially responsible manner and regardless of actual or potential social pressure by stakeholders. In other words: Legal assists the company in doing 'the right thing'.
- **Vision of Legal on legal matters:** In an active company, doing the right thing - in stronger legal terms: doing justice - has an objective meaning. It does not necessarily mean justice for the company. It explicitly and positively takes into account the rights and interests of third parties in the company's operational and strategic matters, also when interpreting the company's legal obligations. Doing no harm to others is essential to the company's objectives and practices. In this vein, Legal is actively involved in developing, implementing and monitoring the company's human rights policy. This policy stems from the ethical values that go beyond legal obligations, but at the same time are rooted in legal principles. The essence of the human rights policy is to respect human rights and doing no harm to others. Taking the rights and interests of other stakeholders seriously means that Legal is actively involved in stakeholder dialogues, asking questions and exchanging ideas to understand the position of the stakeholders.

<sup>45</sup> *Ibid.* This approach reflects the *strategic business case*: sustainability as integral to the long-term competitive position and/or survival strategy (such as by reducing dependence on nonrenewable resources and directing product development towards societal challenges).

## 4.9 Proactive phase

- **Key:** Proactive companies have an active, externally oriented attitude and aim to take shared responsibility for solving societal problems. In this phase, CSR means Corporate Societal Responsibility or Corporate Sustainable Responsibility.
- **General:** Companies in the proactive phase are externally oriented and aim to take shared responsibility for solving societal problems. Sustainability and human rights are fully integrated in the company strategy, from purchasing to marketing, from communication to investor relations and reporting. In contrast to the active company, the proactive company looks beyond societal developments relating to company business or representing direct challenges, taking into account developments affecting it less directly. The company has a truly cosmopolitan view. It undertakes activities aimed at external stakeholders right at the beginning of an issue's life cycle and it approaches external secondary stakeholders to explore new horizons and strategic collaboration, and consults them, often confidentially, about difficult dilemmas. Solutions are sought in open and collaborative dialogue with external partners based on confidentiality and trust. The company presents itself as a stakeholder; there is equality and reciprocity.<sup>46</sup>
- **Role of legal in the company:** Like in an active company, Legal's remit goes over and beyond the company's legal obligations and the company's reputation. It is explicitly inspired by ethical values that are the basis of the company's code of conduct.<sup>47</sup> Compared to the active company, the company's code of conduct does not only focus on doing the right thing by not causing harm to others and the environment, but it also focuses on doing the right thing by actively and positively contributing to sustainability and to human rights protection, also with respect to challenges that go beyond the company's direct challenges. For this reason, Legal is actively involved in stakeholder dialogues to discuss and share dilemmas, questioning and exchanging ideas to understand the position of the stakeholders and do them justice, as well as to finding partners to achieve or contribute to solutions.

<sup>46</sup> *Ibid.* This approach reflects the *societal business case* (or '*new economy*' business case): sustainability as the quest for new synergistic value creation, instilling a positive attitude to learning and adaptation, innovation, risk and opportunity management in a complex, dynamic environment, introducing new earnings models, advancing system transitions and forming partnerships.

<sup>47</sup> For more details about ethics and human rights, see, inter alia, George G. Brenkert, 'Business Ethics and Human Rights. An overview', *Business and Human Rights Journal* 1 (2016) 2, p. 277-306.



- **Vision of Legal on legal matters:** In a proactive company, like in an active company, doing the right thing has an objective meaning. It does not only mean justice for the company but it also means justice for the stakeholders, of which the company is one. Legal explicitly and positively takes into account the rights and interests of third parties in the company's operational and strategic matters, also when interpreting the company's legal obligations. Unlike in an active company, the proactive company goes beyond doing no harm to others by actively and positively contributing to sustainability and to human rights protection. In this vein, Legal is actively involved in developing, implementing and monitoring the company's human rights policy. The essence of a human rights policy is to not only to respect human rights and to prevent doing harm to others, but also to contribute to structural solutions to problems and issues, in partnership with local and central governments, other companies and NGOs. It actively tries to protect these rights and interests, even if this is detrimental to the company's short-term business results. Hence, the focus of the proactive company is not only on respecting human rights but also on enhancing human rights protection.

Obviously, these phases each have their challenges and dilemmas. They also come with different costs. An inactive approach might bring better financial results in the short term but maybe not in the long term, whereas an active or proactive approach might be more costly in the short term but more beneficial in the long run. There may also be different effects for the company's reputation.

Another important caveat is that companies are complex organisations and that their entities do not always move in the same direction and, if they do, they do not always move at the same pace. Hence, it is very well possible that some parts of the company are in or moving towards the active or proactive phase, whereas other parts still linger in the inactive or reactive phase. I will come back to this in sections 7.2 and 8.

## 5. An example: Unilever

An interesting example is Unilever, the Anglo-Dutch multinational consumer goods company. Unilever is the first major company that reported in detail on its implementation of the UN Guiding Principles on Business and Human Rights.<sup>48</sup> This is an important step, because transparency is essential for any active and proactive human rights policies. Transparency also means frankness: not polishing up reality and being clear about the challenges. Unilever's report shows the major challenges and the many dilemmas the company faces when implementing the Guiding Principles.

The human rights ambitions of Unilever are not just a PR story, but a policy that CEO Paul Polman has taken on as his personal responsibility. Such leadership from the top is an important indication of a sincere company's human rights policy. It is also a condition for the effectiveness of the implementation of the policy. Moreover, it is courageous because it makes the CEO, the face of the company, vulnerable for criticism. In the introduction to the report Polman wrote:

*'I approach this report [...] with a mixture of conviction and humility.*

*Conviction, because the need to act cannot be in doubt. Business can only flourish in societies in which human rights are respected, upheld and advanced. And yet, as incidents such as the tragedy at Rana Plaza in 2013 remind us, basic human rights for many of those employed in corporate value chains across the world cannot be taken for granted. Safe working conditions, freedom of association, fair wages, protection from forced labour, and freedom from harassment and discrimination: these must become universal operating conditions. Today, they are not.*

*And humility, because the challenges we face as a business community are enormous. Let me be clear, we are fully committed to driving a sustainable business that is both commercially successful and socially and environmentally responsible but we are cognisant of the barriers. Today, the risk of systemic human rights abuses exists across our value chain and the value chains of other global businesses. This is a reality we must confront and work together to resolve.'*

When a company reports about its active or proactive human rights policy, the question is how transparent it chooses to be. Where it is impossible to be complete, the company needs to be clear about the information it has left out. I began this lecture with the tea estates in Assam where Unilever sources its Lipton tea. It is likely that Unilever knew about the problems on the estates, but it did not mention them in its Human Rights

<sup>48</sup> Unilever, *Enhancing Livelihoods, Advancing Human Rights, Human Rights Report 2015* (London-Rotterdam, 2015): [https://www.unilever.com/Images/slp-unilever-human-rights-report-2015\\_tcm244-437226\\_1\\_en.pdf](https://www.unilever.com/Images/slp-unilever-human-rights-report-2015_tcm244-437226_1_en.pdf).

report. Unilever later explained that it had limited its first Human Rights report to its top 200 suppliers<sup>49</sup> but a clear statement about this limitation cannot be found in the report. Unilever was criticised in the Dutch newspaper *Financieel Dagblad*<sup>50</sup> and in other media.

The mercury contamination in Kodaikanal, India by one of Unilever's subsidiaries was not mentioned in Unilever's Human Rights Report either. The case came back into the news by a clip of an Indian rapper going viral, getting three million views on YouTube in a short period of time. In a press release, Unilever denied liability for the damage caused and clarified its position. However, the statement made clear that the case was on-going when the Human Rights report was drafted.<sup>51</sup>

In the updated version of its press release regarding the Kodaikanal contamination, Unilever stated that Hindustan Unilever Limited (HUL) had signed a settlement on humanitarian grounds with former workers on 4 March 2016. The High Court of Madras took the settlement agreement on record. As part of the agreement, HUL, with an objective to ensure long-term wellbeing of its former workers, agreed to provide ex gratia payments to 591 workers/association members and their families to be used towards livelihood enhancement projects and skill enhancement programmes.<sup>52</sup>

However, what the statement (again) did not mention, was that Unilever only started to take action after a claim against the Unilever parent company and HUL was filed in the London High Court for the contamination in Kodaikanal. In the Madras Court, the case had been dragging on for 11 years, but Unilever agreed to a settlement within 16 months after the case was filed in London.<sup>53</sup>

As I said earlier, we need to look at learning organisations like Unilever differently than at organisations that are unwilling to learn. And the lesson that companies with an active human rights policy can learn from these two examples is that transparency is great, but being transparent about transparency is better. PR departments and legal departments that prefer secrecy over transparency in order to avoid poor publicity do not do their companies any favour, as these hidden facts will come to light sooner or later. They do not serve their company very well either because incomplete statements provide a false

49 Wouter Keuning, 'Verbeteringsproces kost nu eenmaal tijd', *Financieel Dagblad*, 12 September 2015: <http://fd.nl/ondernemen/1118427/het-proces-kost-nu-eeemaal-tijd>.

50 Jeroen Molenaar, 'Misstanden bij productie Unilever thee', *Financieel Dagblad*, 8 September 2015: <http://fd.nl/ondernemen/1117884/misstanden-bij-productie-unilever-thee>. It was only during the presentation of the annual accounts in January 2016 that Polman reacted to this media story. He said that the company mostly buys tea from its own certified plants, but that it also buys bulk tea on the free market that is certified by the Rainforest Alliance and so it could have bought tea from plants with substandard labour conditions. Polman did not answer questions as to why the company continued to sell tea without being able to guarantee that it was produced according to its high sustainability standards: Wouter Keuning, 'Beperkte betrokkenheid Unilever bij schandaal Indiase theeplantages', *Financieel Dagblad*, 9 January 2016: <http://fd.nl/ondernemen/1135739/unilever-heeft-lek-weer-boven>.

51 <https://www.unilever.com/sustainable-living/what-matters-to-you/kodaikanal-india.html>.

52 <https://www.unilever.com/sustainable-living/what-matters-to-you/kodaikanal-india.html>.

53 'Unilever settles dispute over mercury poisoning in India', *The Guardian* 9 March 2016: <https://www.theguardian.com/environment/2016/mar/09/unilever-settles-dispute-over-mercury-poisoning-in-india>.

picture, with liability risks due to incorrect reporting or to unfair commercial practices. An active human rights policy should include the maximum possible transparency.

