

# **Business and Human Rights**

## **Ethical, Legal, and Managerial Perspectives**

**Florian Wettstein**

University of St. Gallen, Switzerland



# Contents

List of Boxes	<i>page</i> xv
Preface	xvii
<b>1 Introduction: Learning and Unlearning Business and Human Rights</b>	<b>1</b>
1.1 Unlearning Human Rights: Challenging Traditional Human Rights Thinking	1
1.2 Unlearning Business: Challenging Corporate Social Responsibility	2
1.3 Learning BHR: The Human Rights Perspective on Corporate Responsibility	4
1.4 Rationale and Structure of the Book	6
<b>Part I Foundations</b>	
<b>2 BHR: Emergence and History of a Movement</b>	<b>11</b>
2.1 Precursors (1945–1995)	11
2.2 The Beginnings (1995–2005)	15
2.3 The Formative Years (2005–2011)	18
2.4 Maturing of the BHR Movement (2011–ongoing)	19
2.5 BHR in the Academic Discourse: Emergence of a New Field	21
<b>3 A Brief Introduction to Human Rights</b>	<b>25</b>
3.1 Philosophy of Human Rights	25
3.1.1 A Brief History of Thought on Human Rights	26
3.1.2 Elements of Human Rights	30
3.1.3 Universalism v. Relativism	31
3.1.3.1 Absolutism	32
3.1.3.2 Relativism	32
3.1.3.3 Universalism	33
3.1.3.4 Are Human Rights Western?	35
3.1.4 Foundation and Justification of Human Rights	38
3.1.4.1 Foundationalist Accounts of Human Rights	38
3.1.4.2 Non-Foundationalist Accounts of Human Rights	42
3.1.4.3 Reconciliation of Different Approaches	45

3.2 International Human Rights System	46
3.2.1 UN Human Rights Bodies and Agencies	46
3.2.2 Other Human Rights Bodies and Agencies	49
3.3 International Human Rights Law	52
3.3.1 Kinds of Human Rights	53
3.3.2 Sources of International Human Rights Law	54
3.3.3 International Bill of Human Rights	56
3.3.4 Core Human Rights Treaties	58
3.3.5 Regional Human Rights Conventions	60
<b>Part II Setting the Scene</b>	
<b>4 Corporate Human Rights Violations: Direct and Indirect</b>	<b>65</b>
4.1 A Note on Terminology: Impact v. Violation	65
4.2 Direct Human Rights Violations	66
4.3 Indirect Human Rights Violations	67
4.3.1 Active Complicity	70
4.3.2 Passive Complicity	71
4.3.3 Moral and Legal Elements of Complicity	72
<b>5 Corporate Human Rights Violations: Overview of Issues</b>	<b>77</b>
5.1 Employment Relations	77
5.1.1 Discrimination and Harassment	77
5.1.2 Monitoring and Privacy	78
5.2 Workers in the Supply Chain	80
5.2.1 Child Labor	80
5.2.2 Exploitation and Sweatshop Labor	82
5.2.3 Forced Labor and Modern Slavery	82
5.3 Affected Communities	83
5.3.1 Land-Grabbing and Displacement	83
5.3.2 Security and Protest	85
5.3.3 Conflict	85
5.4 Environment	87
5.4.1 Contamination of Air, Soil, and Water	88
5.4.2 Deforestation	90
5.5 Vulnerable Groups	91
5.5.1 Indigenous Communities and Free, Prior, and Informed Consent	92
5.5.2 Migrant Workers	94
5.5.3 Human Rights Defenders	95

