Human Rights Due Diligence and Systemic Inequalities
Conference Report

Speakers’ Contributions at the Online Conference on Human Rights Due Diligence and Systemic Inequalities, 25-26 October 2021
Compiled by Lise Smit, Senior Research Fellow in Business and Human Rights and Director, Human Rights Due Diligence Forum, BIICL, with thanks to Madeleine Boyle and Georgia Greville

Date: March 2022

This report contains the respective presentations made by speakers as part of the conference on Human Rights Due Diligence and Systemic Inequalities, co-organised by the British Institute of International and Comparative Law (BIICL) and the University of Copenhagen Centre for Private Governance (CEPRI), and held online on 25 and 26 October 2021.

The views of speakers are their own and do not necessarily reflect the views of BIICL, CEPRI or the editors. Please cite accordingly, for example:

[Name of speaker], ‘[Title of presentation]’, in Human Rights Due Diligence and Systemic Inequalities: Conference Report, BIICL and CEPRI (March 2022), available at: www.biicl.org/categories/business-and-human-rights
Contents

Introduction .......................................................................................................................... 5
Foreword: The centrality of equality to human rights due diligence .................................. 6
Lise Smit ................................................................................................................................ 6

Panel 1: The UNGPs and Systemic Inequalities
1. The interrelated nature of systemic inequalities, and moving forward constructively
   Krishnendu Mukherjee ........................................................................................................ 7
2. A structural reading of the UNGPs, access to remedy, and social awareness
   Manel Chibane .................................................................................................................. 10
3. The conceptual perspective of the UNGPs framework to the idea of systemic inequalities
   Michael Addo ................................................................................................................... 13
4. Structural poverty and structural discrimination
   Bonita Meyersfeld ............................................................................................................. 16
5. The potential of the UNGPs and human rights due diligence in addressing systemic inequalities
   Rachel Davis ..................................................................................................................... 21

Panel 2: Human Rights Due Diligence and Systemic Inequalities ..................................... 26
1. Systemic inequalities within the UNGPs
   Erika George .................................................................................................................... 26
2. Practical experiences and challenges of HRDD and systemic inequalities
   James Sinclair .................................................................................................................... 30
3. HRDD and systemic inequality faced by LGBTQI+ people
   Daniel Berezowsky .......................................................................................................... 33
4. Focusing on structural inequalities in National Action Plans, the informal economy and the media
   Harpreet Kaur .................................................................................................................. 37
5. The long-term view and the corporate structure
   Charmika Samaradiwakera-Wijesundara ....................................................................... 40
6. HRDD and systemic inequalities within international investment law
   Barnali Choudhury .......................................................................................................... 44

Panel 3: The Status Quo and Lessons Learnt ...................................................................... 48
1. Framing inequality, dignity and human rights, and bridging the gap
   Thabisile Phumo .............................................................................................................. 48
2. Human rights at the margins: intersectional inequalities within the private security sector
   Sorcha MacLeod .............................................................................................................. 51
3. Examples from practical experiences in the Arab Gulf
   Mustafa Qadri ................................................................................................................ 57
4. The UNGPs and systemic inequalities through the lens of decoloniality
   Grace Mutung’u ........................................................................................................... 61

5. The role of multi-stakeholder initiatives (MSIs) and the corporate form
   Fola Adeleke ............................................................................................................... 63

Panel 4: The Way Forward ........................................................................................................ 65

1. The centrality of dignity and a rights-based approach in addressing systemic inequalities
   Sindiso Mnisi Weeks ..................................................................................................... 65

2. The importance of understanding the historical context and examples from country visits
   Dominique Day ............................................................................................................. 69

3. Comparing the UNGPs framework with the Convention on the Rights of Persons with Disabilities
   Paolo Vargiu .................................................................................................................. 73

4. The role of institutional investors in addressing systemic inequalities within the UNGPs framework
   Mary Beth Gallagher ...................................................................................................... 76

5. Business responses to systemic inequalities within the UNGPs framework
   Andrea Shemberg ......................................................................................................... 79
Introduction

The British Institute of International and Comparative Law (BIICL) and the University of Copenhagen Centre for Private Governance (CEPRI) held the conference ‘Human Rights Due Diligence and Systemic Inequalities’ on 25 and 26 October 2021.

The UN Guiding Principles on Business and Human Rights (UNGPs) expect business enterprises to undertake human rights due diligence to identify, prevent, mitigate and account for their adverse human rights impacts, and apply to “all internationally recognised human rights”. Equality lies at the heart of the origins and interrelated nature of human rights, and therefore falls squarely within the ambit envisioned by the UNGPs. Existing equality legislation has often focused on individual abuses of the right to inequality, such as discrimination in the workplace, which can be contrasted with systemic inequalities that are built into the wider structures of society.

This conference focussed an intersectional lens on how the UNGPs apply to systemic inequalities, and considered the human rights due diligence responsibilities of companies in relation to systemic inequalities. It also considered how the concepts of going beyond formal equality to substantive equality and justice apply in this context.

The conference took place online and in two parts — Theory and Practice — set over two consecutive days in order to accommodate the speakers’ respective time zones.

This report provides an overview of the discussions and is divided into four parts according to the four panels’ topics. It contains the written versions of each speaker’s contributions in the order of their first appearance.

The conference organisers, Lise Smit and Sorcha MacLeod, wish to thank the speakers and the chairs — Freya Dinshaw, Abiodun Michael Olatokun and Elsa Savourey — for their participation and for sharing their valuable insights. Special thanks to the BIICL Events Team, particularly Leigham Strachan, Bradley Dawson, Carmel Brown and Bart Kolerski, for ensuring the smooth running of the series, and to Madeleine Boyle and Georgia Greville for assisting with the preparation and editing of this report. Thank you also to the various colleagues within and outside of BIICL for their input.
Foreword: The centrality of equality to human rights due diligence

Lise Smit

Equality is central to the origins and the conceptualisation of human rights. And therefore, in order to identify and assess the actual or potential adverse human rights impacts of a company, its human rights due diligence by definition needs to take into account the inequalities that are embedded in the systems where it does business.

And yet, human rights due diligence is frequently not explicitly framed using the language of intersectional systemic inequalities. During this conference we heard examples of how this could and should be done, both conceptually and practically, what we can learn from the past and present, and how to take this forward into the future — constructively, collectively and practically.

Also, these questions do not only relate to Pillar II of the UNGPs and the corporate responsibility to respect human rights. But very importantly, they have implications for Pillar I on the state duty to protect human rights, and Pillar III on access to remedy. Especially as we are now entering an era with a new wave of regulatory developments that seek to turn human rights due diligence into a legal duty of care. This is a field in which BIICL has recently undertaken research, and please do have a look at our business and human rights page for some of our recent studies. As we know, Germany has recently introduced a new Supply Chain Due Diligence law, and there is currently a legislative initiative underway at European Commission level to introduce mandatory human rights and environmental due diligence as a legal duty of care. Multiple other campaigns and legislative proposals are underway across the European continent in particular.

