



Enhancing Human Rights Protection: a Company Lawyer's Business

Professor Cees van Dam

Inaugural Lecture Rotterdam School of Management, Erasmus University

Special Chair International Business and Human Rights

18 September 2015

**AMNESTY
INTERNATIONAL**



Stichting Vredeswetenschappen

Edited text of the inaugural lecture, as given on 18 September. An elaborated and referenced text will be published early 2016.

Mijnheer de Rector Magnificus!

Ladies and Gentlemen!



Photo: Chris Gorzeman (www.capitalimages.nl)

1. Introduction

It's just past four o'clock. In England, this means: it's teatime. And at this time of the day the quintessential English question is: 'How would you like your tea?' My answer then is: a bit of sweat is fine but I'd 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. Last week, the BBC published the shocking results of an investigation into the working and living conditions on tea estates in Assam, India. 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 2/3 of the minimum wage and the levels of malnutrition are very high, even by India's woeful standards. This is the cause for fatal diseases, such as diarrhoea, tuberculosis and meningitis. Workers spray chemicals without protection, and on some estates, young children were found working.



How did the industry respond to the BBC report? The owner of the plant 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.

The Rainforest Alliance, the ethical certification organisation, provided tea from this estate with a frog seal, assuring that the tea is 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'. A local NGO campaigning to improve conditions on the tea estates told the BBC he believes the Rainforest Alliance's logo 'is more about selling tea than about empowering workers'.

Unilever also sources tea from these estates, such as for its Lipton brand. It says it takes the issues seriously, that progress has been made and that it is working with its suppliers to achieve responsible and sustainable practices.

The responses all sound like the previous day suddenly something went wrong on the tea estates. In fact, the poor living and working conditions on tea estates are structural and have been known and documented for a long time. In fact, nothing much has changed since colonial times.

This case illustrates:

- that the company responses are almost identical: it looks like they all bought the same PR do it yourself kit;
- that ethical partnerships of companies may not be as ethical as their name suggests;
- that ethical certification organisations may in fact be a sham.

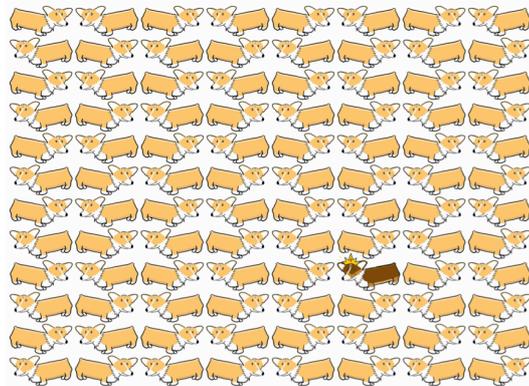
However, the case also illustrates something else. An increasing number of businesses understand that it is no longer enough to release a worn off PR statement - but that they need to develop and implement a proper human rights policy. Therefore, it is important to also look behind the facts of this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

- it illustrates the challenges and dilemmas companies face when implementing their human rights policies;
- particularly when the local government is not willing to introduce and maintain a proper legal framework and is therefore part of the problem rather than the solution;
- it is also possible that the company is in the process of implementing a human rights policy and therefore ‘in transition’; such a learning company needs to be looked at differently than 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.

2. A lawyer in a business school

The challenge for me at this chair in international business and human rights is also 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.



For the research to be carried out for this chair, I look for themes on the crossroads of human rights and international business to which I can contribute from my expertise as a lawyer. An important theme is the role of the company’s Legal Department in developing and implementing the company’s human rights policies and practices. The perceived perception is that when it comes to human rights policies Legal is cautious, limiting such policies, controlling them and sometimes even obstruct them. This may cause tensions within the company and may negatively affect the company’s internal alignment, as well as the narrative it would like to get across with its human rights policy. On the other hand, there are also examples of companies where the Legal took the initiative for a human rights policy and also took responsibility for its design and implementation.

3. From voluntary self-regulation through soft law to 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 voluntary activity aimed at protecting the company’s reputation. It was aimed at doing more than the law requires. The companies enforced their own corporate or industry codes. From this perspective, Legal could play a defensive role, particularly looking at whether the new policies created or increased legal risks.

This picture is changing. Legal rules with respect to human rights are becoming increasingly relevant for a company. In 2011, the United Nations adopted the principle that businesses must respect human rights. This means that businesses must conduct human rights due diligence and provide a remedy for victims of human rights violations. These are so-called soft law obligations. It is called soft law because if a company does not comply with these obligations, it will not face legal consequences: in a case against a company, a victim cannot directly invoke these obligations in a court of law and States cannot fine the company if it does not comply. However, even though there is no legal sanction, there can be many other consequences for a company that does not comply with these soft law obligations. In a moment, I will come back to this.