This example raises also other questions. What role did Unilever's legal department (and probably its PR department<sup>54</sup>) play in deciding not to include the Kodaikanal case in the report?<sup>55</sup> More generally, what role does the legal department play with respect to Paul Polman's human rights ambitions in particular and the company's human rights policy in general? Understanding and analysing the role of Legal vis-à-vis other departments and vis-à-vis the company's human rights policy will therefore be an important part of my research at the Rotterdam School of Management.

54 See above, section 2.

55 The same goes for other controversial issues Unilever has faced over the past years: Wouter Keuning, Jeroen Molenaar, Richard Smit, 'Vijf keer de mist in', *Financieel Dagblad* 12 September 2015: <http://fd.nl/ondernemen/1118429/vijf-keer-de-mist-in>.

## 6. The legal business case for an active or proactive human rights policy

### 6.1 Introduction

One may say: 'That's all very well but an active or proactive human rights approach is an ethical, reputational or strategic thing to do. It is not a legal thing to do.' My case in this lecture is that an active or proactive human rights policy is also the right legal thing to do.

I begin with an observation by John Ruggie, the former Special Representative of the UN Secretary General for Business and Human Rights. He was asked: how can we bring morality back into business? And this is what he said:

*'Take the example of human rights. Human rights is actually a very simple issue. It means: 'treat people with dignity'. You can describe that as a moral code but you can also describe that as the essence of social sustainability of business enterprises because if you don't treat people with dignity you are not going to have them around very much longer, either as employees or as consumers. And if it is communities in which you are operating they are going to be pushing back against you. So yes, it is a moral issue to treat people with dignity but it is also very much a material issue for business.'*<sup>56</sup>

Human rights means: treating people with dignity. This is not only a moral issue and a material issue, as Ruggie says. It is also, to a considerable extent, a legal issue. Indeed, there are various solid **legal** reasons for the company to adopt an active or proactive human rights policy.

<sup>56</sup> Arun Marsh, 'John Ruggie on UN Human Rights Principles - video, *The Guardian*, 11 October 2013: <https://www.theguardian.com/sustainable-business/video/jo-confino-talks-to-john-ruggie-un-human-rights-video>.

## 6.2 Soft law norms and hard law: a distinction to be ignored by the company lawyer

The most fundamental reason for Legal to take soft law norms seriously is that there is no clear distinction between soft law and hard law and that they are intertwined in such a way that they can no longer be understood without each other. This means that Legal would be wise to adopt the view that soft law norms are legally relevant norms and that they should be fully incorporated in a company's business principles.

When SRSG John Ruggie started working on his Framework and Guidelines, it was not an option for him to create a legally binding instrument on business and human rights if he was to gain the support of the business world.<sup>57</sup> He therefore created responsibilities for businesses to respect human rights, and therefore the UN Guiding Principles do not provide legally binding obligations for companies. This means that a victim of human rights violations by a company cannot invoke the Guidelines in a court of law as a basis for his claim for damages. However, it would be wrong to conclude that the responsibility for businesses flowing from these Guidelines and from other instruments like the OECD Guidelines is legally irrelevant and irrelevant for Legal.

The theoretical discussion is about whether the UN Guidelines constitute soft law and, more theoretically, what soft law exactly is. The term 'soft law' is not well defined and under some definitions, the UN Guiding Principles do not qualify as soft law.<sup>58</sup> There is a wide diversity in the instruments of so-called soft law, which makes the generic term a misleading simplification.<sup>59</sup> In fact, the line between hard law and soft law is blurred. According to Shelton soft law 'usually refers to any international instrument other than a treaty that contains principles, norms, standards or other statements of expected

57 In August 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'. These Norms intended to create binding human rights obligations for businesses: <http://hrlibrary.umn.edu/links/norms-Aug2003.html>. The corporate world actively lobbied against this approach and was supported by most western governments.

In April 2004, the UN Commission on Human Rights considered the Norms, and expressed '... its appreciation to the Sub-Commission for the work it has undertaken in preparing the draft norms, said they contained useful elements and ideas for consideration but it did not approve them, and said they had no legal standing (Document E-CN 4 DEC-2004-116). In July 2005, UN Secretary-General Kofi Annan appointed Professor John G. Ruggie to be Special Representative of the UN Secretary-General on business & human rights. Against the background of the failed Norms, it was clear that he would not opt for a binding instrument. Consensus between governments, businesses and NGOs was of more importance. In 2011, this ultimately resulted in the UN Human Rights Council endorsing the UN Guiding Principles on Business and Human Rights.

58 For more on soft law, see for example, Dina Shelton, 'Soft law', in: David Armstrong (ed.), *Handbook of International Law* (Abingdon: Routledge, 2008), p. 1-30; Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in: Surya Deva and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013), p. 138-161.

59 Christine M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' 38 (1989) *International and Comparative Law Quarterly* 38 (1989), p. 850. In the same vein A.E. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' *International and Comparative Law Quarterly* 48 (1999), p. 901.

behaviour.<sup>60</sup> Boyle defines soft law as not legally binding, consisting of general norms or principles rather than rules, and that it is not readily enforceable through binding dispute resolution mechanisms.<sup>61</sup> In these definitions, the UN Guiding Principles and the OECD Guidelines can be considered to be soft law.

So why is soft law legally relevant and relevant for Legal? First, soft law may serve as a precursor to hard law. It might be used as a real life laboratory for the development of hard law legislation that is formally binding.

Second, the UN Guiding Principles basically formulate the expectations of the international community vis-à-vis the way companies behave with respect to human rights risks. They can be seen as social norms. Social expectations are an important element in shaping the open norms of tort law (also known as liability law). Tort law generally holds that companies and individuals must conduct their activities with the care required by society in the circumstances of the case (see section 7.2). Hence, the soft law norms of today, particularly the UN Guiding Principles and the OECD Guidelines, will probably be the tort law obligations of tomorrow.

Third, soft law norms may not be enforceable in a court of law, but they are enforceable and are indeed enforced in a number of other ways. Governments, banks, and investors are increasingly imposing compliance with soft law on companies in order to provide them with benefits or make them eligible for these benefits (see section 6.6).

Fourth, hard law comes in a variety of levels of hardness. They do not always require companies to guarantee specific results but rather require them to 'make an effort', or 'take sufficient care'.

Fifth, although hard law has the potential to be legally enforced, this is often more theory than practice. Enforcing a legal obligation against a powerful company requires a powerful victim (private enforcement) or a powerful governmental enforcement body (public enforcement). Both ways of enforcement are limited. For a victim of human rights violations to lodge a claim against a multinational enterprise requires an enormous effort, time and money.<sup>62</sup> Only a fraction of a fraction of human rights violations by companies is and can be addressed by private actions for damages.

Sixth, hard law norms, such as the EU Directive on non-financial reporting by large companies are furnished by reference to soft law instruments: companies can make use of reporting norms that are developed by private organisations: a form of private soft law.

60 Dina Shelton, 'Normative hierarchy in international law', *American Journal of International Law* 100 (2006), p. 319.

61 Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', *International and Comparative Law Quarterly* (48) (1999), p. 901-902.

62 Cees van Dam, 'Tort Law and Human Rights - On the role of tort law in the area of business and human rights', *Journal of European Tort Law* 2 (2011), p. 228-232. See also Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights', *City University of Hong Kong Law Review* 3 (2011), p. 1-41.

This illustrates that the distinction between hard law and soft law is not black and white but that they blend into each other. In some areas, enforcement of soft law norms may be even more effective than enforcement of hard law obligations. This goes particularly for the area of business and human rights with a relatively high level of scrutiny by NGOs, governments, investors, banks, media and social media.<sup>63</sup>

The UN Guiding Principles are also the manifestation of multilevel governance, where global norms (UN Guiding Principles, OECD Guidelines) are operationalised at a regional (EU Regulations and Directives) and a national level, with a mix of binding obligations and non-binding norms and a mix of governance institutions and lawmakers. It is a mix that is constantly changing at a relatively fast pace.

In conclusion, soft law instruments are legally very relevant and therefore very relevant for Legal. Ignoring soft law norms by Legal means that the company is orientated in the past rather than the future and that it denies rather than anticipates the incoming tide. This attitude implies an inactive or reactive approach to a human rights policy. Such a company will welcome the advice that it does not have to comply with soft law or take it seriously because it cannot be legally forced to comply. It is a similar approach as to hard law norms where inactive and reactive companies are inclined not to follow the rules as long they can get away with it because of a lack of private (tort) enforcement (section 4.1).

Legal in an active or proactive company understands that it is not wise to distinguish between hard law obligations and soft law norms and will embrace both, will include them in their business principles, and implement and enforce effectively. Both soft law and hard law are the company lawyer's business.

There are various other reasons why Legal should embrace soft law norms, which I will now briefly describe.

### 6.3 Improving assessment and management of legal risk

Research shows that companies tend to overestimate their ability to accurately predict the risks of stakeholder impacts. It is therefore likely that company lawyers tend to overestimate the ability to correctly assess the level of legal risk for the company.<sup>64</sup> A more accurate estimation of the legal risk may be achieved by a company with an

63 See also Jan Eijbouts, *Corporate responsibility, beyond voluntarism. Regulatory options to reinforce the licence to operate*, Inaugural lecture Maastricht (Maastricht: Maastricht University, 2011), p. 17-23; A.J.A.J. Eijbouts, 'Corporate Social Responsibility: A Matter of Principle(s), Law or Both?' in: *Tussen Themis en Mercurius, Bedrijfsjuridische bijdragen aan een Europese beleidsconcurrentie*, NGB 1930-2005 (Deventer : Kluwer, 2005), p. 83-96.

64 The failure of companies to accurately predict risk may result from the natural tendency of persons - confirmed by experiments and empirical studies - to overestimate their ability to accurately predict risk: Douglas Hubbard, *The Failure of Risk Management: Why It's Broken and How to Fix It*, (John Wiley & Sons, Inc., 2009) ("Hubbard"), Kindle ed., pp. 457-459; Fagone, *Masters of Disaster: At Wharton's Risk Management and Decision Processes Center, researchers are investigating why humans do such a poor job planning for, and learning from, catastrophes*, Wharton Magazine (Summer 2010), available at <http://www.whartonmagazine.com/issues/815.php>.



active or proactive human rights policy that engages in human rights due diligence and conducts a proper stakeholder policy. This means complying with soft law obligations improves discovery, assessment and management of legal risks.<sup>65</sup>

## 6.4 Preventing disputes and operational delays

Taking soft law seriously by complying with the responsibility to conduct human rights due diligence enables the company to anticipate, prevent or mitigate the consequences of disputes with workers, trade unions and local communities. The costs of due diligence and stakeholder meetings may be much smaller and often even a fraction of the operational losses caused by disputes.<sup>66</sup>

## 6.5 Staying ahead of the legislative games

An active or a proactive human rights policy, following global soft law standards, allows the company to anticipate the haphazard regulatory changes at national, EU and at the international level over the next decade. Legislation in this area is taking off and gaining momentum. See the brief overview provided in section 3.