It is concerning that there seems to be a debate about whether it is an option to leave out the right to remedy from these new statutory instruments — but instead to frame these laws towards the most convenient exercise of administrative oversight in the Global North on behalf of rights-holders rather than at their behest and through their own agency. When rights-holders are expected to be witnesses or whistle-blowers rather than plaintiffs in matters that concern a violation of their own human rights — when they are to be shepherded through this process rather than conducting it — and where it culminates in consequences for the company but no remedy for those affected — the regulatory relationship takes place exclusively between Global North oversight bodies and companies, thereby removing the centrality and the equality and the dignity of the rights-holders from the equation.

Moreover, this statutory model redirects victims to the existing tort law system for their attempts at obtaining remedies, and we have seen that these frameworks pose several practical and procedural barriers, particularly in transnational harm claims. So the effect of foregoing the introduction of statutory remedies is that European-based victims would often have access to remedies that victims in the Global South would not have access to — even for the same kind of claims against the same kind of company — thereby embedding the intersectional inequalities even further into the formal legal framework.

This all shows us that these inequalities are so inherently built into the systems that they are even embedded within the ongoing regulatory movements that seek to address corporate human rights harms globally.

So from this we can see that the discussions of this conference are not merely academic — but urgent and central to the work that we all do at the moment.
Panel 1: The UNGPs and Systemic Inequalities

1. The interrelated nature of systemic inequalities, and moving forward constructively

Krishnendu Mukherjee
Doughty Street Chambers

You are an English barrister and Indian advocate, with over a decade’s experience in legal practice around human rights and environmental violations. Could you say something about the interrelated and systemic nature of systemic inequalities, and how one violation frequently leads to another?

I just wanted to give some of the insights that I have from my work in the subcontinent in India and Bangladesh.

When it comes to human rights due diligence, in relation to Pillar II of the UNGPs, it is not simply enough to look at the supply chains upward or downward. We have to look at the cause and effect of those violations. For instance, if you as a business entity identify forced labour in a factory or in a mine, that violation may have multiple causes and effects. The migration to that factory might be caused by environmental issues, and increasingly things like climate change. Or it might be caused by land acquisition where proper compensation has not been paid or has not been speedily paid. Forced labour — labour that is being paid below the minimum wage — may lead to debt. And that may lead to other violations which flow from that, such as sex trafficking and child marriage.

All these things need to be seen when you are doing your human rights due diligence in order to get the full account of the violations. These examples are not hypothetical. In a couple of surveys that we have done in the Rajasthan sandstone industry, and more recently in the Indian Sundarbans, which is an area where there has been a large number of climate refugees, we found that this is exactly what is happening. Due to lack of livelihood, people are forced into forced labour in garment factories or mines, and because of low wages or COVID forcing them back to their home areas, they get into a debt cycle. That debt cycle causes all kinds of issues, such as child marriage and sex trafficking, which have increased.

We will discuss these issues at the launch of our Sundarbans project on the first of November. Details can be found on the King’s College and Doughty Street Chambers websites.

Could you also elaborate on how basic inequalities often lead to a situation where people simply cannot escape the many violations which they face, and how this wider context could be addressed?

A lot has been said about the difficulties in assessing human rights violations because of the opaque and diffuse nature of many of the violations. But from my experience, the reality is that many violations are actually very much apparent, and it does not take much — or should not take much — human rights due diligence to actually discover them.

In the Rajasthan natural stone industry, there are about 33,000 natural stone mines. There are over 3 million mineworkers, and nearly 400,000 child laborers. There are very high levels of occupational disease and very high levels of sexual harassment. It is an industry where there is a British and EU connection, because that stone is exported to Britain and the UK. People say that it is very difficult to find violations, but the reality is that in an industry like that there is a wholesale lack of compliance which is

---

replicated in many industries. It should be easy to find out what violations are and put some degree of remedial measures in place to try and address them.

Another industry I have been working in is the asbestos industry. That industry has EU suppliers, and I have written a blog that looks at the connection between EU companies and the asbestos industry.\(^2\) We all know that the asbestos industry has had well-known violations for many decades now, and yet there is still EU business activity within that sector. In a country like India, the tragedy is that despite efforts to educate people about the risk of asbestos, people continue to work in that industry. The reason for that is that there is simply no viable alternative. Jobs in the asbestos industry are better jobs, comparatively. So even though they know the risks, people ultimately remain in those risky occupations. How do we solve that problem?

There really is a necessity for companies based in the EU to use their economic leverage to improve conditions. This must be done in the obviously violative industries in which people work, like the asbestos industry, but even in other industries, conditions must improve so people are not forced to work in poorly paid or unstable jobs like many in the Global South that I come across.

Let us turn now to the law. There are currently various legislative movements underway — including towards mandatory human rights and environmental due diligence, a duty of care or duty to prevent. Do you have any thoughts on whether and how a law, and potentially a European law, could impact on the inequalities that you have described and the status quo?

As people have said, there is not one solution. These problems are ingrained and systematic.

However, what has to be recognized is that even in situations where EU-based companies or American-based companies are only a small part of the output, or of these industries, proper and effective due diligence that looks at the entirety of cause and effect and works with communities, employees, and the general public, can have a significant effect on these situations. I am absolutely convinced that they can. And at the moment, what is important is to have case studies which can be upscaled or replicated in other places and that show examples of good practice so that the good practice can be followed by companies that have a real will. Obviously, that is the crucial question — will companies have a real will to implement these laws when they come into force?

We have heard about the status quo and the structural challenges inherent in the current system. Is there a way to move forward in a practical way, using the UNGPs and all these experiences as tools towards equality and justice?

I think the COVID crisis has really illustrated the massive systemic inequalities in the system.

One could not have not been moved to see the vast numbers of people in India walking back home, having lost their jobs and facing humanitarian crises. Climate change is already similarly affecting the most vulnerable and marginalized. It is hard sometimes not to feel despondent.

But there are some things that we should not feel despondent about. The first is that human rights and environmental rights were not in the language of business until a decade or so ago, and that is a huge step forward. We understand that modern slavery, as well gross violations and much wider violations, are happening, yet the term “modern slavery” allows us to conceptualize the grossest of human rights violations that are happening in labour. So those are two positive things that have to be built on.

There has to be adoption of the language of human rights and adoption of the principles and working mechanisms of the UNGPs by states and corporations, and they do have to participate in these mechanisms. I am absolutely with Rachel in terms of bottom-up. I think that we have to start from the bottom when we need to see what is affecting communities and labour, and we have to use that to ultimately set the standards, and to enforce those standards in the context of human rights due diligence and tackling systemic inequalities.

Krishnendu Mukherjee is a barrister and Indian advocate based at Doughty Street Chambers in London. Since 2007 he has been working on serious violations arising in India, including toxic pollution, forced labour and the effects of global warming. In particular, his team has diagnosed and distributed £12m of compensation to rights-holders affected by asbestos-related diseases, he has filed numerous cases in Indian courts and is working on a project on global warming in the Indian Sundarbans. This has led to an understanding that it is the inequalities in the state enforcement mechanisms, the legal protection systems and the impoverishment of labour and communities that allows these violations to continue. Whilst legal cases are part of challenging violations, these inequalities mean that a much wider and holistic approach needs to be taken when considering how serious violations should be tackled.
2. **A structural reading of the UNGPs, access to remedy, and social awareness**

Manel Chibane

Clooney Foundation for Justice

Let us turn now specifically to the UNGPs, and how systemic inequalities fit within the UNGPs framework. You have written on a structural reading of the UNGPs in the context of systemic inequality. Could you elaborate a bit on this?