## Part III Corporate Human Rights Responsibility

<b>6</b>	<b>Justification of Corporate Human Rights Responsibility</b>	103
6.1	Human Rights as Ethical Obligations of Business	103
6.1.1	Ethical Obligations of Business: Beyond Profit-Maximization	103
6.1.2	Human Rights as Ethical Imperatives of Business: Two Approaches	106
6.1.3	Corporate Power and Authority	107
6.2	Human Rights as Legal Obligations of Business	110
6.2.1	Legal Personhood at the National Level	110
6.2.2	Legal Personhood at the International Level	112
6.2.3	Human Rights as Legal Imperatives of Business	113
6.3	Pragmatic Perspectives on Human Rights Obligations of Business	116
6.3.1	The Social License to Operate	117
6.3.2	The Business Case for Corporate Human Rights Responsibility	118
6.4	Common Objections	122
<b>7</b>	<b>Nature and Extent of Corporate Human Rights Responsibility</b>	126
7.1	Basic Obligation Types	126
7.2	Human Rights Obligations in Particular	128
7.3	Corporate Obligations to Respect, Protect, and Fulfil Human Rights?	129
7.3.1	The Corporate Obligation to Respect Human Rights	129
7.3.2	The Corporate Obligation to Protect Human Rights	131
7.3.2.1	Direct Protection: Relational Contexts	133
7.3.2.2	Indirect Protection: Structural Contexts	136
7.3.3	The Corporate Obligation to Fulfil Human Rights	138
<b>8</b>	<b>Operationalizing and Implementing Human Rights Responsibility at the Corporate Level</b>	142
8.1	Managing Impacts: Human Rights Due Diligence	142
8.1.1	Human Rights Due Diligence in Law	142
8.1.2	Human Rights Due Diligence in Business Practice	144
8.1.3	Human Rights Due Diligence Process	145
8.1.3.1	Committing to Human Rights: Human Rights Policy Statement	145
8.1.3.2	Identifying Impacts: Human Rights Impact Assessments	147
8.1.3.3	Responding to Human Rights Impacts: Operational-level Grievance Mechanisms	148

8.1.3.4	Tracking Responses: Human Rights Performance Indicators	151
8.1.3.5	Communicating Responses: Human Rights Reporting	153
8.1.4	Remediating Adverse Human Rights Impacts	154
8.1.5	Implementation Challenges	159
8.1.5.1	Industry and Company-Specificity	160
8.1.5.2	Dedicated v. Non-Specific Human Rights Processes	160
8.1.5.3	Prioritization and Weighing of Risks and Impacts	161
8.1.5.4	Community Engagement	162
8.1.5.5	Effective Collaborations	162
8.1.5.6	Supplier Engagement and Audits	163
8.1.6	Critique of Human Rights Due Diligence	163
8.2	Beyond Managing Impacts: Organizing for Human Rights	165
<b>Part IV Corporate Human Rights Accountability</b>		
<b>9</b>	<b>Transnational Governance and Corporate Human Rights Accountability: Preliminary Questions and Foundational Issues</b>	<b>171</b>
9.1	International and Domestic Approaches	172
9.2	Public and Private Approaches	174
9.3	Hard and Soft Approaches	176
9.4	Soft Accountability Mechanisms: Certification, Labels, and Stakeholder Pressure	178
9.4.1	Consumers: Certification and Labels	178
9.4.2	Investors: ESG Investment	180
9.4.3	Civil Society: Naming and Shaming	182
<b>10</b>	<b>The UN Guiding Principles on BHR: Foundations, Contemplations, Critique</b>	<b>185</b>
10.1	The UN Protect, Respect, and Remedy Framework	185
10.1.1	Pillar One: The State Duty to Protect Human Rights	187
10.1.2	Pillar Two: The Corporate Responsibility to Respect Human Rights	188
10.1.3	Pillar Three: Access to Remedy	191
10.2	The UN Guiding Principles on BHR	192
10.2.1	Content of the UNGPs	193
10.2.2	Accountability Regime of the UNGPs	196
10.3	Critical Assessment	197
10.3.1	Key Achievements	198
10.3.2	Main Criticism	199
10.3.2.1	Principled Pragmatism: Accommodating Business to Achieve Consensus?	199

10.3.2.2	Normative Foundation: Social Expectations or Ethical Principles?	200
10.3.2.3	Enforcement Mechanisms: Hard Duties or Soft Responsibilities?	201
10.3.2.4	Distribution of Roles and Responsibilities: Clear Division or Blurred Lines?	202
<b>11</b>	<b>Further International Soft-Law Standards and Voluntary Initiatives</b>	<b>206</b>
11.1	OECD Guidelines for Multinational Enterprises	206
11.1.1	Content	207
11.1.2	Accountability Regime	208
11.1.3	Critique	209
11.2	UN Global Compact	211
11.2.1	Content	211
11.2.2	Accountability Regime	215
11.2.3	Critique	216
11.3	ISO 26000	218
11.3.1	Content	218
11.3.2	Accountability Regime	220
11.3.3	Critique	221
11.4	The Role and Purpose of Multi-stakeholder Initiatives	221
<b>12</b>	<b>Home-State Solutions</b>	<b>226</b>
12.1	The State Duty to Protect Human Rights	227
12.2	Extraterritorial Obligations	229
12.3	Policy Measures	233
12.3.1	National Action Plans on BHR	233
12.3.2	Public Procurement	235
12.3.3	Export Credit and Investment Guarantees	238
12.4	Legislative Measures	240
12.4.1	Accountability by Reporting: Transparency and Disclosure Legislation	241
12.4.1.1	UK Modern Slavery Act and Australian Modern Slavery Act	242
12.4.1.2	California Transparency in Supply Chains Act	244
12.4.1.3	EU Non-Financial Reporting Directive	246
12.4.2	Accountability by Process: Disclosure and Mandatory Human Rights Due Diligence Legislation	248