In fact, companies are confronted with a complex array of legislative and non-legislative measures and guidance. They are issued from different levels (UN, OECD, EU, and national legislators), and in different forms (hard law, soft law, private regulation through industry codes, including Global Compact, through the conditions set by investors and lenders, as well as by certification organisations).<sup>67</sup> Business and human rights is one of the areas where 'law' is transnational and multiform by nature.<sup>68</sup>

An inactive or reactive company taking a formal approach on what is binding and what is not binding is running serious legal risks, as the distinction is blurred and cannot be maintained as a decision making tool. Such an approach also means that the company has to respond to a constant stream of various piecemeal changes in various parts of the

65 It may also lead to the conclusion that some legal risks were overestimated.

66 See, for example, Rachel Davis and Daniel M. Franks, *Costs of Company-Community Conflict in the Extractive Sector*, Corporate Social Responsibility Initiative Report Nr. 66 (Cambridge MA: Harvard Kennedy Law School 2014: [https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict\\_Davis%20%20Franks.pdf](https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf)).

67 For more about enforcement of company and industry codes see Anna Beckers, *Enforcing Corporate Social Responsibility Codes. On Global Self-Regulation and National Private Law* (Oxford: Hart Publishing, 2015). See also Jan Smits, 'Enforcing Corporate Social Responsibility Codes Under Private Law, or: On the Disciplining Power of Legal Doctrine', *Indiana Journal of Global Legal Studies* 24 (2016) 1 (forthcoming); also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2671496](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2671496).

68 For a concise overview of the concept of transnational law Peer Zumbansen, 'Transnational Law, Evolving', in: Jan Smits (ed.), *Encyclopedia of Comparative Law*, 2nd edn. (Cheltenham: Edward Elgar, 2012), p. 899-925, with further references: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1975403](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975403). See also Fabrizio Cafaggi, 'Transnational Private Regulation. Regulating Private Regulators', in: S. Cassese, *Research handbook on global administrative law* (Cheltenham: Edward Elgar, 2016). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2615694](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2615694).

world where the company operates. Adapting to each regulatory change may turn out to be more costly than investing in an active or proactive human rights policy and staying ahead of the game, or rather staying above the legislative waterline.<sup>69</sup>

## 6.6 Increasingly active banks, investors, procurement, business customers

It is true that soft law obligations cannot be legally enforced. However, non-compliance increasingly carries other business risks, such as not being eligible for export credit guarantees, not being allowed to participate in trade missions, losing out in procurement procedures, and becoming less attractive for banks and investors.

The Fair Finance Guide (Eerlijke Geldwijzer), a project of a consortium of NGOs, including Amnesty International, monitors the development of banks and investors becoming more critical on human rights risks in their portfolios. It regularly publishes data on how banks and other financial institutions invest their money. This enables consumers to decide about their financial investments.<sup>70</sup> This again influences the way banks lend money to companies and under which conditions.

## 6.7 The inherent link with corporate governance

There is an inherent link between good governance and corporate social impact.<sup>71</sup> This is recognised in the Dutch corporate governance code, which requires the company's supervisory board to have due regard for corporate social responsibility issues and for the relevant interests of the company's stakeholders'.<sup>72</sup> The Code applies the 'comply or explain' principle: either the company includes information about compliance with the Code in its annual report or it explains why a Code provision was not applied.

69 See also John F. Sherman III, *Six Reasons Why Lawyers Should Practice Law with Respect for Human Rights* (Shift, 2014): <http://www.shiftproject.org/article/six-reasons-why-lawyers-should-practice-law-respect-human-rights>, better risk management, achieving sustainability objects, coping with changing law, compliance with national law, prevention of human rights harm, and legal ethics. See also John F. Sherman III, 'The UN Guiding Principles. Practical Implications for Business Lawyers', *In-House Defense Quarterly* 2013, p. 50-57; also available at <http://www.shiftproject.org/publication/un-guiding-principles-practical-implications-business-lawyers>. See more generally, inter alia, Business and Human Rights Initiative, *How to do Business with Respect for Human Rights? A Guidance Tool for Companies* (The Hague, Global Compact Network Netherlands, 2010).

70 See <http://fairfinanceguide.org> and <http://eerlijkegeldwijzer.nl>.

71 Cynthia A. Williams, 'Corporate Social Responsibility and Corporate Governance' in: Jeffrey N. Gordon & Wolf-Georg Ringe (eds.), *Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, forthcoming, 2017): <http://ssrn.com/abstract=2635473>.

72 Principle III.1 of the Dutch Corporate Governance Code: Principles of Good Corporate Governance and Best Practice Provisions: <http://www.commissiecorporategovernance.nl/download/?id=606>.

Legal departments of multinational companies usually not only provide advice on legal matters but also on ethical, political, good governance issues, as well as a host of other aspects that are outside the strict remit of legal advice. Advising the company about soft law easily falls within this broad remit. However, if a legal department engages in soft law, it does not mean that the company has an active or proactive human rights approach. The approach can still be inactive or reactive by solely or mainly focusing on limiting the legal and reputational risks flowing from soft law norms, thus supporting the company's responsibility to maximise profits and return on investments, and being instrumental in helping the company to resist change with respect to non-financial matters such as respecting or enhancing human rights.

By contrast, the legal department of a company with an active or proactive human rights policy takes soft law seriously for entirely different reasons. Soft law norms help the company to focus on doing the right thing by avoiding harm to others and the environment, but also by actively and positively contributing to sustainability and to human rights protection, even if this goes beyond the company's direct challenges. It enables Legal to be actively involved in developing, implementing and monitoring the company's human rights policy, and to be actively engaged in stakeholder dialogues by discussing and sharing dilemmas, by questioning and exchanging ideas to understand the position of the stakeholders and to find partners to achieve or contribute to solutions.

In short, an inactive approach means treating the company with dignity. A proactive approach means treating people with dignity by not only respecting but also enhancing the human rights protection of workers, customers and communities. In the end, this serves the dignity of the company in the best possible way. If you do not treat people with dignity but consider them as a commodity, you will lose them either as employees or as consumers. And if you do not treat the environment and the communities with dignity but consider them as a commodity, they are going to retaliate. So treating people with dignity is a moral, ethical, material and legal issue for businesses.

## 7. Alignment and control: from inactive to proactive

### 7.1 Two examples: AkzoNobel and Zara

An active human rights policy requires the involvement and commitment of Legal. It requires an integrated approach throughout the company to avoid misalignment. Two examples illustrate this.

Around 2000, after a number of acquisitions and divestments, AkzoNobel was characterised by three different cultures, three different ways of doing business. The then General Counsel, Jan Eijsbouts, saw that none of these cultures were keen to do business in an ethically correct way. This adversely affected the company's legal risks. In consultation with CEO Cees van Lede, Eijsbouts drafted and implemented an extensive legal and ethical framework including human rights issues, based on the then leading OECD Guidelines.<sup>73</sup> According to Eijsbouts, this process also changed the role of the company lawyers:

*'The in-house counsel is no longer the legal technician who will only give his specialist advice, if and when requested by the business client based on the latter's assessment. A proactive posture, which includes timely notification by the lawyer of relevant developments in the legal field, should build the close relationship of trust between client and legal adviser that is needed to secure the legal integrity of the corporation in the interest of its stakeholders and the society at large. The Legal Account Managers of the business units have been assigned an important role in ethical and legal compliance.'*<sup>74</sup>

A contrasting example is Spanish fashion chain Zara, as described in a report of research organisation SOMO.<sup>75</sup> In 2011, 15 illegal immigrants were found working and living under deplorable conditions in two small workshops in São Paulo in Brazil. They had to work for up to 16 hours per day and were restricted in their freedom of movement. The government inspectors classified the conditions in the two workshops as 'analogous to slavery'. The workshops were contracted by a supplier of Zara. According to the Brazilian authorities, Zara Brazil exercised directive power over the supply chain and could therefore be considered to be the real employer of the 15 immigrants at the workshops. The authorities therefore argued that Zara was legally responsible for the situation of the workers.

<sup>73</sup> <http://www.goodgovernance.nu/verhalen/jan-eijsbouts-deel-1>.

<sup>74</sup> A.J.A.J. Eijsbouts, 'Corporate Social Responsibility, A Matter of Principle(s), Law or Both', in: *Tussen Themis en Mercurius, Bedrijfsjuridische bijdragen aan een Europese beleidsconcurrentie*, Nederlands Genootschap voor Bedrijfsjuristen 1930-2005, p. 95.

<sup>75</sup> André Campos, Mariëtte van Huijstee and Martje Theuws, *From moral responsibility to legal liability? Modern day slavery conditions in the global garment supply chain and the need to strengthen regulatory frameworks: The case of Inditex-Zara in Brazil* (Amsterdam: SOMO, 2015).

Zara responded in two different ways to the findings of the Brazilian authorities. On one hand, it assured its shareholders it was able to effectively monitor its supply chain. Hence, it admitted that it was in control, and accepted **moral responsibility**. At the same time, Zara denied **legal liability** for the conditions in the workshops. It argued that it had not authorised the outsourcing to these workshops, that it was not aware of the outsourcing and that its contracting party had deceived the auditors. In short: Zara told its shareholders that it was in control of its supply chain but at the same time it was not legally liable because it was not in control of its supply chain. This is a typical example of an incredible and inconsistent form of communication, often as a consequence of the interference by the legal department.

## 7.2 CSR control over subsidiaries and suppliers but no legal control?

A company's human rights policy affects the entire enterprise, and includes subsidiaries and the supply chain. One of the challenges in a large company is to align the human rights policies throughout its different components. For example, it is not credible for a company to have a CSR department that develops and implements a human rights policy, while in case of a dispute the legal department zealously fights every legal issue that it can win or with which it can get away. As a company lawyer from a large Dutch multinational with an extensive CSR programme told me: 'CSR is a commitment of the whole enterprise, even with respect to 50% joint ventures. However, if there is a legal dispute, all registers turn to legal. From then on, we argue that we do not have any legal control over our subsidiaries. We owe this to our shareholders.' This way, Legal is ultimately not interested in Corporate Social Responsibility but in Corporate Shareholder Responsibility.

Alignment of a human rights policy is not only necessary between the company's departments and divisions but also between the parent company and its subsidiaries and between the company and its suppliers. This is an issue with considerable legal dimensions. Responsibility and liability of a company for acts and omissions of its subsidiaries and suppliers is only in its infancy, while the separate entity theory is still popular with company lawyers. This theory implies that the legal entities of the enterprise (usually a myriad of entities designed to limit liabilities such as for damages and tax) are independent and are not liable for each other's acts and omissions.