I will give a bit of a background first. I wrote an article on systemic inequalities and the UNGPs following the renewed focus on the Black Lives Matter movement in 2020, during which numerous businesses publicly expressed solidarity with the movement. But there was no oversight mechanism to see whether they were actually committed to fighting systemic inequality. During my research, I noted that, interestingly, one of the first business and human rights frameworks to address those structural inequalities was the Sullivan Principles, introduced by African-American pastor Leon Sullivan in 1977. He was a board member of General Motors and urged US businesses operating in apartheid South Africa to increase “the number of Blacks and other nonwhites in management and supervisory positions.”

In 1999, then-UN Secretary General Kofi Annan relaunched these principles as the Global Sullivan Principles on social responsibility. Under these principles, the focus is on the structure of businesses, as they ought to increase “racial and gender diversity on decision making committees and boards.” The UNGPs do not quite adopt a structural approach but rather focus on the impact of businesses in the conduct of their activities. Those principles apply to all states, and all business enterprises, regardless of their size, sector, location, ownership, and structure. The UNGPs established this shared human rights responsibility scheme, organized into three parts that follow the “Protect, Respect, and Remedy” framework developed by Professor Ruggie in 2008. Essentially, they provide that states must protect human rights and companies should respect human rights.

An interesting feature of the “respect” principle for businesses is that they should conduct due diligence procedures and track the effectiveness of their response, paying particular attention marginalized and vulnerable groups. The Human Rights Council elaborates that those groups include women, minorities, migrants, persons with disabilities, and indigenous people. Those groups face increased risks of negative impact from business activities. A typical example of a human rights abuse would be racial discrimination by restaurants in the treatment of their customers.

But here, we still see that it [the above provisions of the UNGPs] is not about addressing systemic inequalities. That is where a structural reading of the UNGPs is more likely to address those structural inequalities and would consist of making the structure of corporate entities as a component of human rights.

---

5 UN Guiding Principles on Business and Human Rights, Preamble.
6 UN Guiding Principles on Business and Human Rights, Article 1.
7 UN Guiding Principles on Business and Human Rights, Article 11.
8 UN Guiding Principles on Business and Human Rights, Articles 3 and 20, Commentary of the Human Rights Council which endorsed the UN Guiding Principles in its resolution 17/4 of 16 June 2011.
9 UN Guiding Principles on Business and Human Rights, Articles 3 and 12, Commentary of the Human Rights Council which endorsed the UN Guiding Principles in its resolution 17/4 of 16 June 2011.
rights compliance. That would allow for more scrutiny on the composition and structure of businesses, beyond the requirements of corporate law.

To be more on the conceptual side, we should also consider the equality gap. Despite the two international covenants that provide for non-discrimination and gender equality as overarching principles, systemic inequality is rarely approached through a human rights lens. That was very much illustrated by evidence that 83% of business executives consider human rights a matter for business, while only 5% consider inequality a key area of concern. So here, there really is a gap to fill. To me, a structural reading of the UNGPs allows us to place the inequality debate within the human rights space, and it constitutes an opportunity to address systemic inequalities.

We now turn to access to remedy, set out in Pillar III of the UNGPs, and the principle of “where there is a right there is a remedy”. If we are talking about systemic inequalities, there is not always an individual actor against whom a claim for discrimination could be made, as we have seen for example in employment equality legislation.

Could you speak to us about access to remedy in this context, and the role or potential role of strategic litigation in relation to business and systemic inequalities? What can we draw from the current developments in the litigation around the implementation of the UNGPs?

I will first answer the second question because that is the easiest one to address. What strategic litigation tells us about the implementation of the UNGPs — which as we know are not themselves a binding source of law — is that while they can be invoked before the courts, they cannot be sanctioned as such.

There is, however, real progress to note on that front, because there are increasing references to the UN Guiding Principles in court decisions themselves. This was the case first in 2013 by the Ontario Supreme Court of Justice, another reference was made by the High Court of South Africa in 2015, and by the Inter-American Court of Human Rights. There is also this very interesting recent decision from the Hague District Court, ordering Royal Dutch Shell to reduce their greenhouse emissions by 45% by the end of 2030 relative to 2019 levels.

This court, interestingly, qualified the UNGPs as "authoritative and internationally endorsed soft law instruments which set out the responsibilities of states and businesses in relation to human rights." It was a very powerful decision because they [the judges] considered that those soft law instruments gave businesses obligations. While this judgment has been appealed in July 2021, it is still an interesting one to consider when it comes to reasoning and to the implementation and operationalization of the UNGPs.

Else, when it comes to systemic inequalities, there were interesting cases used and brought by trade unions and other civil society actors to promote equal pay, notably in four European countries: Switzerland, Germany, France and Poland.

---

14 University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others 2015 (5) SA 221 (WCC).
Still, one has to keep in mind that strategic litigation itself is an avenue which presents a number of obstacles related to systemic barriers to access to justice. It requires funding, knowledge and information about the procedures in place, and legal assistance. Even when all of that is gathered, then you have to confront the obstacles related to the procedure itself, such as standards related to admissibility [of NGOs as parties or civil parties, for instance]. All of this takes time, requires money, and redress is not necessarily guaranteed at the end of the day. Strategic litigation is a useful tool but not necessarily the panacea when it comes to systemic inequalities.

We are in a landscape where there is increased social awareness of systemic inequalities, including on social media, at the same time as a new wave of laws around corporate obligations are being designed. You have mentioned the question of “who is having a seat at the table”. Could you elaborate on this important point?

I mentioned how strategic litigation, while one avenue to further corporate accountability when it comes to systemic inequalities, is rather limited still. There are also discussions on having a binding business and human rights treaty. All those discussions take place in the institutional sphere. Although they obviously come with a consultation process with a number of stakeholders — as Krishnendu mentioned — I think we need to have a broader range of stakeholders involved. Social media, in that sense, seems a very important bottom-up lever of accountability for businesses, especially those that are widely receptive to those platforms because they are sensitive to reputational risks.

That brings me back to a campaign that was launched last year by Sharon Chuter, who is the founder and CEO of a cosmetic beauty brand. She initiated this movement called “Pull Up For Change.” This campaign and its viral hashtag, #pulluporshutup, was in response to businesses expressing their commitment to diversity in the midst of the Black Lives Matter movement. She asked the brands to publish, within 72 hours, the number of black employees they had in their organizations at the corporate and executive level. That campaign shed light on how some businesses rely heavily on black culture for marketing purposes, but actually have a very low number of black or Latinx employees at the level of leadership.

