



Human Rights Insights: Trends from the Human Rights Working Group's Spring Meeting

JUNE 2019

Overview

In March and April 2019, BSR's [Human Rights Working Group](#) (HRWG) held its first round of meetings for the year in New York, London, and Tokyo. Established in 2012, HRWG is a collaborative initiative designed to help companies implement the [UN Guiding Principles on Business and Human Rights](#) (UNGPs), bringing together approximately 40 companies from across sectors. In addition to providing operational-level guidance and best practices in the business and human rights field, HRWG has established a global network of business and human rights professionals. The spring meetings covered a mix of substantive and methodological topics:

- » Human rights methodologies
- » Children's rights
- » Legal trends
- » Risks of doing business in disputed territories

A recurring theme throughout discussions was the inconsistent nature of national government-level approaches to protecting human rights and national government-based methods mandating how business must address human rights issues. While some governments seek to enforce mandatory human rights due diligence, others are enacting piece-meal approaches, individually addressing topics like cybersecurity legislation threatening free expression, child labor, and modern slavery. Many governments either fail to address these issues whatsoever or contribute to negative impacts themselves. Multinational enterprises operating in uneven or conflicting jurisdictions can lay the groundwork for a more consistent and streamlined approach by implementing the highest human rights standard.

This round of meetings of the Working Group sought to equip companies with the tools needed to confront the myriad of human rights challenges they face wherever they may operate and provide cohesion to company approaches. This document provides a summary of topics discussed and insights surfaced during the meetings.

BSR member companies interested in joining the Human Rights Working Group should [connect with us to learn more](#).

Human Rights Methodologies

In the meetings, we outlined best practices in respecting and remedying human rights as part of *BSR's 12 Human Rights Methodologies*, including the PANEL Approach, Counterbalancing Rights, Identifying Vulnerable Groups, The Donut Problem, and Remedy. Described below, these methodologies provide practitioners with concrete

steps to consider and address human rights challenges as part of an overall due diligence process. In the meetings we reviewed a collection of hypothetical and real cases to consider how companies can apply these methodologies in practice. In addition to reviewing substantive human rights subjects, unpacking methodologies for human rights due diligence is an important feature of HRWG, providing companies with practical, operational-level guidance on how to implement the UNGPs.

THE PANEL APPROACH

A PANEL approach to human rights entails the following five elements:

- » **Participation** – Everyone has a right to actively and meaningfully participate in decisions affecting their rights.
- » **Accountability** – Every right imposes a duty. The duty-bearer must be responsive to rights-holders and provide appropriate remedy when violations occur.
- » **Non-Discrimination** – There can be no discrimination in the enjoyment of rights.
- » **Empowerment** – Everyone must know what their rights are and how to obtain them. Risk and harm should be viewed from the perspective of the rights-holder.
- » **Law** – Human rights are defined in over 100 international instruments and codified in national constitutions and laws.

COUNTERBALANCING RIGHTS

When business operations consider human rights, they often encounter competing rights claims, such as security versus freedom of expression. If a business or the legal environment in which it operates chooses to support one right over another, the company should still seek to uphold the core principle of the unsupported right. The company should identify ways to soften the restrictions by applying a “reasonableness” test and consider whether the restriction is proportional to the harm that the corporation hopes to prevent.

IDENTIFYING VULNERABLE GROUPS

Anytime a business interacts with human rights, it must give special consideration to identifying and addressing the specific needs of vulnerable groups. BSR suggests four lenses that can be used to identify these groups:

- » Formal laws that discriminate – Are there laws that explicitly discriminate against some people?
- » Societal discrimination or bias – Are there societal norms or practices that contribute the marginalization of some people?
- » Practical discrimination or bias – Are some people marginalized due to life circumstances, such as poverty, lack of access to transportation, etc.?
- » Hidden groups – Are there groups who are marginalized into hiding, e.g. LGBTI people in oppressive countries?

THE DONUT PROBLEM

The UNGPs state that businesses must respect human rights through their operations and business partnerships; however, where the local legal context contradicts international human rights standards, companies are expected to seek ways to honor the principles of internationally recognized human rights. This gap is referred to as the Donut Problem. We reviewed eight ways in which the Donut Problem may emerge:

1. National law or practice contradicts human rights standards

2. National law falls short of human rights standards
3. Information about national law is not publicly available
4. Laws are inconsistent in different jurisdictions
5. No relevant national laws exist
6. No relevant national enforcement of laws takes place
7. No ability to understand a state's compliance with human rights standards
8. Standards are inconsistent at the international or national level

REQUIREMENTS OF EFFECTIVE REMEDY

When a business seeks to remedy a human rights violation, it must first understand the nature and scope of the harm, as well as the cultural context. The company should map the remedy ecosystem available to the victim, including judicial mechanisms, state administrative processes, or company grievance mechanisms. The company should then assess the viability of each pathway in the remedy ecosystem and seek to reduce the costs of the victim in following their chosen avenue. Finally, the business should assess whether the remedy was achieved through a fair process and resulted in an effective outcome.