This separate legal entity theory is a legal construct and fiction, and a very costly one: it forces society to pay for the damage caused by risky subsidiary behaviour.<sup>76</sup> It also starkly deviates from business reality, which is strongly focused on branding of the enterprise and on having 'common control, common business purpose, economic integration, financial and even administrative interdependence'.<sup>77</sup> Subsidiaries are extensively used for

76 Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups', *California Law Review* (2009), p. 200.

77 Philip I. Blumberg, 'Asserting Human Rights Against Multinational Corporations under United States Law: Conceptual and Procedural Problems' *American Journal of Comparative Law* (2002), p. 493-494.

mutual financing and for the purpose of tax avoidance, if not worse.<sup>78</sup>

Interestingly, the separate legal entity theory is ignored in the UNGPs, making it the responsibility of the corporate enterprise to respect human rights. Subsidiaries and also suppliers are brought into the enterprise responsibility by requiring that business enterprises not only avoid causing or contributing to adverse human rights impacts through their own activities, but also seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.<sup>79</sup>

The separate legal entity theory is at odds with aligning the company's human rights policy with its subsidiaries and suppliers. In fact, if companies have a CSR or human rights policy, they are keen to implement it throughout the enterprise, including subsidiaries and suppliers. This shows that they do have influence and control over their subsidiaries, as is also illustrated in the Zara case set out above. Moreover, the development of global value chains, which can only be maintained and managed with a considerable amount of control by the lead company, shows that this influence and control also exists in the supply chain.<sup>80</sup>

The legal theory of separate entities is also called the corporate veil. A generally accepted exception to this rule of non-liability is the piercing of this corporate veil. However, the courts only accept this exception if there is a clear abuse of the corporate veil.<sup>81</sup>

More recently, the courts have started to accept that liability of a company for its business partner (such as a subsidiary or supplier) can be based on the breach of a duty of care the company owed to third parties (such as employees) to supervise the subsidiary or the supplier and prevent it from violating human rights.<sup>82</sup> However, the exact conditions for this duty of care are subject to debate. One of the presumed conditions is that the company exercised sufficient control over the business partner

78 Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law', *Washington & Lee Law Review* 72 (2015), p. 1808.

79 *United Nations Guiding Principle* nr. 13.

80 See in particular Fabrizio Cafaggi, 'The regulatory functions of transnational commercial contracts: new architectures', 36 *Fordham International Law Journal* (2013), p. 1557-1618; Kevin B. Sobel-Read, 'Global Value Chains: A Framework for Analysis', *Transnational Legal Theory* 5 (2014) 3, p. 364-407 ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2312034](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312034)). For a broader picture, see Louise Vytupil, *Contractual control in the supply chain. On corporate social responsibility, codes of conduct, contracts and (avoiding) liability* (The Hague: Eleven International Publishing, 2015).

81 Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (Edinburgh, University of Edinburgh, 2010), p. 61ff.; Cees van Dam, 'Tort Law and Human Rights. On the role of tort law in the area of business and human rights', *Journal of European Tort Law* 2 (2011), p. 248 ff.

82 Notably, the English cases of *Chandler v Cape* [2012] EWCA Civ 525; *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635. See also the considerations of Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3586 (Dooh/Shell); Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3587 (Shell/Akpan); Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell).

causing the harm, and that the company did not use this control in such a way as to prevent the business partner from violating human rights, while if 'acting like a reasonably acting company put in the same conditions'<sup>83</sup>, the company would have done so.

Control can be of a formal character (such as in parent-subsidaries relationships) or mainly factual (such as in supply chain situations).<sup>84</sup> It may also imply that the company has sufficiently control to influence the conduct of its business partner in one way or another. Case law does not yet provide a clear definition of sufficient control. The courts assess this on a case-by-case basis and the assessment differs per jurisdiction.

Unlike in tort law (liability law), the concept of control has been fleshed out in other areas of the law, such as in competition law, in tax law, and in accounting law.<sup>85</sup> For example, accounting law assumes that a company exercises control over its subsidiaries or other business partners if the company (I) controls the majority of shareholders' voting rights; (II) has appointed or has the right to appoint the majority of the subsidiary's management; or (III) has the power to exercise or exercises dominant influence on its subsidiary. Under such conditions, the company must prove that it did not exercise such control.<sup>86</sup>

83 The 'reasonable company' is a variation on the classic 'reasonable man' that is used in liability cases to assess how the defendant should have behaved in the circumstances of the case: he will have breached his duty of care if he did not act as a reasonable man. As regards companies, the circumstances of the case will include the size of the company and the industry sector. See also Cees van Dam, *European Tort Law* (2013), sections 804-805.

84 It is important to note that control is not a necessary requirement for liability. It could very well be that a company sources materials from a supplier over which it does not have legal control or factual control or leverage. If this supplier makes use of forced labour, the company may owe a duty to discontinue sourcing from this supplier. This is particularly relevant for a duty to conduct human rights due diligence, obliging the company to scrutinise its subsidiaries and suppliers, regardless of whether it exercises control over them. See Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence', *Business and Human Rights Journal* 1 (2016), p. 179-202. Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law', *Washington & Lee Law Review* 72 (2015), p. 1769-1864.

85 Cees van Dam, 'Tort Law and Human Rights. On the role of tort law in the area of business and human rights', *Journal of European Tort Law* 2 (2011), p. 248.

86 If the company meets these criteria, its accounts need to be included in the accounts of the group (Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings).

In tort law, control is still a concept to be fleshed out and provides legal space for companies to argue that they cannot be liable for human rights violations by subsidiaries and suppliers for lack of control. This conservative approach of the separate entity theory reflects an inactive or reactive human rights policy. It uses the legal lack of clarity, whereas in fact it controls its subsidiaries and suppliers to a great extent for the benefit of other company policies and brand protection.

An active human rights policy implies that the company accepts accountability for its subsidiaries and suppliers, using its leverage and control to ensure that subsidiaries and suppliers respect human rights, even in situations where the company does not legally or factually control them. A company with a proactive human rights policy considers the conduct of its subsidiaries and suppliers as a shared societal responsibility, ensuring they enhance human rights protection, in partnerships with local and central governments, trade unions, local communities and NGOs.<sup>87</sup>

**Table 4:** Transition phases for Legal: the corporate framework: unity or a loose collection?

	Inactive	Reactive	Active	Proactive
Corporate framework	Separate entity approach: no liability for subsidiaries and suppliers	Separate entity approach: no liability for subsidiaries and suppliers unless legally inevitable	Accountability for subsidiaries and suppliers, also if no or limited legal or factual control	Shared societal responsibility for subsidiaries and suppliers, also if no or limited legal or factual control

87 UN Guiding Principle 13 and 19 clarify the responsibility to respect human rights where the company did not directly cause or contribute to harm caused by a business partner. Guiding Principle 13b holds that the company has to act and cannot remain a bystander: 'The responsibility to respect human rights requires that business enterprises [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts' (Report Ruggie, 2011, p. 14). The appropriate action is set out in the commentary to Guiding Principle 19: by exercising leverage, by terminating the business relationship, and by continuing the relationship while being ready to pay a price and still making mitigation efforts (Report Ruggie, 2011, p. 19). For more details, see Radu Mares, "Respect" human rights: Concept and convergence', in: Robert C. Bird, Daniel R. Cahoy and Jamie Darin Prenkert (eds.), *Law, Business and Human Rights. Bridging the Gap* (Cheltenham: Edward Elgar, 2014), p. 3-47.



## 8. Grievance mechanisms: from inactive to proactive

An important test case for a company's human rights policy is the way it deals with grievances. Providing a grievance mechanism is a requirement of the UN Guiding Principles.<sup>88</sup> As Ruggie wrote in his Framework report:

*'For a company to take a bet on winning lawsuits or successfully countering hostile campaigns is at best optimistic risk management. Companies should identify and address grievances early, before they escalate. An effective grievance mechanism is part of the corporate responsibility to respect.'*

Feedback from stakeholders can vary from the notification of an issue, via a complaint and a grievance to a legal claim. There are no set definitions for these terms. A notification that is not handled effectively may very well end up in a legal claim. The way companies deal with issues and complaints differs and can demonstrate an inactive, reactive, active or proactive approach.

A grievance mechanism has to function properly and be effective. It is not like the customer service department of, for example, a telecom company or an airline. The policy of such departments may be to deny, ignore or belittle the allegations, keeping the complainant at bay, keeping him in the queue, or fobbing him off. There are blunt as well as subtle and sophisticated 'complaint' systems aimed at exhausting the complainant and getting him to drop the complaint or case. This is the typical approach of an inactive company. It is a well-known fact that dealing with complaints in a passive way and not taking the complainant seriously creates the most fertile ground for an escalation of the conflict. But because these companies know that most complainants do not have the means to litigate, they consider this escalation risk to be acceptable.

88 UN Guiding Principle 29: 'To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.'

**Table 5:** Transition phases for Legal: grievance mechanisms and litigation behaviour

	Inactive	Reactive	Active	Proactive
Grievance mechanism	No effective grievance mechanism	Limited grievance mechanism	Effective grievance mechanism	Effective grievance mechanism
Aim	Discouraging complaints	Information tool for company risks	Information tool for human rights risks	Information tool for human rights risks
How	Kill the complaint: how can we get away with this?	Deal with complaint in a defensive way	Solving complainant's problem	Solving complainant's problem and contributing to solving underlying problems
Litigation attitude	Defensive and calculating: how can we get away with this	Defensive and calculating: how can we minimise the risk?	Resolving the dispute by providing damages	Resolving the dispute by providing an appropriate remedy including apologies and vindication

The grievance mechanism set up by a **reactive** company aims to channel complaints and deal with them in an efficient albeit defensive way. The focus is on managing the risks for the company. As the aim of the company is to maximise revenues, the budget for addressing grievances and resolving disputes will be minimal and so will be the company's willingness to come to an appropriate settlement. Exhausting the complainant's energy can be part of the company's way of dealing with grievances or disputes.

The **grievance** mechanisms set up by an active company serve as a risk information tool and contribute to the company's learning process. The focus is both on the risk for the company and the human rights risk. Although these are often two flips of the same coin, the focus does matter: the responsibility of the company is to respect human rights, not because that is a risk for the company, but because it is a responsibility in its own right. Complaints are taken seriously and approached without prejudice, and the grievance mechanism is effective in solving the complainant's problem. The company's grievance policy is based on objective and independent advice.<sup>89</sup>

<sup>89</sup> A comparison can be made with product liability regimes. A fault liability regime asks whether the manufacturer exercised due care when producing the product. However, the European product liability Directive, as implemented in the EU Member States, asks whether the product provides the safety the user or consumer is entitled to expect. The first regime links with the company risk approach: did the company exercise due diligence to prevent causing harm? The second regime links with the human rights risks approach: here, the question would be whether the company provided the stakeholders the safety they were entitled to expect.