Another great illustration of how social media can be a real agent of change in that field was the “15% Pledge” campaign reshared massively on social media, that called on major retailers to distribute fifteen percent of black-owned businesses’ products on their shelves. Major retailers joined the pledge and made that commitment last year. Those are initiatives that were born on social media and that were launched by business actors on the ground, who may themselves face structural barriers to access to justice, investment, and employment. They are not necessarily involved in those consultative and technical processes, because of those structural barriers, and as a result, they do not necessarily have their voice heard on those [decision making] platforms. But their initiatives should definitely be granted more attention. That is how I see social media as a real lever to address systemic inequalities.

Manel Chibane is a qualified lawyer in France with a background in corporate accountability, international criminal law and international human rights law. She has worked in international law firms in Paris and London and volunteered for non-profits in the Middle East. She advised government institutions, international bodies and conducted various academic research projects. She is a graduate of Columbia Law School (LL.M, Harlan Fiske Stone Scholar), Paris II Panthéon-Assas (LL.M, LL.B), and Nanterre University (BA, Philosophy). In addition to her native French, she speaks English and Spanish fluently as well as conversational Arabic. (Any statements of fact, opinion, or analysis expressed are those of the panellist and are not attributable to the Clooney Foundation for Justice.)
3. The conceptual perspective of the UNGPs framework to the idea of systemic inequalities

Michael Addo
University of Notre Dame London

Could you speak to us about the conceptual perspective of the UNGPs to the idea of systemic inequalities, and explore the adequacy or in fact the inadequacy of the UNGPs framework to the idea of systemic inequalities?

Thank you, Lise, and if I may, as this is the first time I am appearing in a public forum since the very sad and unexpected passing of Professor John Ruggie, I would like to register the immensity of the loss to the business and human rights community and to pay tribute to him in recognition that pretty much all of this conversation revolves around his vision and leadership.

I agree with Krishnendu and Manel’s points about the nature of systemic inequality. It has both a micro nature, described in the example about discrimination at work, and a macro nature, described in Krishnendu’s examples of supply chains. Even bigger, though, is the whole international economic system that is founded on structural inequality.

The big problem we must address is the nature of systemic inequality. Everything seems to predate the UNGPs, and if that is the case, then the UNGPs should be seen as responding to the inequalities that predate them. If not, they are not good enough. But I think they are, and they do respond very well. The UNGPs do not respond so much to the effects of systemic inequality, but rather try to figure out some of the root causes of those systemic inequalities. We can imagine a whole variety of root causes: issues of power imbalance, greed, intolerance, etcetera. The UNGPs try in many ways to respond to all of this. But one aspect I find particularly fascinating about the UNGPs is that they try to reconcile tensions and conflicts in social values. I am not suggesting that other parts are not important, but it seems to me that there is added value in creating a social consciousness that suggests that a certain dominant economic approach — free market liberal economic tradition — has become normal and acceptable but in practice has generated considerable hardships to individuals and communities. That is the platform around which the UNGPs design their strategy.

The UNGPs recognize this, but they do so knowing the doctrinal and practical separation between the free market approach and the equally important value of protection of the rights of individuals. That creates tension which unfortunately we do not have an easy way to reconcile. The UNGPs try to propose a strategy for the reconciliation of this tension using principles such as principled pragmatism, shared responsibility, due diligence, smart mix, and access to remedy. All of these try to acknowledge the importance of the different societal values that clash and propose ways of reconciling the emerging tension.

You then asked me if this is adequate. I believe the UNGPs’ approach to the subject to be extremely helpful in redefining the challenge, which to my mind, is half of the solution. In this respect, you have to look at adequacy in a slightly different way, because the UNGPs look both forwards and backwards. They ask you to prepare for a revised consciousness, in terms of how you handle your economic affairs, as well as confronting the problems that we have now. Unfortunately, that prospective aspect of the UNGPs, the one that looks forward and tries to educate people into a new type of consciousness, seems to have taken over. We can easily think that because the UNGPs take this prospective approach they are not adequate. However, I will invite people to look back a little bit more on the bits that can be done right away.
People will tell you that the UNGPs are not adequate because they want answers to problems yesterday. Now, now, now. If you think about it, it took generations to get to the kind of difficulties we have. It is understandable to imagine that our patience in seeking an effective solution to adverse human rights impacts arising from economic activity is fairly spent at this stage and yet an opportunity to benefit from the full impact of the UNGPs may take a little more time.

One more thing. This is a process of recalibration, re-education, and re-learning how to conduct economic affairs, as well as dealing with the problems we have now. This is where the UNGPs actually sit at the moment. This is not the perfect final solution. I do not even think that if John Ruggie were here he would argue that this is the perfect solution. This is a new strategy that actually helps us move forward. It is not an end in itself. It is a means to an end.

Is there room to use the UNGPs to address these systemic inequalities? And specifically, what are your thoughts on the relationship between remedy and inequalities and the power imbalances resulting from systemic inequalities? Is there a way to build on the UNGPs framework and go forward?

Yes. We should employ the UNGPs as a starting point, as the floor, and not an end in themselves. They are what may be termed first order principles. They are general principles that are meant to be adapted and adjusted to particular circumstances. This is essentially what is already happening.

Consider some of the work of the UN Working Group. They have this unpacking project, which is what Manel was talking about. When it comes to reinterpreting the structural reading of the UNGPs, you do not need to take them so literally. Of course, if taking them literally solves your problem, then do that. But usually you need to take them in a structural way to respond to the problems you encounter. When you do that, you begin to realize they have plenty of mileage. In a recent paper I argued for an elastic interpretation of the UNGPs, which is a way of bringing the UNGPs from ideals and principles into practice. Regarding remedy, this is exactly the point where the UNGPs acknowledge that there are adverse effects that require immediate redress. This needs a flexible and imaginative application and interpretation of the UNGPs. Recall my earlier point about looking forward as well as looking backwards. The UNGPs do not deny the existence of problems that call for immediate redress, and they make clear proposals which are to be used in response to existing problems.

We tend, generally, to be more comfortable with what may be termed the “authoritative approach” to remedy, by which governments pass legislation that seeks to respond to specific problems. It is great when such laws are successful in their scope and application but sadly, this is not always the case and this is why we need alternatives such as the preventive approach, which revolves around re-consciousness, re-education, and reconsideration. Requiring companies to reinvent ways of providing remedy sits perfectly in the conceptual framework of the UNGPs. Remedy does not always have to be decreed from the top. If you understand that the economic structure needs to recalibrate, then you can do it yourself. Remedy sits perfectly within this process of trying to get an actor to share the responsibility for adverse impacts on human rights that they have caused or contributed to.

---

Michael Addo is Professor of Law at the University of Notre Dame Law School, and Director of the Notre Dame London Law program. Before joining Notre Dame Michael held positions at the Universities of Exeter and Staffordshire. Michael’s career in international human rights spans over 30 years, including as a member of the United Nations Working Group on Business and Human Rights from 2011-2018, during which time he also served as a member and then Chair of the Coordination Committee of the United Nations Special Procedure mandate holders. He is author inter alia of *The Legal Nature of International Human Rights* (Nijhoff) 2010, *International Law of Human Rights* (Ashgate) 2006; *Freedom of Expression and the Criticism of Judges: A Comparative Study of Legal Standards in Europe* (Ashgate) 2000 and *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer) 1999.
4. Structural poverty and structural discrimination

Bonita Meyersfeld

University of Witwatersrand Johannesburg

You work frequently on structural poverty and structural discrimination based on sex and gender. You have said that in terms of linking this to the UNGPs framework, it is for you “less about the creation of remedies that are more accessible but about the deconstruction of those systems”, in particular that “there is no incentive for a corporation to participate in the deconstruction of poverty”. Could you elaborate on this?