These tenants comply with the UNGPs' assertion that business has a duty both to respect human rights in its operations and provide remedy where appropriate.

BSR will be finalizing new access to remedy frameworks and tools shortly, for use by our member companies.

Children's Rights

[The UN Convention on the Rights of the Child \(UNCRC\)](#) outlines the responsibilities of business to respect the rights of children in the workplace, marketplace, and community. Beyond the risk of child labor in supply chains, there may be infringement of children's rights by the products and services a company offers. Companies therefore have a duty to protect children in the marketplace by creating safe products and engage in responsible marketing.

Examples of companies identifying and responding to such concerns include the Singapore-based telecoms company Singtel, which identified the risk of cyberbullying, device addiction, privacy concerns, and other negative effects of telecoms products for children. Singtel responded by creating a "[digital citizenship](#)" program, raising awareness about online safety and promoting digital literacy.

Businesses should also establish grievance mechanisms that are easily accessible and communicated to children, their families, and communities. Recognizing that each situation is different, the remedy process needs flexibility to accommodate specific circumstances and must always involve the child and those close to them in the process.

Emerging Legal Trends in Human Rights

VEDANTA AND SUPPLY CHAIN RESPONSIBILITY

Regardless of industry, multinational corporations with global subsidiaries should take note of the U.K. Supreme Court's ruling in the lawsuit against British mining company Vedanta Resources.

In 2017, a group of Zambians sued Vedanta for environmental and medical harms caused by their subsidiary, KCM. Courts in the U.S. and many European countries have traditionally not given foreign groups standing to sue parent companies for claims against their international subsidiaries. However, in April 2019, the Supreme Court of the United Kingdom [reversed this precedent](#), ruling that the plaintiffs could sue Vedanta in the U.K. This decision hinged on Vedanta's relatively active oversight of KCM and its global environmental policies, which, it was stated, create a duty of care.

Although some might see this ruling as incentivizing passivity when dealing with subsidiaries, this is not the correct response. [Rather, Vedanta and other emerging legal trends demand companies take a more active role in oversight](#). To comply with Vedanta, companies should go beyond merely referencing human rights and instead, integrate these commitments into their operations and oversight of subsidiaries and business relationships.

A crucial innovation of the UNGPs is their recognition that multinational corporations defy traditional boundaries and require new transnational conceptions of both state and corporate responsibility. Principle 16 of the UNGPs says that states should reduce the legal burden for victims to access remedy. The U.K. has fulfilled its obligation by allowing individuals to sue for remedy from a British corporation even though the harm did not occur in the U.K.

MODERN SLAVERY AND HUMAN RIGHTS DUE DILIGENCE

More and more, countries are considering or adopting laws that will require all businesses to conduct rigorous due diligence of their operations and supply chains.

As the U.K. looks to strengthen the enforcement and requirements of its [Modern Slavery Act](#), other nations are considering creating their own legislation, such as [Australia](#), which has implemented its own version of modern slavery legislation. Canada is [considering a bill](#) requiring disclosure and the potential prohibition of goods manufactured by forced or child labor from entering the country. In the U.S., Congress is considering a federal-level Modern Slavery Act requirement, similar to [California's Transparency in Supply Chains Act](#). The Legislative Council of Hong Kong is [considering a bill](#) aimed at combating slavery and human trafficking in Hong Kong and in supply chains.

[France](#) currently requires corporations with more than 5,000 employees to conduct supply chain-oriented due diligence assessments covering human rights, health and safety, and environment. These companies are also face civil liability for harm that could have been prevented with proper due diligence. They must engage in public reporting and pay fines if they do not comply.

[Germany](#) and [Switzerland](#) are currently considering proposals for mandatory due diligence. These proposals diverge from France's in that they require companies to inspect the complete supply chain, rather than merely established commercial relationships. One of the two current Swiss proposals is perhaps the most ambitious, as it would apply to all companies except for low-risk SMEs.