12.4.2.1	Dodd-Frank Act, Section 1502 and EU Conflict Minerals Regulation	248
12.4.2.2	Dutch Child Labor Due Diligence Law	251
12.4.3	Accountability by Impact: Mandatory Human Rights Due Diligence and Liability Legislation	254
12.4.3.1	French Duty of Vigilance Law	254
12.5	Adjudicative Measures: Foreign Direct Liability	259
12.5.1	Reasons for Human Rights Litigation against Parent Companies	260
12.5.2	Common Characteristics and Challenges	261
12.5.2.1	Jurisdiction	261
12.5.2.2	Forum Non Conveniens	262
12.5.2.3	Choice of Law	264
12.5.2.4	Attribution	266
12.5.3	US: Alien Tort Claims Act	269
12.5.3.1	Main Features	269
12.5.3.2	<i>Curtailing ATCA I: Kiobel v. Royal Dutch Petroleum Co.</i>	272
12.5.3.3	<i>Curtailing ATCA II: Jesner v. Arab Bank</i>	274
12.5.4	UK: Common Law Duty of Care	274
12.5.4.1	<i>Vedanta Resources Plc v. Lungowe</i>	276
12.5.4.2	<i>Okpabi v. Royal Dutch Shell Plc</i>	279
12.5.5	Canada: Duty of Care Liability Continued	281
12.5.5.1	<i>Araya v. Nevsun Resources</i>	282
12.5.6	Various Civil Law Jurisdictions	285
12.5.6.1	The Netherlands	285
12.5.6.2	Germany	288
12.5.6.3	Italy	289
12.5.7	Corporate Criminal Liability	290
12.6	Home-State Solutions: Criticisms and Responses	292
12.6.1	Imperialism	292
12.6.2	Unintended Consequences	293
12.6.3	Compliance over Engagement	294
12.6.4	Frivolous Litigation	295
<b>13</b>	<b>International Law-Based Solutions</b>	<b>298</b>
13.1	International Investment Law and International Arbitration	298
13.1.1	Integrating Human Rights into International Investment Agreements	300
13.1.2	Human Rights Compatible Investor-State Dispute Settlement Mechanisms	301

13.1.3	Arbitration for BHR Disputes Beyond Investor-State Dispute Settlement Mechanisms	304
13.2	Toward a Binding Treaty on BHR	305
13.2.1	Elements of a Binding Treaty on BHR	306
13.2.1.1	Scope	306
13.2.1.2	Sanctions and Enforcement	308
13.2.2	Arguments For and Against a Binding Treaty on BHR	310
13.2.3	Outlook and Prospect of (Current) Treaty Negotiations	312
<b>Part V Selected Industries and Emerging Discussions</b>		
<b>14</b>	<b>Industry-Specific Issues and Challenges</b>	<b>317</b>
14.1	Extractive Sector	317
14.1.1	Issues and Challenges	318
14.1.2	Sector-Specific Standards and Initiatives	319
14.1.3	Solutions and Best Practice	320
14.2	Finance and Banking Sector	322
14.2.1	Issues and Challenges	323
14.2.2	Sector-Specific Standards and Initiatives	324
14.2.3	Solutions and Best Practice	327
14.3	Information and Communication Technology Sector	328
14.3.1	Issues and Challenges	329
14.3.2	Sector-Specific Standards and Initiatives	332
14.3.3	Solutions and Best Practice	334
14.4	Garment and Footwear Sector	335
14.4.1	Issues and Challenges	336
14.4.2	Sector-Specific Standards and Initiatives	339
14.4.3	Solutions and Best Practice	340
14.5	Food, Beverage, and Agribusiness Sector	341
14.5.1	Issues and Challenges	342
14.5.2	Sector-Specific Standards and Initiatives	344
14.5.3	Solutions and Best Practice	345
<b>15</b>	<b>Emerging Discussions and Narratives</b>	<b>348</b>
15.1	BHR and the UN Sustainable Development Goals	348
15.2	BHR and Climate Change	352
15.3	Gender Perspectives on BHR	356
15.4	BHR in (Post-) Conflict and Transitional Justice Contexts	358



<b>16 Conclusion: Building Back Better</b>	<b>364</b>
Helpful Online Resources and Blogs on BHR	368
References of Court Cases	370
Glossary	372
References	375
Index	413