Inequality is a term that by necessity includes poverty. A person who has wealth does not claim the grief of inequality. A person who has power does not claim the grief of inequality. That inextricable link between the social concept of inequality and the economic concept of poverty is something that I think requires redress and address.

I am not sure if it is the job of the Guiding Principles to do that. I think the Guiding Principles are a set of mechanisms that facilitate that. It is the job of those with power to begin listening to those from whom they have taken power, and I would like to echo what Lise said about the development of remedies and approaches to remedies that are created by those who really have never had to use them.

The point of departure, for me, is that those fault lines, those intersectional fault lines of inequality, are based on essentially economic power. That economic power can be exacerbated. The reason why I say that corporations and multinational corporations do not have an incentive to interrupt cycles of power is because the attainment of power rests on the assurance that nobody will take it away from you. The cycle of poverty and the entrenchment of poverty means that there is a broad workforce, and that workforce will provide and contribute to the production and the creation of all of the components that constitute the economy and the marketplace.

But that production, which is seminal to the workings of the marketplace, and which is a precondition to the accumulation of wealth and therefore is of pivotal importance, that production has very little monetary value. We see this expressly in the mining context, or in large-scale infrastructure development, where the people who earn the least are generally the ones who take the highest risk, such as rock drill operators underground. The extraction of certain materials, particularly platinum, is never going to be mechanized completely, so the rock drill operator is indispensable to the production of platinum. Not many of us have the specialized skills that the rock drill operator does. Yet the rock drill operator is paid a salary that is an infinitesimal amount of the salary paid to the managers and owners and financiers involved in the mining operation.

Now, if that project and if the contributions to that project by the rock drill operator are so indispensable, we have to ask why there is such a huge differential in the value and the payment of that work? The answer, at least that I posit, is that it is because of the colour of the rock drill operators, and the original demarcation of the value of labour based on the value of the person who is doing it. This is why we continue to see women underpaid in the same jobs, for the same purpose, doing the same work as men. It is a 20% pay gap for the same work with the same qualifications that we see worldwide. The only explanation for that is structural inequality. I think that the recalibration of work, the value of work, and who does that work is a fundamental part of that answer. The problem though, is there is no incentive for those with the power to address it, to really do so.

You have been looking at positive obligations and positive duties. Many of the ongoing legislative movements towards mandatory human rights and environmental due diligence, and even proposals for a duty to prevent, would operate as a positive legal duty. Could you share some thoughts on positive
obligations and what they could or should look like, particularly in the context of structural inequalities and their historical contexts?

The first point to make is that the whole distinction between positive and negative is an artificial one and often unhelpful in terms of rights. But I do think it is helpful in terms of duties and understanding the nature of duty. My proposition is that there is a lawful and politically justifiable basis for multinational corporations to have positive obligations to not only prevent violations, but also to fulfil human rights standards. That is a very contentious concept, and I think it is unnecessarily so, for reasons I will explain. I do think, though, that multinationals emanating from the Global North particularly, or very wealthy multinationals operating in contexts of high levels of poverty and inequality, have a positive duty to fulfil human rights, including socio-economic rights. And this triggers a visceral reaction on the part of those opposed to the notion for many reasons. It appears to be an invasion of the autonomy of a corporation. It appears to be a ticket out for governments to actually take responsibility for those aspects of its society that are suffering as a result of inequality.

But I think there are some very practical, reasonable and arguably sustainable situations in which corporations may be held liable to fulfil human rights, and to put money into that fulfilment. There are five or six factors I can discuss here. Some of them are the seriousness of the violation and the imminence of the violation. And one of these aspects is this notion of a gatekeeper. A corporation takes on the role of a gatekeeper when the corporation is the only entity that is able to provide the fulfilment of a right — not forever, but for a limited period of time. The question becomes, “Is it lawful for them not to?” Much of this is moored in the history of the circumstances. Freya and Rachel both very evocatively referred to the historical context in which this discussion is taking place, and the fact that that historical harm is very present.

If we are truly responsive to law — not to ethics, not to morality, but to law — then if we take, for example, the situation in South Africa or in Australia, corporations that are operating on and benefiting from the fruits of land that was stolen, owe that money back. So of course, the chain of causation is going to be raised as a reason not to have that obligation. But if one were to say that that obligation does not arise merely because of a corporation’s presence there, but arises when the corporation’s presence creates a situation in which they are the only one that can help; in which the most vulnerable are going to be hurt; the hurt will be egregious; and the corporations hold the key to the fulfilment of that right, then why should we steer away from that? So positive duties are something that we should be bringing to the forefront, without catastrophizing the notion of capitalism or corporate autonomy.

The underlying principle is very interestingly reflected in the South African Constitution, which is one of the few (if not only) constitutions in the world that is of a complete horizontal nature, in that, the Bill of Rights will bind private persons — including juristic persons — in certain circumstances. Those situations are yet to be fully developed by the jurisprudence of our courts, but the principle is a resoundingly interesting one. It is a fascinating one, and in many ways is the leader that others should follow, which is that there are reasonable circumstances where juristic persons will have the same duties as the state — and perhaps even beyond.

You have also raised these issues in the context of financial institutions. There has been a recent example in South Africa relating to social grants and financial institutions, including the IFC. Could you speak to us about this example and the lessons we can learn from it?

In many ways I think this example exemplifies the moving parts of this discussion.

The right to receive social welfare in South Africa is a constitutionally protected right. The actual mechanisms to distribute the grants themselves are very difficult for government to implement, for a whole range of reasons, not least of all because those who are the majority of grant recipients live in far-
flung areas, often are un-banked, and are not able to access financial instruments. A company bid for a tender to distribute those grants. The company’s name was (it has now dissolved) Cash Pay Master Services (CPS). It was a subsidiary of Johannesburg-listed and New York-listed company Net1. The CPS was granted this tender to distribute the grants and it would do so through a really impressive banking platform. It did so in a way that would allow the most indigent people to access their grants through a cell phone, bearing in mind that everybody in South Africa has a cell phone or access to a cell phone, so it was deemed the most appropriate and the safest way of doing it. And it made a lot of sense.

The problem was that the tender was challenged by the other tenderers. The Constitutional Court found that the tender was unlawful, but it actually allowed the company to continue distributing the grants because basically they had no other option. If this company did not do it, nobody would, and nobody would receive their social grants. It was a bit of a crisis situation.

Over the period of five years, which was the duration that the company was given to do this job, an alarming phenomenon happened. Grant recipients started to find that large chunks of money were missing from their grants, at the beginning of every month. Sometimes the entire grant would be gone. You can imagine that, for a person who has a child grant for their child, this is very serious. And in South Africa it is not just one person who lives on a grant. The grant helps whole families survive.