More recently, also hard law obligations have appeared on the business and human rights stage. These obligations concern legislation and rules established in case law. They *can* be legally enforced by individual victims or the state. For example, the EU and the US are increasingly imposing obligations on companies to report about their human rights policies and practices. The UN is currently discussing a binding Treaty on business and human rights. And individual European countries are issuing legislation or plan to issue legislation in the area of business and human rights.

Legislation and case law are 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 they can be more effective and victims can get redress for human rights violations.

Clearly, hard law will become more important but it would be too simplistic to say that this regulatory process moves from voluntary self-regulation, through soft law to hard law. It is not expected that hard law will completely replace voluntariness 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 that they can solve the underlying structural problems that are often complex and wide-ranging.

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

Distinct features of self-regulation, soft law and hard law

	Voluntary self-regulation	Soft law	Hard law
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)

	Voluntary self-regulation	Soft law	Hard law
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. Transition phases for Legal with respect to a company's human rights policies

Every lawyer will agree that human rights are a company lawyer's business. But the key question is: how does he engage with the company's human rights policy? Does he resist, control, facilitate, or support the company's human rights policy?

In order to make the various positions of Legal more visible I am developing features belonging to various levels of engagement. For this purpose, I am building on the transition phases model of my colleague Rob van Tulder. This model serves two purposes. First, it enables comparison of the various ways in which Legal Departments perform in companies; this is the static function. Second, the model also has a dynamic function in that it shows how Legal develops and has developed and how it can take concrete steps for her engagement in the direction of an active or proactive human rights policy. Here is a first draft.

Four phases are distinguished in this model: an inactive, reactive, active and proactive phase. These phases belong to different business orientations: an internally oriented business, a business that is reactive to external stakeholders, an active business that is internally oriented, and a proactive business that is externally oriented.

The second line shows the various possible business attitudes: the attitude of the inactive and reactive businesses is 'doing no harm to the company'. An active business pledges to do no harm to the company and to others. This means that others (workers, consumers, communities) are a pivotal part of the business model. The proactive business is characterised by a positive aim, which is to do good to others; this basically means: not just respecting others but also enhancing their human rights protection.

On the next row we find the possible company's human rights policies: these vary from no (or no serious) policy (inactive), a policy following external triggers (reactive), a policy that considers respecting human rights as pivotal to its business model (active) and a policy where enhancing human rights protection is leading (proactive).

Transition phases for Legal

	Inactive phase	Reactive phase	Active phase	Proactive phase
Orientation	Internally oriented	Reactive attitude to external stakeholders	Active, internally oriented attitude	Externally oriented
Business attitude	No harm to company	No harm to company	No harm to company and respecting others	No harm to company and protecting others
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	Instrumental to resist change	Assists in adapting to unavoidable change	Actively involved in shaping and implementing human rights policy	Actively involved in shaping and implementing human rights policy

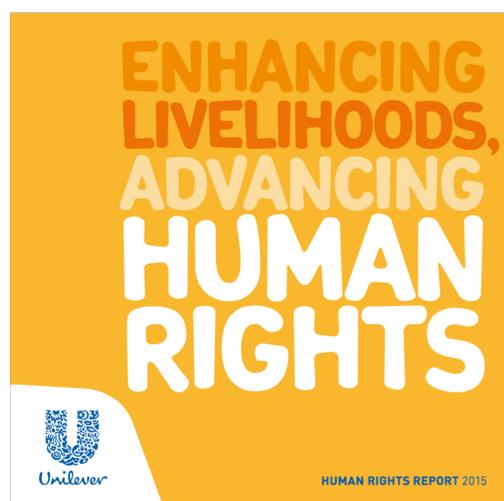
Finally, we can look at the possible roles of Legal: it can be instrumental for the company to resist change (inactive), it can assist the company in adapting to unavoidable change (reactive), it can be involved in shaping and implementing the company's human rights policies, either to do no harm to others (active) or to actively enhancing their human rights protection (proactive).

Obviously, these phases each have their challenges and dilemmas. They also come with different costs. An inactive approach might be cheaper in the short term, whereas an active or proactive approach might be cheaper in the long run. There may also be different effects for the company's reputation. Moreover, it is also possible that in some respects the company is in or moving towards the active or proactive phase, whereas in other respects it may still conduct its business in an inactive or reactive way.