The **proactive** company does not only look at the complaint but also at the background of the complaint. It aims to deal with the complainant's issue and to contribute to solving the underlying and more structural societal problems in partnership with the involved stakeholders. Here, the company lawyer is no longer the advocate of the company alone, but also takes the rights and interests of the complainant into consideration.

## 9. Sometimes lawyers can be problematic people

As lawyers, we are trained to prevent wrong things from happening. If something has gone wrong, we have learned to negotiate and to get a deal done. And if this does not work, we have learned how to litigate. We tend to focus on problems and we are less proficient in solving them. We are not particularly good at creating something good out of a crisis. One could argue that this not the job of a lawyer: the law usually requires someone not to do the **wrong** thing. It hardly ever requires someone to do the **right** thing.

A salient example illustrates this point. Bodo is one of the heavily polluted areas in the Niger Delta in Nigeria. Since leakages in Bodo began in 2008, the area is predominantly black. Unlike in the Oruma case (which is pending before the Dutch court), Shell had admitted liability for the pollution in Bodo. But Shell and the local residents were unable to reach an agreement over how the area should be cleaned. Then the Dutch ambassador to Nigeria, Bert Ronhaar, took up the role of mediator between Shell and the local residents.

However, no progress was made. Ambassador Ronhaar observed that the parties were outright hostile to each other. Then he decided to ask the parties to negotiate without their lawyers. That was the breakthrough. The negotiations got on their way, trust between the parties was established and they came to a solid agreement about the cleaning up of the area.<sup>90</sup>

Lawyers need to learn and know more than how to fight a conflict by taking a purely partial approach. Particularly active and proactive companies that are looking to align their human rights policies throughout their enterprise and supply chain can benefit from lawyers who see the solution rather than the problem. And more particularly, not just to see the solution for the company, but also the solution for the company **and** the complainant(s) and, preferably, for society. In the famous words of Abraham Lincoln:

*'Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.'*<sup>91</sup>

90 Gerard Reijn, 'Ik vroeg: waarom gebeurt hier niets?' Interview met Bert Ronhaar, *Volkscrant*, 4 May 2015: <http://www.volkscrant.nl/economie/-ik-vroeg-waarom-gebeurt-hier-niets~a3997708>. This does not mean that lawyers do not have a role to play, as it is likely that they were involved in the final drafting of the agreement. The case also highlights the role mediation may play in brokering effective solutions for problems caused by human rights violations. In this case, the main hurdle had already been taken, which was Shell Nigeria's admission of liability. See also Elodie Aba, 'Shell & the Bodo community - settlement vs. litigation', *Business and Human Rights Resource Centre*, 12 January 2015: <https://business-humanrights.org/en/shell-the-bodo-community-%E2%80%93-settlement-vs-litigation>.

- 91 Abraham Lincoln's Notes for a Law Lecture, July 1, 1850: 'Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.  
' <http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm>. See also Benjamin W. Heineman, 'The General Counsel and Ideal of the Lawyer-Statesman', *ACC Docket* 22 (2004) 5, p. 60-67 (<http://www.accdocket.com/articles/resource.cfm?show=17031>) and for a further advanced view Kimberly J. Stamatelos, *The Compassionate Lawyer* (West Des Moines: LifeInBalance Publishing, 2014).

# 10. The litigation database research: some initial findings

## 10.1 Introduction

As a lawyer at the Rotterdam School of Management, I have the privilege to cooperate in a wider interdisciplinary research agenda, including quantitative research projects. One of these research projects is the development of a database of multinational companies that have been involved in human rights lawsuits. We then link these companies to a variety of other data, such as the industry sector, the type of company (listed, family), the seat/headquarters of the company, the country where the violations took place, the reporting system, the company model (shareholder or stakeholder), the management system, etc. etc.

One of the aims of this research is to find out what specific company characteristics contribute to the way companies (and their legal departments) respond to lawsuits and what this implies for the position of the company compared to its peer companies and the whole economy. For example, we examined the impact of lawsuits on company performance on the stock market, by comparing the share price on the filing date and on the termination date of the lawsuit. Starting from a big sample of documented lawsuit cases by the Business and Human Rights Resource Centre and selected reading of the literature, we selected 74 lawsuit cases concerning severe human rights violations involving 54 publicly quoted multinationals. The period covers the 1950s until present.<sup>92</sup>

Let me give you some initial results of this research project. I will start by giving you some general findings in section 10.2, followed by some company specific findings in section 10.3.

92 Here is how we did it methodologically:

**Sample Selection and Source of Information:** The sample consisted of the 117 lawsuits profiled on the website of the Business and Human Rights Resource Centre ([www.business-humanrights.org](http://www.business-humanrights.org)), as well as 55 other cases mentioned in Richard Meeran, 'Tort Litigation Against Multinationals for Violation of Human Rights: An Overview of the Position Outside the US', *City University of Hong Kong Law Review* 3 (2011) 1, p. 1-41; Michael D. Goldhaber, 'Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard', *UC Irvine Law Review* 3 (2013), p. 127-149, and Rasmus Kløcker Larsen, 'Foreign Direct Liability Claims in Sweden. Learning from *Arica Victims KB v. Boliden Mineral AB?*', *Nordic Journal of International Law* 83 (2014), p. 404-438. We removed cases of companies for which we were not able to find reliable financial information (such as in annual reports, stock prices, etc.) and ended up with a final sample of 56 companies. Within this sample we focused on well-known companies with a diverse industrial and geographical background. Additionally, we analysed and factored in the severity of the cases, in particular the possible impact of the violations, so as to ensure their reliability.

**Data Collection:** For the companies included in the final sample, we collected information about the lawsuits (claim, number of plaintiffs, lawsuit initiation date, settlement information, damages information, countries where the violation took place, etc.). Subsequently, financial data were derived from Annual Report and SEC filings. We used the consolidated financial statements of the companies, as well as their geographic/segment information (sales/assets/employees) to document their internationalisation patterns throughout the years, generally from 1990 to 2014. This allowed us to observe which regions and countries were more used, based on asset development, revenue production, and talent/employee acquisitions. Stock price information was extracted from The Center for Research in Security Prices (CRSP) database, as well as the NASDAQ official website. Additionally, peer group information was obtained through individual research for each of the companies selected, and by observing specific market indices such as the S&P Metals and Mining index.

**Stock Price Fluctuations and Comparison to Benchmark Methodology:** In order to correctly compare the stock price performance of individual companies with the general market benchmark (S&P500) and the specific industry benchmark (S&P Oil and Gas Exploration and Refining Index, S&P Technology Multimedia and Networking Index, S&P Pharmaceuticals, etc.), we indexed all historical stock and index prices for the specific period. We took the first date ( $t=0$ ) of the time period of interest and equated this to 100%. Afterwards, all data following ( $t=1,2,3,\dots,n$ ) had to be divided by the share price at  $t=0$  and multiplied by 100. Subsequently, we subtracted 100 from the calculated indexed value in order to assess the changes in prices. We followed the same procedure for the benchmark indexes, which allowed us to see the changes both in the market, in the specific industry sector, and in the company itself. Hence, all graphical data representations have three lines (company, industry, market).

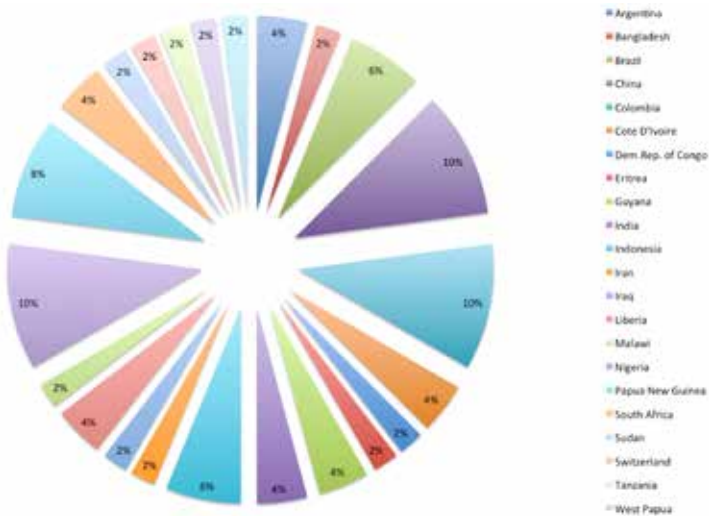
## 10.2 General findings

The general findings are related to the locations of the alleged human rights violations, the locations and nationalities of the corporate headquarters that were involved in the lawsuit, and the distribution over the various industries.

**Figure 1:** Locations of alleged human rights violations (map)



**Figure 2:** Locations of human rights violations (chart)





Not very surprisingly, the locations of human rights violations can be mainly found in South America, Africa, the Middle East, South and Southeast Asia. A remarkable point is the strong concentration of cases in large developing countries. Do people in smaller countries find it more difficult to file a lawsuit? Were NGOs less active there? Or were there fewer and less severe human rights violations in these countries? The latter sounds unlikely but cannot be excluded. Additional research is needed into the correlation between human rights violations and country size.

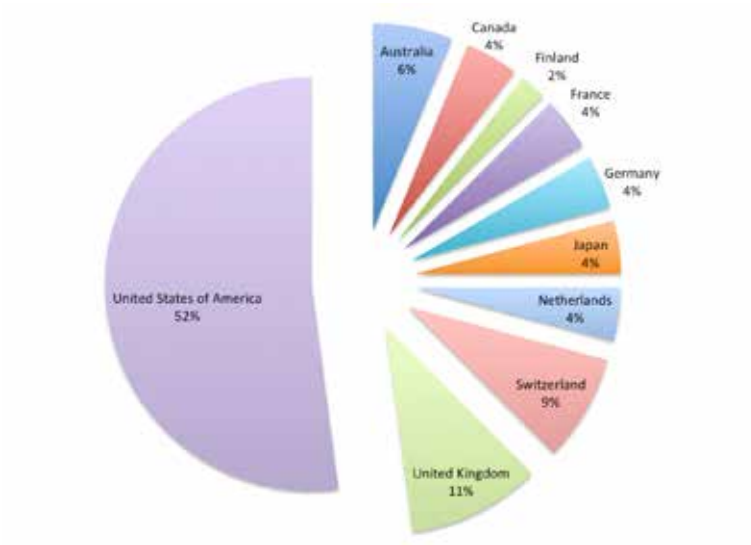
The following two slides show the seats, the headquarters of the companies involved in lawsuits for human rights and environmental law violations. Also here, the picture is not very surprising: apart from Australia, the headquarters are solely in countries in the northern hemisphere.