It turned out that CPS, as part of the Net1 Group, had access to all of the data and biometrics of the grant recipients and had been transferring that data to other subsidiaries within the same corporate entity, within the Net1 Group, which would then use that data to execute malevolent targeting of financial services to grant beneficiaries. A lot of those financial services were sent in a manner that grant recipients either did not understand, or in a way that would exploit grant recipients’ indigent circumstances. The problem, though, was not so much that they were given or offered these services. The problem was that if, for example, a person chose to have an emergency loan, the repayments would then be deducted directly off their social grant by CPS. This was unlawful in certain respects and obviously widely unethical.

Technically, there was a way in which the grant recipients could contact CPS to find a way out of this. But the contact number was free only if you were phoning from a landline. Otherwise, it would cost you. Now, there are no landlines in most of the areas where grant recipients live, so the reality was that there was no functional remedy. There was no functional relief, even though they claimed to have one. We actually spent two or three days trying to phone that line, and there was no answer.

The complication was that money was coming off these accounts in such huge amounts that the IFC (the International Finance Company), which was the largest shareholder of Net1 with a shareholding above 16%, had reinvested in CPS after the Constitutional Court declared that it had a constitutionally invalid unlawful tender. They decided to reinvest because they claimed it was demonstrating a really useful way of ensuring financial accessibility to people living in poverty. But the reality was that they were making money hand over fist. So much so that towards the end of the period that CPS had this contract — I think it was about 2017 — the IFC reported that of all of its African investments, the most lucrative was CPS.

So this was a development bank aimed at deconstructing poverty, and it made an untold self-confessed fortune out of deductions from the poorest, marginalized, most destitute people, who never got their money back. Never.

When the Constitutional Court had to deal with this again, and we went back to the Constitutional Court to say this was happening, the Court said, ‘all right, you are not allowed to do it anymore’. But the horse had bolted, and about a year later CPS declared bankruptcy. But the harm was done.

So you can talk about remedies and you can talk about these facilities. I actually sat down with representatives of the IFC who came to South Africa to find out what had gone wrong, because the press around this in South Africa at the time was significant. And they insisted they had done their due diligence.
My response was: Every single person in the social justice sector in South Africa knew this was happening. There were reports going on about it. How could you honestly say you had done your due diligence when a simple Google search would have yielded the result? But as matters stand, the most indigent in this country have suffered so that the wealthiest in the world profited.

**Question from the Q&A:** Should due diligence address the structural inequality which is revealed by wage inequality, minimums, and maximums, and if so, what mechanisms do the panel suggest beyond living wage guarantees in supply contracts? [Please also see Rachel Davis’ answer to this question.]

Bonita, do you also have some thoughts on this?

Very esoteric ones, unlike the very effective, concrete and practical response from Rachel!

I did a training recently for a multinational mining company. They do a leadership training, and I was speaking about some of the human rights and environmental responsibilities that leaders may want to consider. I spoke a lot about the question of remuneration. One wants to move away from the language of wage. It is “proper remuneration” because it is not just about how much money is given. It is about whether you are given access to health care, and all of those aspects that come with the package that those sitting in senior offices receive. It is not the quantum, at the end of the day, it is the entire package.

Rachel, you said there is a nerd in you. Oh my, I can out-nerd you any day. The philosopher John Rawls developed this concept of the “veil of ignorance.” Many of you may know about it. He asks you to imagine creating a just society from behind a theoretical hypothetical veil, where you cannot see what that society is going to look like. So from behind that veil, you have to create structures within the society, but you do not know where in that society you will sit. You do not know if you will be able-bodied or not. You do not know if you will have a specific gender identity, whether you will be binary, whether you will be rich or poor. You do not know where you will sit. The idea is that if you do not know where you will be placed in society, then you will be very careful as to how you calibrate justice and economic equality in that situation.

The challenge I posed was, if you do not know where you are going to sit in the mining industry, how would you ensure value-linked remuneration? That is the question. You do not know if you are going to be occupying the position of a cleaner, or an underground worker, or the in-mine manager, or the financier, or the leader, whatever the case may be. You have got to justify the reason for the remuneration you give. I think it is quite a useful tool to actually really, sincerely ask and escape assumptions about what valuable work looks like.

One of the explanations I often get from people who talk about the justification for such a large gap between the highest and lowest paid people within the mining industry — or any of these industries, for that matter, the tech or financial services industry — is that those who lead have very rare skills, and are very few, and have a rare education. But I always query that as a valid justification, because how many of those leaders fail regularly to actually lead those sectors responsibly? Also, the scarcity of skills is something that actually applies at many levels of industrial operations and marketplace work. If we then have to take scarcity of skills off the table, what is left? Maybe education. But formal education is only one type of education. What about inherited knowledge about a mining mechanism? Or inherited knowledge about the growth of a product, agriculture, the manufacture, the creation, whatever it is — why do we devalue that? And why is that lifelong intergenerational knowledge worth less than a degree obtained from a shabby university like Harvard or Yale or Oxford or Cambridge, as the case may be?

The veil of ignorance is a cheeky but potentially useful and very nerdy approach that could be taken.
Bonita Meyersfeld is a human rights lawyer, academic and advocate. She is an associate professor at Wits Law School and from 2012 to 2017, she was the director of the Centre for Applied Legal Studies. She has worked in various international NGOs and was a parliamentary legal advisor in the House of Lords in the United Kingdom. She was an editor of the South African Journal on Human Rights and is the founding member and chair of the board of Lawyers against Abuse.

Bonita obtained her LLB (cum laude) from Wits and her masters and doctorate in law from Yale Law School. Bonita teaches and publishes in the areas of gender-based violence, business and human rights, international law and animal law. She is the author of the book Domestic Violence and International Law. Bonita has consulted for, and presented expert statements to, various United Nations fora. Bonita has been appointed Chevalier de l’Ordre national du Mérite (Knight of the National Order of Merit) by the President of France in honour of her work in human rights and gender-based violence.
5. The potential of the UNGPs and human rights due diligence in addressing systemic inequalities

Rachel Davis
Shift

Your work includes engaging with business about their responsibility to respect rights and using the UNGPs to push the envelope of what is expected beyond their existing comfort zones. Could you speak to us about how you see the potential of the UNGPs and human rights due diligence in addressing systemic inequalities?

Thanks very much to the organizers for the invitation to be here. Like Freya, I would also like to acknowledge the traditional owners of the land that I am speaking to you from — the Arakwal people of the Bundjalung nation — and to recognize that sovereignty was never ceded.

Thank you Michael for your really kind and graceful comments as well. Indeed, we lost an icon and very dear friend in John Ruggie, but his extremely deep and real commitment to human rights, to the humanity in human rights, to real outcomes for people, is very much in this discussion today, so I am particularly pleased to be part of it.

I would like to start by referencing what I consider the harm of calling the Guiding Principles, a “do no harm” standard. I often hear that phrase, and it implies the avoidance of making things worse. It certainly has no connotations of the past or impacts that are being carried forward, as Michael said.

