"Mind the gap"   Background Reading and notes to accompany talk Cambridge 16 November.

1.General introduction

Business and Human Rights Resource Centre: *Anyone interested in BHR will find this Centre an invaluable resource. They publish a note of weekly developments globally. Of note are the exchanges they publish with multinationals involved in complaints.*

UN Guiding Principles on Business and Human Rights (UNGPs) and OECD Guidelines for multinational enterprise .   *These are important basic documents as they set out the framework under which corporate responsibility for human rights has developed around the world.*

UN High Commission for Human Rights, The Corporate Responsibility to Protect: An Interpretative Guide, 2012   *A good reference document.*

G. Skinner and others, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business (ICAR, 2013*). This is a very good (if slightly long) analysis of the issues around remedy generally for adverse rights impacts. It predates developments in the UK supreme court.*

2. BHR in International Law

Business and human rights treaty, Revised draft and the Business and Human Rights Resource Centre page on the treaty.   *It is difficult to predict the likelihood of a general BHR treaty ever taking effect or to ascertain what the influence of the current BHR treaty negotiations is, but they highlight a number of issues.*

3. HRDD Due diligence

Making Sense of Managing Human Rights in Supply Chains, BIICL with Norton Rose Fulbright (2018). *Good background to supply chain issues*

Amnesty International investigation into Cobalt mining in DRC (2016) and subsequent reports. *This is a good example of Civil Society exposing problems. Of note is that is that they went beyond the then 2016 OECD due diligence recommendations. That the 2016 report had significant impact can be seen from Amnesty's subsequent reports and the announcements of various motor car and battery manufacturers and users dealing with cobalt, lithium etc.*

Greenpeace 2017:   Dirty Bankers: How HSBC is Financing Forest Destruction for Palm Oil. *HSBC was accused of arranging loans and other credit facilities totaling $16.3 billion for six companies profiled in Greenpeace's Dirty Bankers report, as well as nearly $2 billion in corporate bonds since 2012, despite its sustainable policy. HSBC denied the allegations. Right or wrong this report is of particular interest because of the way it analyses the impact of different structures of financings from project finance, through general corporate finance to equity underwriting. In my view it was years ahead of the general BHR "market" in its analysis. The relationship between a financier and a BHR "harm" was debated at the Thun forum of banks in 2017.*

At this point many financial institutions claimed only to be "linked" to harm their finance caused. Others (the Dutch banks for example) accepted they could be "contributing".

Telenor 2021: An action brought against Telenor before the Norwegian NCP is illustrative of the importance of seller HRDD and illustrates that decisions can be difficult. Note the OECD has produced guidelines on responsible disengagement.

Amnesty International Report on how the UK NCP handles complaints under the OECD Guidelines for Multinational Enterprises 2016 A *good summary of how the system works with its weaknesses.*

SOMO representing 474 Myanmar CSOs vs. Telenor ASA", 27 July 2021

Allegations: *On 27 July 2021, the Centre for Research on Multinational Corporations (SOMO) on behalf of 474 Myanmar-based civil society organisations submitted a complaint against Telenor ASA to the Norwegian NCP. The complaint contends that Telenor's sale of its Myanmar business to the Lebanese company M1 Group fails to meet the standards of responsible disengagement set out in the OECD Guidelines, in three key respects:*

1. *Telenor has failed to conduct appropriate risk-based due diligence and has failed to seek to prevent or mitigate adverse human rights impacts potentially arising from the sale of its Myanmar operations.*
2. *Telenor has failed to meaningfully engage with relevant stakeholders in relation to the sale of Telenor Myanmar to M1 Group, including the Myanmar-based civil society organisations endorsing the complaint.*
3. *Telenor has not been transparent in relation to its decision to disengage from its Myanmar operations.*

Telenor's sale to M1 Group comes after the Myanmar military's 1 February 2021 coup and brutal crackdown on peaceful protests, civil society and independent media, as well as heightened electronic surveillance. Civil society members involved with the complaint have explained their need for responsible telecommunications businesses that will push back, rather than collude, with repression by the authoritarian government. M1 Group is owned by the billionaire Mikati family, who have a history of business in authoritarian countries including Syria, Sudan and Yemen and face unresolved allegations of corruption and terrorist financing. The complainants do not trust that M1 Group will uphold their human rights responsibilities or do business with integrity

4. Some Recent UK and EU Cases

 Okpabi v Shell (UK).   *This UK Supreme Court decision was the latest in a series, all involving solicitors Leigh Day brought on behalf of groups of complainants.   Understanding the implications of these decisions is fundamental to anyone advising multinationals.   These cases show the UK Supreme Court (and in two of the three cases the Court of Appeal, but also see Philip Sales dissenting judgement) in a good light as they went back to basic tort principles to cut through the complexities of group structures without unduly damaging corporate law principles of separate legal personality. The approach of the UK courts can be contrasted with that of the US Supreme Court.*

 Summary of Milieudefensie v Royal Dutch Shell (Netherlands).   *The Dutch case in which Shell was found responsible for failures in relation to climate change targets in the Netherlands. Whilst the result may be acclaimed it gives rise a number for legal "issues".*

KiK case (Germany*). In which an attempt to hold a German company responsible for deaths caused by a fire in a factory in Bangladesh failed.*

Nestlé & Cargill v Doe (USA). *The US Supreme Court reversed a ruling that allowed several individuals to sue food corporations **Nestlé** USA and **Cargill** over child slavery claims, limiting corporate liability under the Alien Tort Statute.*

5. Regulatory developments & Commentary

National movements for mandatory human rights due diligence in European countries, BHRRC

France: Commentary on the French Duty of Vigilance Law, Sandra Cossart Germany. *An understanding of the French law is important as this informs the likely impact of new EU based laws. The UK will probably be forced to follow these developments if it fails to take the lead itself. The fact it is better to "lead" in this area will probably be lost on the present UK government.*

A UK Failure to Prevent Mechanism for Corporate Human Rights Harms BIICL with Quinn Emanuel (2020*). This is the most likely route the UK will go, eventually, following on form the precedent in the Bribery Act.*

EU Parliament Resolution on Corporate Due Diligence and Corporate Accountability of 10 March 2021

Proposal for an EU wide mandatory human rights due diligence law, Stuart Neely

The importance of civil liability for a corporate human rights duty, Lise Smit

6. Professional Codes and behaviour

IBA Practical Guide on Business and Human Rights for Business Lawyers *Torn between publishing helpful guidance on practitioner's responsibilities and providing a tool for plaintiff's this was published in 2016. There have been some useful publications eg standard clauses since. Followed by a number of publications by the Law Society.*

See Articles by Kershaw and Moorhead on the subject of professional ethics. They focus originally on events around Lehmans and the "legal opinion" (2015). For more recent examples the US sanctions cases against BNP, Soc Gen etc and the use or abused of legal opinions.

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