5. An example: Unilever

A good example is Unilever. Unilever is the first major company that reports in detail on its implementation of the UN Guiding Principles on Business and Human Rights. This is an important step, because active and proactive human rights policies cannot do without as much transparency as possible. Unilever's report also shows the major challenges and the many dilemmas the company faces when implementing these Principles.

The human rights ambitions of Unilever are not just a PR story but a policy that its CEO Paul Polman has taken on as his personal responsibility.



This is an important indication for the sincerity of the 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.

When a company reports about its active or proactive human rights policy, the question is how transparent it chooses to be. Where it is hard or impossible to be complete, the company needs to indicate what sort of information it has left out. I began this lecture with the tea estates in Assam where Unilever sources its Lipton tea. It is likely Unilever knew about this problem but it did not mention in its Human Rights report. Asked by the media, Unilever explained this by saying it had limited its first report to its top 200 suppliers. That is fair enough but it should have mentioned this limitation in the report. The consequence was that Unilever was told off in the media, such as in the *Financieel Dagblad* this week.

Another example of a dilemma for Unilever's Human Rights Report was the Indian case about mercury contamination in Kodaikanal by one of Unilever's subsidiaries. This case was neither mentioned in the report. Unilever denies liability for the damage caused. The case was recently brought back into the news by a clip of an Indian rapper going viral and got 3 million views on YouTube. In a press release, Unilever clarified its position but the statement made clear that the case was on-going when the Human Rights report was drafted. This raises the question which role (if any) Unilever's Legal Department played in deciding not to include this case in the report. As I said learning organisations like Unilever need to be looked at differently than organisations that are unwilling to learn. And the lesson that can be learned from these two examples is that transparency is great but that being transparent about your transparency is better.

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

One may say: 'That's all very well but an active or proactive human rights approach is only 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* 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.'

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.

a. Fluid borders between soft law and hard law

‘Hard law is Legal’s responsibility; soft law is for CSR’. Alternatively: ‘Soft law is for the softies, hard law is for the tough guys.’ Of course, this is a false dichotomy. The distinction between hard and soft law is fluid and they get more and more intertwined. For example, non-financial reporting obligations are increasingly connected with soft law guidance. Soft law is definitely a company lawyer’s business if he wants to ensure that the company properly reports on its human rights policies.

b. Improving assessment and management of legal risk

Research shows that companies tend to overestimate their ability to appreciate 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. A more accurate estimation of the legal risk may be achieved by a company with an 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.

c. Preventing disputes and operational delays

Conducting 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.

d. Staying above the legislative waterline

An active or a proactive human rights policy, following global soft law standards, anticipates the haphazard regulatory changes at a domestic and EU level over the next decade. Conversely, a reactive human rights approach means responding to these various piecemeal changes. This 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.

e. Active banks, investors, procurement, business customers

It is true that soft law obligations cannot be legally enforced but not complying with them increasingly carries other business risks, such as being not eligible for export credit guarantees, 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.

f. Link with corporate governance

There is an inherent link between good governance and corporate social impact. 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’. The Code applies ‘comply or explain’-principle: either the company

includes information about compliance with the Code in the annual report or it explains why a Code provision was not applied.

g. Soft law obligations are legal obligations

Perhaps the most fundamental reason for Legal to support a company's active or proactive human rights policy is the following. Since the adoption of the UN Guiding Principles for business and human rights in 2011, it is a legal obligation of the company to respect the human rights of workers, customers and communities. A company lawyer or an external counsel from a law firm may argue: this is only a soft law obligation that cannot be legally enforced and that if the company does not comply, there is no problem because there will be no legal consequences. In other words: the company can easily get away with non-compliance. Indeed, a company with an inactive or reactive human rights policy will welcome such a defensive and calculating advice. In various companies, the legal policy is to not or only minimally comply with hard law obligations as long as it factually and legally can get away with it.

By contrast, the Legal department of a company with an active or proactive human rights policy takes soft law seriously, embraces it by treating people with dignity, by respecting (active) or even protecting (proactive) their human rights. This way the company does not only protect its workers, customers and communities but also itself.

In short: an active human rights policy requires the involvement and commitment of Legal. This way, Legal can contribute to an integrated human rights policy throughout the company, preventing inconsistencies and misalignment.

7. Alignment and misalignment within the company



AkzoNobel is a good example. Around 2000, after a number of acquisitions and divestments, the company 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 took the initiative to draft and implement an extensive legal and ethical framework including human rights issues, based on the then leading OECD Guidelines. 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.’