Getting business to focus on risks to people is an enormous change, if you think about the full potential of what that change is asking for. It is the hardest thing for a company to do. Most companies are not wired naturally to do that. They are wired to go where the company has control, to look at risks in its own operations, and keep things manageable. Whereas the Guiding Principles expect companies to go to both ends of the value chain, to look at where the most severe risks are, to go beyond provisions in contracts, and to use all available forms of creative leverage. What do they expect of business? Do not cut relationships with risky partners just to manage a challenging PR situation; invest proper time and resources in better outcomes. Hold yourself accountable to those outcomes. Ask hard questions about your business model. Look at who you lobby. Bring the perspectives of people who are impacted into the boardroom and into your decision-making, and show empathic leadership. This is really different behaviour, and it is what my colleague at Shift, Francis West, has called the inherent if perhaps “quiet radicalism” of the Guiding Principles.¹⁹

I think due diligence is too often reduced to just risk assessment in the form of social audit with corrective action plans, for example in a factory workplace context, or on a plantation or other worksite, and with all the failings that come with that. But in reality, effective due diligence requires root cause analysis and is a very different type of inquiry, methodologically and practically. Carrying out a root cause analysis can help identify a connection to systemic problems like structural discrimination embedded in institutions and social practice. This requires serious long-term collaborative efforts to address. And even then you still may struggle, as Bonita and others have described, as these challenges are so embedded in our economy and in our society.

But this is part of what the responsibility to respect implies. Yet we have seen in the last ten years of implementation of the UN Guiding Principles that businesses really struggle with what we describe as assessing ‘contextual risk’. They struggle with really understanding all the institutional, legal, and social elements of the context in which they are operating or sourcing from and how that could heighten the severity or likelihood of human rights impacts. And financial institutions have not routinely been asking them to assess contextual risks either. So we do not see businesses making the connections between how weak rule of law, and the undermining of civic freedoms or democratic institutions, influences specific human rights risks. We do not see those questions being regularly asked in human rights risk assessment. We see it in anti-bribery and corruption due diligence, but we are not really seeing it yet in the same way in human rights.

Take one specific example of trade union rights. We have focused on this issue at Shift: we put out joint guidance with a Dutch trade union on it, and have worked with global trade union allies on why these key enabling rights need to be foundational in due diligence and need to be prioritized for so many companies. Undermining of trade union rights is a contextual risk in many countries. If you are a multinational operating in that country and you are not also using leverage to engage the government with your peer companies, or through the ILO, on recognition of trade union rights and why they are so important, then no matter how well-intentioned the worker empowerment programmes you have are, you are probably not going to make substantial progress on living wage, on safe working conditions, or addressing pervasive harassment of women workers.

We would say that, done right, human rights due diligence expects attention to and understanding of systemic or structural risks, and a corresponding investment of leverage in trying to influence the contextual environment that connects to specific human rights risks with which a company may be involved.

You have also written about how the Black Lives Matter movement goes to the heart of what the UNGPs are about. What are some of the lessons about how business needs to consider their connection to severe, systemic impacts in an integrated rather than reactive way?

Shift is a US-headquartered non-profit, and we felt a particular responsibility to engage on this in the context where many of our team work, given the history of harm to black communities from police and other forms of state sanctioned violence and continuing inequalities from the years of slavery. Of course, there are many connections to other contexts and impacts experienced elsewhere — along with important differences.

We saw that most business responses were framed as voluntary commitments by socially responsible or socially conscious companies. But what we saw from our business and human rights perspective was a responsibility to take action. So we put out some guidance regarding what the UN Guiding Principles say about the connections between companies’ own operations and racial discrimination over the longer term, starting specifically with things that are easier to see. We examined the links between companies’ products and services and structural discrimination, which in the Black Lives Matter context included things like companies like IBM providing goods directly to police forces without heightened due diligence. It also included the role of online platforms that were disseminating hate speech and companies that were advertising on those platforms but not taking any action in that regard. It included discriminatory

---


access to financial services — along with discriminatory portrayals in marketing, these are pervasive problems in the US.

We saw some companies’ awareness of these connections start to change. We did see companies like Pepsi and Mars, for example, start to take some action regarding their brands. We also saw that spill over a bit into the sports market, with corporate sponsors starting to look at cultural appropriation of First Nations’ and other Indigenous names for sports teams.

But going beyond those immediate connections, we also saw the need for companies to take a longer time horizon in looking at their involvement in specific impacts. We are talking about systemic impacts that have been embedded for years, for generations, in the economy and in society. As a company, you need to take that longer view, and then you need to set yourself clear targets, be willing to invest the resources that they require and commit to transparency on your progress. And again, we saw that starting to happen in some perhaps more predictable areas of the business that were closer to home. For example, pay equity (as Bonita said) is still an incredibly important challenge, along with approaches to procurement, and the broader climate in organizations around meaningful inclusion of racial and other minorities.

But the UN Guiding Principles also push businesses to go further. We didn’t see many companies questioning whether their lobbying funds were being spent to support elected officials with poor records on equality and policing issues. As a business, are you considering the impacts of your taxation strategy, given the massive underfunding of public services for black communities in the US? Are you considering using your voice to support specific regulatory reforms that the Black Lives Matter policy platform was recommending?

At Shift, we believe that the responsibility to respect sets the floor, not a limit, on how companies can act and should act in support of human rights. There were, and are, rationales for them to speak out on broader Black Lives Matter goals and issues that go beyond the framework of the Guiding Principles.

For the Guiding Principles to make sense and add value, you have to look for the connection, the linkage, between the business and what the Black Lives Matter movement is highlighting. As I have just laid out, we think you can actually make a lot of connections. There are a lot of linkages that companies should be working on. But we recognize that there’s more to do beyond that. If companies are using or wanting to use their voice on broader public goals, then they should still do that in consultation with affected stakeholders, with people who know the impacts first-hand, with those who are directly affected. We see that as being particularly important in advocacy around LGBTQIA+ rights, for example, and have put out guidance on that specifically.22 My colleague, Daniel Berezowsky from Shift, will be speaking about that tomorrow.

You are working on the role of state-based oversight bodies to enforce human rights due diligence-based regulation, and emphasise that these should be complementary to judicial or civil remedies for victims or rights-holders. Is there a risk that structural inequalities are also present in the way European-based regulation is designed?

Yes, there is a real risk. We are seeing this happening already in the legalization of due diligence, in that it becomes classified as a first-tier supply chain problem. That leaves us in the land of an approach based primarily on audit, ‘command and control’ or top-down management of issues in the supply chain, terminating problematic business relationships, ‘cleaning the supply chain’ and so on. These are all things that we are actually trying to move away from as the sole way of managing harms in supply chains

through the UN Guiding Principles and through true human rights due diligence. If those kinds of approaches are what the concept of due diligence means when it becomes law for many European or Western headquartered companies, then that's going to lead to, predictably, not just bad but distressing outcomes for affected communities in cocoa producing countries, for workers in electronics factories in Malaysia, and beyond.