The second slide shows that the majority of cases involve Anglo-American companies, including bi-national company Shell. They represent almost 75% of the cases. In these countries, litigation is also more embedded in the national culture, the possibilities for litigation are usually better and there are solid law firms that only represent victims. Moreover, these are countries with a strong and free press that will generate public attention for the cases, which may potentially cause reputational damage to the company. The litigation culture in these countries may imply that companies are inclined to have a rather inactive or reactive approach.

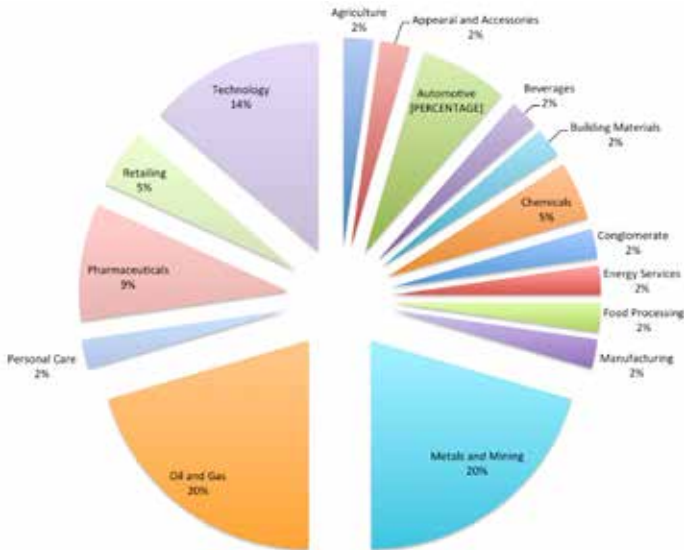
**Figure 3:** Nationalities of corporate headquarters involved in lawsuits (map)



**Figure 4:** Nationalities of corporate headquarters involved in lawsuits (chart)



**Figure 5:** Industry distribution (74 cases involving 54 companies)



As expected, we found a strong concentration of cases in the mining of metals, oil and gas. However, and this may be a little surprising for some, we also found an increasing number of cases in technology, pharmaceuticals and in the automotive industry.

### 10.3 Company specific findings

Subsequently, we examined the impact of lawsuits on company performance on the stock market by comparing the share price on the filing date and on the termination date of the lawsuit. We compared this with the general trend on the stock market (as noted in the S&P index) and a sample of peer companies.

**Figure 6:** Chevron



This slide is about oil multinational Chevron. It faced two lawsuits: one in Nigeria<sup>93</sup> and one in Ecuador.<sup>94</sup> Both lawsuits started around 2000 and continued for quite some time. Both were finalised in out of court settlements. From the point of view of the legal department this may have been a positive result, also because the court did not decide the case and hence a precedent was avoided.

However, if you look closely at the graph, the conclusion might not be that positive from a strategic point of view. The blue line shows the trend of Chevron's stock price performance over the 2000-2015 period. The green line shows the average industry performance over the same period. Comparing the two lines shows that the lawsuits may have had a considerable adverse effect on Chevron's reputation. This conclusion is corroborated by the finding that the company performed relatively the same as the whole S&P index (this is the red line). This means that a legal success may not have had a positive effect on the company as a whole.

93 <https://business-humanrights.org/en/chevron-lawsuit-re-nigeria>.

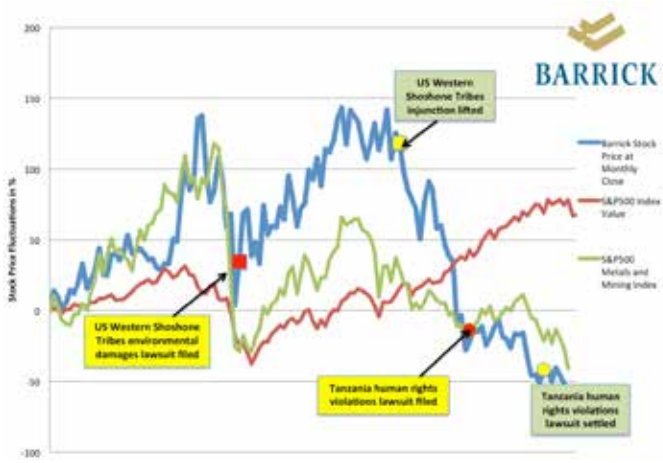
94 <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>.

**Figure 7: British Petroleum**



Over the period 1999-2015, British oil multinational British Petroleum faced several environmental and human rights violation lawsuits.<sup>95</sup> During the first lawsuit, we found no effect on the company’s stock performance. However, we found a negative effect on BP’s performance vis-à-vis its peer group during the second lawsuit, and a negative effect on the company’s position vis-à-vis the general index, which it had followed neatly in the previous period, during the third lawsuit.

**Figure 8: Barrick Gold**



95 <https://business-humanrights.org/en/bp-lawsuit-re-alaska>, <https://business-humanrights.org/en/bp-lawsuit-re-colombia>, and <https://business-humanrights.org/en/bp-lawsuits-re-casanare-colombia>.

At the start of the US Western Shoshone Tribes environmental damages lawsuit,<sup>96</sup> Barrick Gold's stock performance was on par with the industry average. During the time of the first lawsuit, the company's stock price performance increased, but dropped once the injunction was lifted. Faced with a second lawsuit in Tanzania,<sup>97</sup> the effect was the opposite. The company sustained a lower than average stock performance, which was also countercyclical to the total S&P index.

**Figure 9: BHP Billiton**



Mining company BGH Billiton faced with three environmental cases over a longer period of time.<sup>98</sup> The company settled each of these cases. In the first two cases, the company's stock performance was systematically below the industry average.

96 <https://business-humanrights.org/en/barrick-gold-lawsuit-re-western-shoshone-tribes-usa>.

97 <https://business-humanrights.org/en/african-barrick-gold-lawsuit-re-tanzania>.

98 <https://business-humanrights.org/en/bhp-lawsuit-re-papua-new-guinea>.

**Figure 10: Yahoo!**



The Yahoo! case is an example of a short term industry effect resulting in an out of court settlement in 2007-2008. The media company was accused of human rights violations in China.<sup>99</sup> Initially share prices dropped compared to the industry/peer group and to the general average. However, stock price performance recovered quickly after the out of court settlement.

These are a few examples of the database research that I hope to pursue and extend in order to gain a better understanding of the relationship between human rights litigation and the company's stock performance. The initial research suggests that such a negative relationship exists, but more research is needed to draw firmer conclusions.

The Business-Society Management Department provides an excellent framework to create relevant insights into the area of international business and human rights. The resulting database will become available to scholars and will hopefully trigger additional research on the interface between law and business studies.

99 <https://business-humanrights.org/en/yahoo-lawsuit-re-china-0>.

# 11. The broader background of business and human rights

## 11.1 Introduction

At the end of this lecture, I will make some brief observations on the broader background of business and human rights. Many of the issues in this area are micro manifestations of macro failures. In other words, many of the problems we face in business and human rights are a result of the way the world is organised: historically, economically and politically.

## 11.2 Business and human rights in the western world

Human rights are not only under pressure in developing countries, in conflict zones and in fragile states but also in the western world. Erosion of human rights is a global development under the influence of deregulation, privatisation, and the decreasing protecting role of the State.<sup>100</sup> We see an increasing poverty gap, a shrinking middle class, a growing lower class, a break-down of labour rights and increasing precarity because of more temporary and zero-hour contracts while pension schemes are limited or are being abolished. Business and human rights is therefore not only a concern in the developing world but increasingly so in the western world.<sup>101</sup>

100 Often linked with neoliberalism, a catch-all term for what has been the predominant policy in the western world over the past three decades. It paved the way, inter alia, for much weaker labour rights, privatisation of public services, and a considerable reduction of public law enforcement. It is often perceived as an economic theory, but it is in fact an economic ideology. It considers competition to be the defining characteristic of human relations and believes that the market delivers benefits that cannot be achieved by planning. 'Freedom from trade unions and collective bargaining means the freedom to suppress wages. Freedom from regulation means the freedom to poison rivers, endanger workers, charge iniquitous rates of interest and design exotic financial instruments. Freedom from tax means freedom from the distribution of wealth that lifts people out of poverty.' George Monbiot, 'Neoliberalism; the ideology at the root of all our problems', *The Guardian* 15 April 2016: <https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot>. Respect for human rights is at odds with neoliberalism proper and current efforts to regulate business and human rights are therefore often half-baked or not baked at all. At the same time these efforts might be part of a more recent development in which neoliberalism is no longer taken for granted. Very recently, researchers of the IMF have put more than serious doubts on the soundness of this policy: see Jonathan D. Ostry, Prakash Loungani and Davide Furceri, 'Neoliberalism: Oversold?', *Finance and Development*, June 2016, p. 38-41: <https://www.imf.org/external/pubs/ft/fandd/2016/06/pdf/ostry.pdf>. See also George Monbiot, *How Did We Get into This Mess?* (London: Verso, 2016) with further references. For the failure of privatisation to deliver positive results, see James Meek, *Private Island. Why Britain Now Belongs to Someone Else* (London: Verso, 2015).

These two worlds are also connected in a cynical way: growing poverty in the West means that for many people cheap clothes are not a luxury but a necessity. The same cheap clothes that are produced in Asia under doubtful labour conditions, including child labour. The result is that the poorest people in Asia make it possible for the poorest people in the West to make ends meet.<sup>102</sup>

### 11.3 Close connection between governments and the corporate world

The cosy link between the corporate world and governments, including the European Union, is of growing concern. Human rights are especially at risk where governments insufficiently resist the powerful and ever more influential corporate lobby. This issue is closely linked to the fact that over the past decades governments have been strongly led by neoliberal policies, giving companies as much freedom and as many advantageous tax deals as possible. Let me give three examples linked to the area of business and human rights.

First, the increasingly powerful corporate lobby towards governments and the European Union is leading to serious imbalances. Big money is having an increasing influence on the political process,<sup>103</sup> most openly in the United States<sup>104</sup> and the United Kingdom.<sup>105</sup>

101 A salient example is the report of the British Parliament on the appalling working conditions and practices at Sports Direct shops and its warehouse in Derbyshire. The Business, Innovation and Skills Select Committee reported a disturbing picture of the working practices and business model at Sports Direct, where people had been paid below the minimum wage, workers had been mistreated, including staff being penalised for taking a short break to drink water and for taking time off work when ill, the so-called 'six strikes and you're out' policy: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/news-parliament-2015/working-practices-at-sports-direct-report-published-16-17/>.