A contrasting example concerns Spanish fashion chain Zara. This example is derived from a report of research organisation SOMO. 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 Brasil 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.

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 been deceiving audits. 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.

Control is an important theme in the discussion about the legal liability of multinational companies. Companies like to argue that they do not have control over their suppliers and that they do not have control over their subsidiaries (the latter is the so-called separate entity theory). However, the soft law and CSR practices show a different picture, as is also illustrated in the case above about Zara. The argument of lack of control is also at odd with the concept of global value chains. These chains are impossible to maintain and manage without a considerable amount of control by the lead company.

This legal approach can be linked to the company’s human rights policy. The separate entity theory reflects an inactive or reactive human rights policy. An active human rights policy implies that the company accepts accountability for subsidiaries and suppliers (depending on the leverage and the level of control), whilst a proactive human rights policy considers subsidiaries and suppliers as a shared societal responsibility.

Transition phases for Legal: the company as a unity or as a lose collection of units

	Inactive	Reactive	Active	Proactive
Corporate framework	Separate entity theory: no liability for subsidiaries and suppliers	Separate entity theory: no liability for subsidiaries and suppliers	Accountability for subsidiaries and suppliers	Responsibility for subsidiaries and suppliers

8. Grievance mechanisms

An important test case for a company’s human rights policy is the way the company deals with grievances. Providing a grievance mechanism is a requirement of the UN Guiding Principles. 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.’

A properly functioning grievance mechanism means something else than the procedures at customer services departments of, for example, telecom companies or airlines. The policy of such companies is to deny, ignore or belittle the allegations, this way keeping the complainant at bay, keep him in the queue, or fob him off. There are blunt as well as subtle and sophisticated ‘complaint’ systems aimed at exhausting the complainant and let him drop his 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.

Transition phases for Legal: Grievance mechanisms

	Inactive	Reactive	Active	Proactive
Grievance mechanisms	No (effective) mechanism Aim is discourage complainants	Limited grievance mechanism Aim is to channel complaints and deal with them in defensive way	Effective mechanism that serves as risk information tool Aim is to solve complainant’s problem	Effective mechanism that serves as risk information tool Aim is also to contribute to solving underlying problems

The grievance mechanism set up by a *reactive* company aims to channel complaints; it will deal with them in a defensive way.

For the *active* company the grievance mechanism serves as a risk information tool and contributes to a learning process. Complaints are taken seriously and approached without prejudice and the mechanism is effective in solving the complainant’s problem. The company’s grievance policy is based on objective and independent advice.

The *proactive* company does not only look at the complaint but also at the background of the complaint and aims to not only deal with the complainant’s issue but to also contribute to solving the underlying societal problems. To achieve this, a proper stakeholder and partnership policy is essential. Here, the company lawyer is no longer the advocate of the company alone but he also needs to take the rights and interests of the complainant into consideration. This requires a new approach by the legal department.

9. 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 know how to litigate and to fight. We tend to focus on problems and we are less proficient in solving problems, let alone contributing to create something good out of a crisis. Because, as we often say, this is not the job of a lawyer. After all, the law usually requires someone not to do the *wrong* thing. It hardly 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 the 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 against 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.

It is therefore important to train lawyers to see the solution rather than the problem. And not the solution for the company but the solution for the company *and* the complainant and, preferably, for society.

10. The database research

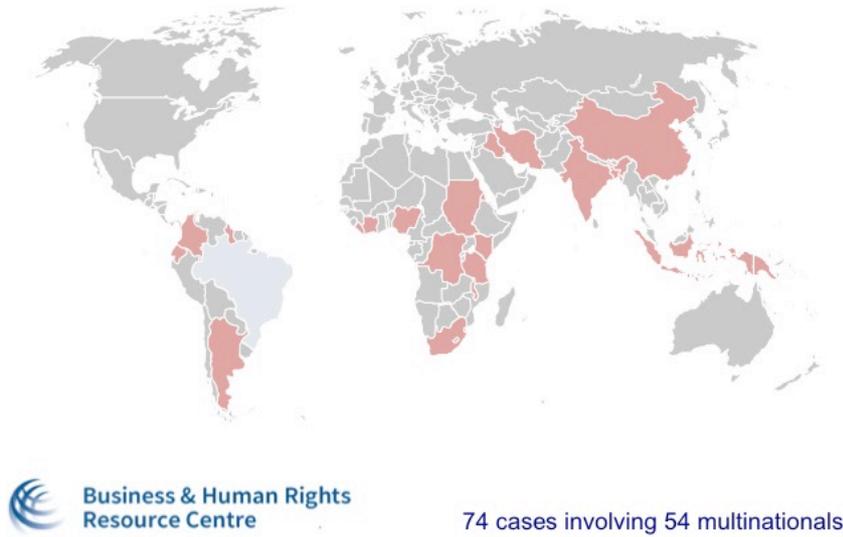
As a lawyer at the Rotterdam School of Management I have the privilege to cooperate in a wider interdisciplinary research agenda, including quantitative research projects. One of these research projects is the development of a database of multinational companies that have been involved in human rights 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 is to find out what specific company characteristics imply for the way companies (and their legal departments) are responding to lawsuits and what this implies for the position of the company compared to its peer companies and the whole economy. For example, we