As more countries require due diligence concern and action to prevent exploitative labor practices in supply chains, businesses should prepare for the future by integrating rigorous due diligence into their operations. Moreover, BSR anticipates an increase in calls for mandatory human rights due diligence across all human rights—rather than due diligence focused on specific issues, such as modern slavery, conflict minerals, and child labor—and that many companies may see this more holistic approach as preferable.

DISCRIMINATION LAWS

Another global trend is an increase in laws that prohibit discrimination. This is an important factor for businesses to consider and ensure they are operating in a way that does not discriminate against women workers or parents, particularly as countries that didn't previously have laws relating to issues like gender discrimination are increasingly adopting and enacting them.

The U.S. has seen a [rise in lawsuits](#) related to the [Pregnancy Discrimination Act](#), which prohibits employers from discriminating or making employment decisions based on pregnancy. California also [passed legislation](#) requiring California-based public companies to have at least one female member of their board of directors by the end of the year.

China is currently considering [providing heightened legal protection](#) against sexual harassment. The government also instituted a ban on gender discrimination in the workplace. The Philippines, Hong Kong, and Thailand recently [increased](#) maternity and in some cases paternity leave.

The preamble of the UNGPs asserts the importance of applying its principles in a non-discriminatory manner. Businesses must ensure they do not discriminate on the basis of gender, sexual orientation, ethnicity, religion, or other status so that they do not violate the right to non-discrimination outlined in Article 2 of the Universal Declaration of Human Rights.

LABOR PROTECTIONS

In the U.S., a wave of companies is jettisoning arbitration agreements which have historically been used to stop employees from raising sexual harassment and other complaints. These actions can help companies prevent discrimination and exploitative labor practices in their workplaces and provide better access to remedy when violations occur.

At the same time, protections for gig economy workers are weakening in many markets. Ride-sharing apps and companies with similar business models have been [sued by their drivers](#) to be considered employees instead of independent contractors. When workers are classified as independent contractors, they may not be able to access basic protections and benefits like health insurance.

PRIVACY

Privacy is increasingly an issue of concern for business, particularly those who have access to and thus, must protect sensitive data from users and customers.

The [California Consumer Privacy Act](#) requires large corporations or other entities using the data of over 50,000 Californians to provide greater transparency around what data is being collected to customers. The law also gives customers the right to demand to know that type of information being collected, for what purpose, and with whom it is being shared.

[Malaysia](#), [Vietnam](#), [Thailand](#), and [India](#) have all passed cybersecurity laws, which civil rights advocates fear could be used to give governments unjust access to personal data and restrict freedom of expression and speech. Principle 23 of the UNGPs gives companies an obligation to respect human rights even in contexts where local law is at odds with them.

Doing Business in Disputed Territories

An Amnesty International-led [campaign](#) against businesses operating in the Occupied Palestinian Territories (OPT) has brought to the foreground the difficult nature of doing business in disputed territories. The [UN](#) and [International Court of Justice](#) consider Israeli settlements in the West Bank to be an illegal occupation. Increasingly, companies are being challenged on whether they can operate in the West Bank while fulfilling their duty to respect human rights as outlined in the UNGPs. The insights from this conflict can be applied to operations in other occupied territories, such as Russian-controlled Crimea, and in future conflicts.

A 2014 [report](#) by the UN Working Group on Business and Human Rights concluded that the heightened risk of operating in occupied territories requires companies to “undertake ‘enhanced’ human rights due diligence.” Amnesty International disagrees, using the UNGPs to argue that it is impossible to do business there because any activity “will contribute to an illegal situation.”

In November 2018, [Airbnb](#) opted for Amnesty International’s approach, removing listings for Israeli-owned homes in the OPT. A group of Israeli settlers responded by filing a discrimination lawsuit against Airbnb in the U.S. Airbnb subsequently decided to relist the properties in the OPT but donate the profits to humanitarian aid NGOs.

Other human rights organizations suggest that it is possible to do business in occupied territories, provided companies conduct heightened due diligence. This approach requires companies to be cognizant of local and international law and keep careful watch for red flags.

Conclusion

A growing body of regulatory frameworks governing various aspects of business and human rights presents both challenges and opportunities for companies in the fulfillment of their human rights commitments. While the landscape has become dotted with regulations requiring different types of disclosures and demand varying degrees of diligence have become commonplace, their proliferation may also help companies and activists make the case for a comprehensive approach to due diligence in line with the UNGPs. These more holistic approaches would be more likely to satisfy existing and future legal requirements wherever a company may operate.