102 Indeed, issues of inequality are global. For a view from developing countries, see for example, Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', *International Community Law Review*, 10 (2008), p. 371-378; Makau W. Mutua, 'What is TWAIL?', *American Society of International Law, Proceedings of the 94th Annual Meeting*, pp. 31-39, 2000: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1533471](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533471).

103 In 2016, the OECD concluded that many economically advanced countries are failing to fully enforce regulations on political party funding and campaign donations or are leaving loopholes that can be exploited by powerful private interest groups, in particular big corporations and their lobbyists: *Funding Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* (Paris: OECD, 2016): <http://www.oecd.org/governance/financing-democracy-9789264249455-en.htm>.

104 See for example, Martin Gilens and Benjamin I. Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens', *American Political Science Association* 2014, p. 564-581: [http://journals.cambridge.org/download.php?file=%2FPPS%2FPPS12\\_03%2FS1537592714001595a.pdf&code=3878cdb472bf697de5fb4dfe7e2a40f0](http://journals.cambridge.org/download.php?file=%2FPPS%2FPPS12_03%2FS1537592714001595a.pdf&code=3878cdb472bf697de5fb4dfe7e2a40f0). The authors from Princeton and Northwestern University argue that over the past few decades America's political system has slowly transformed from a democracy into an oligarchy, where wealthy elites wield most power. Using data drawn from over 1,800 different policy initiatives from 1981 to 2002, the two conclude that rich, well-connected individuals on the political scene now steer the direction of the country, regardless of or even against the will of the majority of voters.

105 See, for example, Transparency International, *Corruption in UK politics*, Policy Paper Series no. 3 (London, 2012).



The same is starting to happen in the Netherlands and on the continent.<sup>106</sup> In the developing world, we call this process corruption. In the Western world it is called democracy and lobbying.

Historically, it is striking to read Franklin D. Roosevelt's address in Madison Square Garden in New York, on 31 October 1936 when he stood for re-election as President of the United States of America:

*We had to struggle with the old enemies of peace - business and financial monopoly, speculation, reckless banking, class antagonism, sectionalism, war profiteering. They had begun to consider the Government of the United States as a mere appendage to their own affairs. We know now that Government by organized money is just as dangerous as Government by organized mob. Never before in all our history have these forces been so united against one candidate as they stand today. They are unanimous in their hate for me- and I welcome their hatred.*<sup>107</sup>

Three days later, Roosevelt won the greatest electoral landslide since the beginning of the two-party system in the 1850s.

The amounts spent by the corporate world vastly outweigh the amounts spent by the interest groups on the other side of the spectrum. It inevitably leads to government policies and legislation being more favourable to protecting companies rather than individuals.<sup>108</sup> For example, during the negotiations on CETA<sup>109</sup> and TTIP<sup>110</sup>, representatives of the corporate world were given ample opportunities to influence the negotiations, whilst European parliaments and citizens were kept in the dark.<sup>111</sup> At the same time, as mentioned above (section 3), western governments, heavily lobbied by the corporate world, refused to start negotiations on a world-wide treaty to globally protect human rights against corporate conduct. The main concern of western governments is free trade and legally protecting the already powerful industry, whilst maintaining almost complete impunity for companies in a transnational context.

106 For more about the influence of the energy companies on governmental policy in the Netherlands, see for example, Magda Smink, *Incumbents and institutions in sustainability transitions*, PhD Utrecht University (2015). In Germany, NGO Abgeordnetenwatch (MP Watch) scrutinises lobbying in the German Parliament ([www.abgeordnetenwatch.de](http://www.abgeordnetenwatch.de)).

107 See: <http://www.presidency.ucsb.edu/ws/?pid=15219> for the full text

108 Transparency International ([www.transparency.org](http://www.transparency.org)) is a non-partisan organization, working with governments, businesses and citizens to stop the abuse of power, bribery and secret deals ([www.transparency.org](http://www.transparency.org)).

109 The Comprehensive Economic and Trade Agreement between Canada and the European Union.

110 The Transatlantic Trade and Investment Partnership between the United States and the European Union.

111 It was only after a huge lobby of civil society and severe criticism from the EU Ombudsman (<http://www.euractiv.com/section/trade-society/news/ttip-papers-published-as-eu-ombudsman-demands-more-transparency>) that the European Commission decided to publish negotiating materials in January 2015: [http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154477.pdf](http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154477.pdf). Still, transparency as such does not matter much as most of the information cannot be used to influence the debate. The key issue is that the mandate of the European Commission is too broad and that it can only present the final outcome as a take-it-or-leave-it result.

Second, investment treaties protect investment companies in foreign countries against detrimental policies of the host state. So-called freezing clauses in these treaties make it hard, if not impossible, for states to protect human rights. A rise in the minimum wage may be considered by the protected company as a breach of the freezing clause, and this can lead to procedures before secret arbitration panels, obliging states to compensate the company. Although companies have a legitimate interest in being protected against arbitrary decisions and some changes in legislation, the power of the companies in these disputes is often much bigger than that of the country that it is suing. Moreover, due to the secrecy of the arbitration panels and their limited possibilities to include human rights considerations, countries usually pay a high price for investments by foreign companies.

The same arbitration model is applied in the CETA and TTIP investment treaties. When this information came to light, it caused a major outcry in the public opinion in the western world. However, the same system has been applied for decades to the detriment of developing countries and to the advantage of western companies. It is very well possible that these treaties will adversely affect the protection of human rights in either of these regions. Indeed, it has been argued by the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, that the privileges big business gain through trade agreements like TTIP

*'... constitute an attack on the very essence of sovereignty and self-determination, which are founding principles of the United Nations. [...] Experience shows that many of the 608 arbitration awards that have become known, have overridden national law and hindered States in the sovereign determination of fiscal and budgetary policy, labour, health and environmental regulation, and have had adverse human rights impacts, also on third parties, including a "chilling effect" with regard to the exercise of democratic governance. An international order of sovereign and equal States [...] must not be undermined by private attempts to replace it with an international order ruled by investors, speculators and transnational enterprises lacking democratic legitimacy [...] international investment agreements are usurping State functions as if the only rights were the rights to trade and to invest.'*<sup>112</sup>

In the Netherlands, a love affair between the State and businesses has led to serious problems in Groningen, where decades of gas drilling has caused earthquakes, damage to properties and to people. The gas field is operated by NAM, a company that is owned by Shell and ExxonMobil and in which the Dutch Ministry of Economic Affairs plays an influential role. In 2015, the Dutch Safety Board (Onderzoeksraad voor Veiligheid) concluded that the safety of citizens with respect to earthquakes had not influenced decisions regarding the exploitation of the gas field until 2013. Risks of earthquakes

<sup>112</sup> Statement of Mr. Alfred-Maurice de Zayas, Independent Expert on the promotion of a democratic and equitable international order at the Human Rights Council, 30th Session, Geneva, 16 September 2015: <http://www.ohchr.org/en/newsevents/pages/displaynews.aspx?newsid=16461&langid=e>.

measuring up to 4 on Richter scale were taken for granted.<sup>113</sup> It can be argued that the Dutch State failed to fulfil its positive obligations under the European Convention on Human Rights to protect the rights to life, to private life and to home of the people living in the affected area. The interests of the corporate operators of the gas field and of the Dutch state ran parallel, and together they infringed the human rights of Dutch citizens on a grand scale.<sup>114</sup>

Another Dutch example (but applicable almost globally), is the Urgenda case, in which the Urgenda Foundation ('Stichting Urgenda') and 886 citizens sued the State for not doing enough to combat climate change.<sup>115</sup> In a ground breaking decision, The Hague District Court obliged the State to step up its efforts to reduce greenhouse gas emissions in order to meet the targets for preventing dangerous levels of climate change.<sup>116</sup> The Dutch government could have taken this decision as an encouragement and used it to positively engage with the business world and civil society to take the necessary steps to reduce greenhouse gas emissions. However, it chose to play the legal card and to appeal the decision.

Also in the area of environmental policies, governments do not take sufficient measures which is likely to be due to a powerful industry lobby.<sup>117</sup> The Dutch court ordered the State to do more to combat climate change. Although the decision has been appealed by the State, the case illustrates the pivotal role of the courts in enforcing human rights.

113 Onderzoeksraad voor Veiligheid (Dutch Safety Board), *Aardbevingsrisico's in Groningen. Onderzoek naar de rol van veiligheid van burgers in de besluitvorming over de gaswinning* (1959-2014) (Den Haag: Onderzoeksraad voor Veiligheid, 2015). For a summary in English see <https://www.onderzoeksraad.nl/uploads/phase-docs/844/972d8bf7f1d1summary-gaswinning-groningen-en.pdf>. See also Lucas Amin, 'Shell and Exxon's €5bn problem: gas drilling that sets off earthquakes and wrecks homes', *The Guardian* 10 October 2015: <https://www.theguardian.com/environment/2015/oct/10/shell-exxon-gas-drilling-sets-off-earthquakes-wrecks-homes>.

114 In September 2015, the District Court Noord-Nederland ordered NAM to pay compensation for the loss of value of houses in the Groningen earthquake area, regardless of whether there is material damage or whether the house has been sold: District Court Noord-Nederland 2 September 2015, ECLI:NL:RBNNE:2015:4185 (Four Foundations/Nederlandse Aardolie Maatschappij).

115 <http://www.urgenda.nl/en/climate-case>.

116 District Court The Hague 25 June 2015, ECLI:NL:RBDHA:2015:7196 (Urgenda/The Netherlands). <http://www.urgenda.nl/en/climate-case>. See, for example, Suryapratim Roy and Edwin Woerdman, 'Situating Urgenda versus The Netherlands Within Comparative Climate Change Law', University of Groningen Faculty of Law Research Paper 2016-01: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2695077](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695077); T.J. Thurlings, 'The Dutch Climate Case - Some Legal Considerations', SSRN [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2696343](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2696343).

117 The oil industry has known about climate change since the early 1980s but it continued funding research to promote climate change denial. See, for example, Suzanne Goldenberg, 'Exxon knew of climate change in 1981, email says - but it funded deniers for 27 more years' *The Guardian* 8 July 2015: <https://www.theguardian.com/environment/2015/jul/08/exxon-climate-change-1981-climate-denier-funding>. Shell only cut ties with the conservative lobby group American Legislative Exchange Council (Alec) in August 2015. It is telling they had been a member of this right wing lobby group at all: <https://www.theguardian.com/business/2015/aug/07/royal-dutch-shell-alec-climate-change-denial>.