look at how start and termination of lawsuits impacted on the corporate position on the stock market. 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 is 1950s until present. Let me give you some first quick results of that research project.

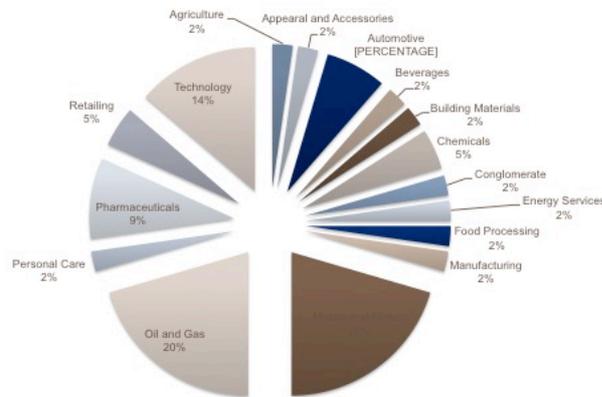
LOCATION OF HUMAN RIGHTS VIOLATIONS



Locations of human rights violations: these 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 NGO’s less active there? Or were human rights less violated there? The latter sounds unlikely but it cannot be excluded. We need additional research into the correlation between human rights violations and the size of the country.

INDUSTRY DISTRIBUTION

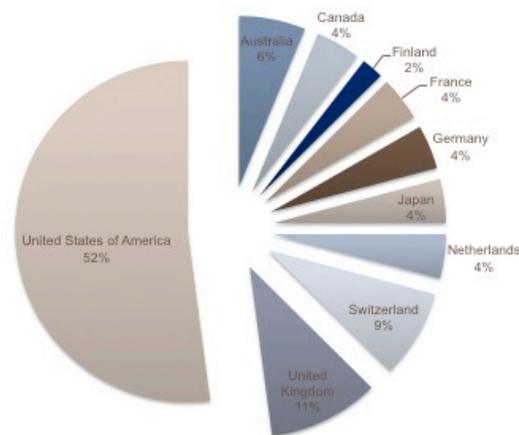
N= 54



74 cases involving 54 multinationals

Industry distribution: As we 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 the automotive industries.

CORPORATE NATIONALITIES



74 cases involving 54 multinationals

Corporate nationalities: Where was the seat, where were the headquarters of the company that was sued? The graph above 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 the possibilities for litigation are usually better and there are solid law firms that only represent victims. In these countries litigation is also more embedded in the national culture. Moreover, these are countries with a strong and free press that will generate public attention for the case, which potentially causes reputational damage to the company. The litigation culture in these countries may imply that companies are inclined to have a rather reactive and defensive approach.

Then we selected cases to look at the impact of the start and the termination of lawsuits on the companies share prices. We compared this with the general trend on the stock market (as noted in the S&P index) and a sample of peer companies.

At this point, let me remind you of my experience in Uppsala and the strange language spoken at the conference, which, as a lawyer, I hardly understood. So to all my lawyer friends in the room, I'm with you when you are not able to grasp the following picture at first sight but rather start to slowly slide down your chair.

Here we go.



This slide is about oil multinational Chevron. It was faced with two lawsuits: one in Nigeria and one in Ecuador. Both lawsuits started in the early 2000s 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 from a strategic point of view might not be that positive. You see a dark blue, a light blue and a grey line. Look at the light blue line. This indicates the development of the share prices of Chevron over the 2000-2015 period. Now compare it with the dark blue line, showing the average industry performance on the stock market over the same period. Comparing the two lines show that the lawsuits may have had a considerable adverse effect on Chevron's reputation. This conclusion is corroborated by the finding that the company scores relatively the same as the whole S&P index (this is the grey line). This means that a success of Legal may work out less positively for the company as a whole.