In fact, in the case of a pact between the State and the corporate world, the court is often the last resort.<sup>118</sup>

## **11.4 Contradictory policies: governments protecting and not protecting human rights**

The day before this inaugural lecture, Erasmus University created a temporary home for 200 refugees on this campus. A great act of humanity by the university community. At the same time this week, in the midst of this major refugee crisis, London hosted one of the world's biggest weapon fairs. The western weapon industry earns billions of euros in conflict zones and fragile states and particularly in the countries from which millions of people have fled, looking for a safe and sane place in Europe. Most western countries silently but vigorously and unscrupulously protect their national weapon industries, whilst at the same time advocating the need for human rights protection.

This is an illustration of how governments often pursue contradictory and diverging goals. Many western countries have policies to develop and protect human rights but usually abroad rather than domestically. At the same time, they develop and protect their domestic investment climate, strike tax deals with companies and support them in a conflict against a developing country on the basis of an investment treaty clause. Alignment of policies is often not the biggest strength of governments, and policies to protect human rights are usually subordinate to protecting national corporate interests.

These examples illustrate how human rights are often crushed between the interests companies and governments jointly pursue. And it does not look like the relationship between governments and corporates will lose some of its cosiness anytime soon.

## **11.5 The power of governments and companies working together to enhance human rights**

This pact between States and the corporate world provides a grim picture. However, cooperation between the State and the corporate world is not only a problem and a threat; it also provides opportunities to enhance human rights protection. So let me balance the picture with a few observations on the positive role businesses can play to protecting human rights, not only in cooperation with the state, but also against failing states.

<sup>118</sup> See also the claim of the Stichting Rookpreventie Jeugd (Youth Smoking Prevention Foundation) against the Dutch State for the close ties it has with the tobacco industry and the tobacco lobby which, the Stichting argues, violates article 5(3) of the Framework Convention on Tobacco Control: Birgit Toebes, 'Tabakszaak tegen Nederland. Nauwe banden tussen overheid en tabaksindustrie', *Nederlands Juristenblad* 90 (2015) 37, p. 2606-2611.

First, many human rights projects in the developing world are carried out in close cooperation (Public-Private Partnerships) between the state, companies and civil society.<sup>119</sup> Facilitating this often complicated and challenging cooperation is what the Partnership Resource Centre does, here at the Rotterdam School of Management.<sup>120</sup>

Second, the relationship between businesses and states can be tense if states stand in the way of businesses that aim to respect and enhance human rights. As we saw in the case of the Indian tea estates, central and local governments are not helpful in tackling the structural problems that are occurring there. Companies with an active or proactive human rights policy often have to fight against and to deal with corrupt politicians and civil servants. Indeed, many people living in conflict zones, fragile states, or corrupt states have been left alone by their failing governments, and may put their hopes on those western companies that are courageous enough to operate in a difficult environment, while at the same time conducting an active human rights policy.

Finally, not only citizens but also a growing number of responsible businesses are adversely affected by the joint power play of States and the corporate lobby. Indeed, it is unlikely that the corporate lobby reflects the diversity of its constituency. Whereas the lobby usually argues against regulation in the area of business and human rights, businesses with an active or proactive human rights policy may very well welcome regulation to level the playing field.

**Table 6:** Transition phases for Legal: public and political relations

	Inactive	Reactive	Active	Proactive
Public and political relations	Lobbying against human rights legislation and policies	Lobbying against human rights legislation and policies	Lobbying for minimum binding rules (level playing field in the sector)	Lobbying for minimum binding rules (level playing field in society)

119 *Public-Private Partnerships in developing countries A systematic literature review*, IOB Study nr. 378 (The Hague: Ministry of Foreign Affairs, 2013): <https://www.government.nl/documents/reports/2013/06/13/iob-study-public-private-partnerships-in-developing-countries>.

120 The Partnerships Resource Centre (PrC) at the Rotterdam School of Management, Erasmus University, is an independent, flexible learning network in which professionals, academics and practitioners around the world share and collect information on selecting appropriate partnerships and increasing their efficiency, impact and effectiveness. The PrC carries out fundamental research, develops tools and knowledge-sharing protocols and delivers web-based learning modules and executive training; see <https://www.rsm.nl/prc>.

What does this diverse picture mean for business and human rights? It means that we can and need to keep fighting the micro manifestations of human rights violations, but that we must not lose sight of the bigger picture of the macro economic and political failures. It is therefore important to observe whether companies and their legal departments work to benefit from these macro failures and, for example, lobby against human rights legislation. Or that these companies and their legal departments may want to make a difference, row against the tide, align human rights policy with public and political relations policy, lobby for minimum binding rules, and contribute to a correction of the micro manifestations of macro failures by enhancing human rights protection for their workers, customers and communities.

Climate change is beyond doubt the most urgent problem the world is currently facing. The UN Sustainable Development Goal 13 calls for urgent action to combat climate change and its impacts.<sup>121</sup> Climate change is both a sustainability issue and a human rights issue. It poses a very serious threat to humanity, to life on earth generally, to global security and to well-being. Severe, or rather draconian measures are needed to avert this scenario from happening. Whereas having a human rights policy and implementing it properly is the right thing to do, legally and ethically, combatting climate change is the precondition for survival of the planet and life as we know it now. Governments have been in an unhealthy relationship with the corporate world for too long, ignoring urgent messages of scientists and civil society, or not taking them seriously. However, it is pivotal that governments and businesses work together in a positive partnership to combat climate change effectively. Sometimes it needs a courageous court, like the District Court in The Hague, to urge the government to do more.<sup>122</sup> A positive partnership between governments and businesses is a fundamental necessity to combat climate change, to preserve the planet and make it a sustainable home for the future generations of humankind.<sup>123</sup>

121 See footnote 37.

122 See footnote 122.

123 See, inter alia, Ottavio Quirico and Mouloud Boumghar (ed.), *Climate Change and Human Rights, An International and Comparative Law Perspective* (Abingdon: Routledge, 2015). See also the Oslo Principles on Global Climate Change Obligations. These apply the framework of State Responsibility for trans-boundary effects under public international law to climate change, by drawing on obligations that exist in environmental law, human rights law and tort law. These obligations do not only apply to states but also to enterprises. Text and commentary of the Principles can be found at <http://globaljustice.macmillan.yale.edu/news/oslo-principles-global-climate-change-obligations>. See also Julia Powles and Tessa Khan, 'Climate change: at last a breakthrough to our catastrophic political impasse?', *The Guardian* 30 March 2015 ([www.theguardian.com/commentisfree/2015/mar/30/climate-change-paris-talks-oslo-principles-legal-obligations](http://www.theguardian.com/commentisfree/2015/mar/30/climate-change-paris-talks-oslo-principles-legal-obligations)).

## 12. Concluding observations

The picture of business and human rights provides a mixed bag. On one hand, there are companies that do not take human rights seriously enough or not seriously at all. They do not have a human rights policy, or they have one that is not or insufficiently implemented. In my research, I will particularly look at the role of Legal in not encouraging or obstructing a company's human rights policies.

These are also the companies that probably run the highest litigation risks and sooner or later will have to face the music. Victims, engaged citizens and NGOs have protested against such businesses and they will continue to do so. They will raise their voice at the company's doorsteps, on the streets, on the high seas, on the Internet, and if necessary in the courtroom. They will never give up.

However, in this lecture I have also indicated that theory and practice show that an active or proactive corporate human rights agenda is possible. In the world of today, such an agenda is not only possible but is an urgent necessity. Some multinational companies, also in the Netherlands, are ambitious enough to implement active and proactive human rights policies. The same goes for an increasing number of startups and young companies that make respecting or enhancing human rights the core of their corporate identity.

My argument put forward today is that the company lawyer can play an important role in this process of change to respect and enhance human rights. Not only because it is right thing to do, but also because it is the legal thing to do. The tools I have presented in this lecture and that I will further develop in my research aim to chart and support this change.

Business does not have to be unfair. Human rights violations are not inevitable. Company lawyers can and should be actively involved in enhancing human rights protection. Some are in this process of change. Others are about to embark on it. And I am sure many more can - and will - change.

## 13. Words of thanks

Mijnheer de Rector Magnificus!  
Dames en Heren!  
Ladies and Gentlemen!

With my appointment to this special chair I am back at the university where I started my academic life as a law student. Many hairs ago. It goes without saying that I am most honoured with my appointment and I would like to thank a number of people and organisations for their commitment to establish this chair and to further my appointment.

First of all, I would like to thank the chair's sponsors: Amnesty International the Netherlands and its Director Eduard Nazarski, and the Stichting Vredeswetenschappen - the Foundation for Peace Sciences - and its chair Professor Jaap de Wilde.

I would also like to thank the boards of the Erasmus University and the Rotterdam School of Management, and particularly the Department of Business-Society Management for providing an academic home for this special chair.

I am also most grateful to those who have been instrumental in establishing and supporting this chair:

- Professor Steef van der Velde, the Dean of the Rotterdam School of Management.
- Professor George Yip, the former Dean of the Rotterdam School of Management and now Professor of Management at the China Europe International Business School in London and Shanghai.
- Gemma Crijns, the former manager of the Partnership Resource Centre and formerly Amnesty International who brought both organisations together.
- The Business-Society Management Department at RSM, particularly its chair Professor Lucas Meijns.
- The members of the selection committee, chaired by Professor Slawek Magala.
- Heleen Tiemersma, formerly employed at Amnesty International, and now research associate to the Chair, and Elena Osmochescu, research assistant to the Chair. Both have been incredibly helpful over the past year. I am particularly grateful to Elena who provided the slides of the database and an important part of the underlying research.
- And, last but not least, my colleague Professor Rob van Tulder, founding father of the Business-Society Management Department. Thank you so much Rob for paving my way into the School and the Department and for our most inspiring discussions on the topic of business and human rights. I am beginning to understand your language. And I'm starting to like it.



This is a research chair, which means I do not see many students, although today I am privileged to welcome some forty RSM students and one of my students from King's College in London, where I teach Business and Human Rights. Let me assure you and your fellow students that I would be delighted to meet you to discuss your interest in international business and human rights.

One of our most precious human rights is the right to family life. I feel very privileged to enjoy a wonderful family life in the broadest sense of the word. I would like to thank

- My husband Reinoud Hesper, for having me by his side for almost 25 years and for so much more than words can say.
- My parents, for the way they raised me and my siblings: with love, understanding and a strong awareness of the need to do in life what is fair and just. Much to my regret, my father did not live to see this day. And my mother is not able to attend due to her advanced age - although this did not prevent her from asking critical questions about what I was going to say today.
- My brothers and sisters, both the warm and the cold side, who have now sat through my third inaugural lecture and still refuse to take me too seriously - most of the time.

Ladies and gentlemen!

Dames en heren!

**Ik heb gezegd!**





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