This is just one example but we have, of course, accumulated more. So yes, there are more biscuits in the tin but I will adhere to the best of Dutch traditions: you may take one biscuit and then the tin is firmly closed. Until it is time for the next biscuit.

Together with the Erasmus team, I will continue to further develop this part of the research. 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.

11. The broader background of business and human rights

At the end of my inaugural lecture, I would like to make some observations about the broader picture of the topic of my chair. In business and human rights we often talk about problems that 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: economically and politically. I will say a few words on business and human rights in the western world, and then on the relationship between states and the corporate world, which can be both a threat and an opportunity for the protection of human rights.

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. We see an increasing poverty gap, a shrinking middle class, a growing lower class, workers experiencing less legal certainty and increasing precarity because of more temporary contracts and zero-hour contracts whilst pension schemes are limited or abolished. Business and human rights is not only a concern in the developing world but increasingly so in the western world.

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.

In conjunction with this development, the cosy link between the corporate world and governments is of growing concern. Human rights are especially at risk where government insufficiently resist the powerful and ever more influential corporate lobby. Let me give a few examples out of many.

- The increasingly powerful corporate lobby towards governments and the European Union leads to serious imbalances. Big money is getting increasingly hold of politics, most openly in the United States and the United Kingdom. Would this happen in the developing world, we would call it corruption. In the western world it is called democracy.
- National governments take insufficient measures against climate change, inter alia because they are giving in to the powerful industry lobby. The recent Urgenda case in which a Dutch court ordered the State to do more to combat climate change was to a considerable extent based on an application of the European Convention on Human Rights. The case illustrates the pivotal role of the judge in enforcing human rights. In fact, the court is one of the few places where pacts between the State and the corporate world can be broken.
- The Groningen earthquakes were caused by the NAM, a company owned by Shell and ExxonMobil and in which the Dutch Ministry of Economic Affairs plays an influential role. Only fairly recently it was revealed that the NAM and the Ministry solely pursued their own joint goals and completely failed to respect the rights to life, to private life and to home of the people of Groningen.



- TTIP, the Transatlantic Trade and Investment Partnership between the EU and the US, may also adversely affect the protection of human rights. Whilst the corporate world is given the opportunity to influence the negotiations, European parliaments and citizens are kept at bay. NGOs and citizens are now building up a countervailing power but the outcome remains uncertain.
- Finally, the refugee crisis. Yesterday, the Erasmus university created a temporary home for 200 refugees on this campus. A great act of humanity by the university community. Also this week, in the midst of this major refugee crisis, London hosted one of the world's biggest weapon fairs. The western weapon industry, endorsed by their national governments, earns billions of euros in conflict zones and fragile states and particularly in the countries from where now millions of people flee, looking for a safe and sane place in Europe. And let us not forget that the most desparate people are probably not able to flee.



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.

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 this grim 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 a failing state.

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. Facilitating this often complicated and challenging cooperation is what the Partnership Resource Centre does, here at the Rotterdam School of Management.

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, the local government is not very helpful in tackling the problems. 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 western companies that are courageous enough to operate in a difficult environment, at the same time conducting an active human rights policy.

Finally, not only citizens, also a growing number of responsible businesses is 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. Where 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.

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 also relevant 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, and correct the micro manifestations of macro failures by enhancing human rights protection for their workers, customers and communities.

12. Concluding observations

The picture of business and human rights provides a mixed bag. On one hand, there are the poor performing companies that do not take human rights seriously enough or not serious 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 the 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 also 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 their core business.

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 this proces of change. And I am sure many more can - and will - change.

Words of thanks

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

With my appointment on 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 persons and organisations for their commitment to establish this chair and to further my appointment.

First of all, I 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 also thank the boards of the Erasmus University and the Rotterdam School of 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, formerly 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 Meijjs
- The members of the selection committee, chaired by Professor Slawek Magala
- Heleen Tiemersma, formerly Amnesty International, and now research associate to the Chair and Elena Osmochescu, research assistant to the Chair, who both have been incredibly helpful over the past year; I am particularly grateful to Elena who provided the slides of the database and much 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 don't see many students, although today I am privileged to welcome one of my students from King's College in London where I teach business and human rights and some forty RSM students. 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 thank

- my husband Reinoud Hesper, for having me on his side for almost 25 years and for so much more than words can say;
- my parents for the way they have 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.
- and finally I thank my brothers and sisters, both the warm and the cold side, who have now sit 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!