We have already seen this tension with the use of the US import ban against goods made or suspected of being made with forced labour. There has been great attention by some involved in that debate to make sure that workers actually are receiving remedy where bans are being imposed, or at least repayment of recruitment fees, which is one component of remedy. In those situations, where ‘Withhold Release Orders’ are imposed, there is a struggle to actually ensure remedy because the customs mechanism itself was not designed for that purpose. It was designed for quite a different purpose.

Turning back to the development of mandatory due diligence, there is a risk that European courts and administrative agencies will make decisions that make sense in Brussels or wherever they are located, but do not take account of the impacts and outcomes on the ground. This is particularly so if administrative agencies are making many decisions, quickly and at scale.

When those agencies are going to review large numbers of companies in sectors with challenging issues, one of the things that we've been emphasizing they need to take account of is how those companies are collaborating to achieve better outcomes for affected stakeholders. They will often need to collaborate, whether it is with their own countries’ embassies on the ground or with ILO country offices or with their business partners. Obviously, companies are also expected to take account of existing social dialogue structures where they exist and integrate stakeholder perspectives into their proposed mitigation actions, so agencies will need to require evidence of that. We have to think about what ‘evidence’ means in this context, given all the concerns around audit.

There is lots that could be done, but it probably needs to be a bit creative. And “creative” and “administrative supervision” are perhaps not concepts that go together naturally! But, along with the office of the UN High Commissioner for Human Rights, we are trying to push that conversation where we can.23 There are opportunities to do so. We looked at some of these questions in our work on “Signals of Seriousness,”24 where we highlighted some of the features of due diligence that make it unique, that bring the human element to the forefront. We flagged these features as the kinds of things administrative supervisors will need to consider when assessing the quality of companies’ due diligence approaches. They can look at these features as evidence of whether a company is genuinely trying to make progress as opposed to ticking the box on a series of process steps, which may look very nice on paper but may remain disconnected from outcomes on the ground, or indeed may lead to perverse incentives about how supply chain relationships are managed.

**A question from the Q&A:** Should due diligence address the structural inequality which is revealed by wage inequality, minimums, and maximums, and if so, what mechanisms do the panel suggest beyond living wage guarantees in supply contracts?

Thanks, that is a great question. The short answer is yes, to the first question. The answer to the second question has a couple of parts. The first thing that I would say is fundamental in human rights due diligence is: do not offload your human rights risks. Putting expectations in a contract is important, but if a company’s purchasing decisions do not take account of the real cost of labour, and you are not having

---


that upfront conversation in whatever specific context you are sourcing from, then you are not yet really meeting the responsibility. You are not meeting the responsibility to respect if you just offload that risk to the supplier and seek to maintain the same terms.

The second thing I would say is that — and this is the slightly nerdy answer — reporting and accounting standards matter, and they need to be changed. Accounting standards actually consider wages as a cost to the business, pure and simple. They do not recognize the potential human and social capital that is inherent in the idea of wages and the value that they bring to the business. We have a project at the moment at Shift, working with accounting and trade union and reporting experts on how to develop an accounting model for a living wage. A growing number of business leaders are starting to make declarations about commitments to living wage, but they cannot yet show what they mean in practice. So they cannot be tested on it, but they also cannot get credit for it, and it does not necessarily incentivize anyone else. We need a way to show this in accounting terms and value it in accounting terms. That is a way in which we are trying to make a contribution to that really important issue.

Rachel Davis is Co-founder and Vice President of Shift, the leading center of expertise on the UN Guiding Principles on Human Rights. At Shift, Rachel has led work for the last decade on integrating the UNGPs into national and industry standards, human rights and sports, financial institutions, conflict and international law. She was a senior legal advisor to the former Special Representative of the UN Secretary-General on business and human rights, Harvard Professor John Ruggie (2006-2011), and is a Senior Program Fellow with the Corporate Responsibility Initiative at Harvard Kennedy School. Rachel was the Chair of FIFA’s independent Human Rights Advisory Board from 2017-2020 and has advised the International Olympic Committee on human rights since 2018. An author of the leading study on the costs of company-community conflict in the extractive sector, Rachel has worked at the High Court of Australia and the UN International Criminal Tribunal for the former Yugoslavia. She is a graduate of Harvard University and the University of New South Wales.

25 See https://shiftproject.org/accounting-for-a-living-wage/.
Panel 2: Human Rights Due Diligence and Systemic Inequalities

1. Systemic inequalities within the UNGPs

Erika George
University of Utah

What do you see as the connection between the UNGPs framework and systemic inequalities, and what are some of the missed opportunities within this framework and language used? In particular, what is the relevance of Pillar I on the state duty to protect, Pillar II on the corporate responsibility to respect, and Pillar III on access to remedies for systemic inequalities?

Considering the question of the connection of the UNGPs to systemic inequality, I think it is important to remember that the UNGPs emerged from a rather modest mandate. The mandate was not to address the issue of systemic inequality as such, at least not explicitly. The charge was rather to examine the respective responsibilities of government and business concerning risks to human rights, because Kofi Annan, the UN Secretary General who appointed John Ruggie as the Special Representative on the Issue of Business and Human Rights, was deeply concerned about the uneven impacts of economic globalization and the role of business in influencing the enjoyment of human rights.26 The work of the Special Representative evolved over time, initially identifying and clarifying existing standards and practices, then analysing patterns of human rights abuses involving business and emerging practices by governments and corporations relevant to protecting human rights. This work evolved into something more than merely identifying standards and it succeeded in producing what has become the “authoritative focal point around which the expectations and actions of relevant stakeholders could converge,” as Ruggie intended. Still, it is not something that directly speaks to systemic inequality.

Conducting research for my book Incorporating Rights: Strategies to Advance Corporate Accountability,27 I spent a significant amount of time coding a decade of corporate sustainability reports and other public documents, searching for terms referencing human rights and the UNGPs. I did find increased attention given to human rights and associated social risks in sustainability reporting over time since the UNGPs were endorsed in 2011, but rarely did I find reference to systemic inequality in corporate communications. When I coded the contents of the UNGPs and conducted a text search of the document I found that the term “systemic” appeared just once. It is used in the context of UNGP 29, which pertains to crafting operational level grievance mechanisms to address and remediate issues raised by people or communities adversely impacted by business operations. The explanatory commentary of UNGP 29 notes that by analysing trends and patterns in the types of issues raised through an operational level grievance mechanism, a business enterprise could identify systemic problems and adapt to address problems accordingly.28 Still, systemic inequality is not a clear part of that discussion. As used in this context, the

27 Erika George, Incorporating Rights: Strategies to Advance Corporate Accountability (2021)
systemic reference could be read as basic practical advice on how to identify systemic problems present in business processes.

The term “structural” does not appear in the UNGPs either; nor does the term “inequality.” However, the term “equality” does appear once, in reference to the responsibility of governments to ensure equal protection before the law as part of a State’s duty to protect and promote the rule of law. So, while undoubtedly the authors of the UNGPs likely fully appreciated the presence of inequality in the world, it is less clear from the text of the UNGPs that addressing systemic inequality was a central concern.

That said, I maintain that the UNGPs should be interpreted and implemented in ways that speak to issues of systemic inequality. For example, Pillar I on the State duty to protect against human rights abuses by business enterprises and others should be understood as having much to do with identifying the conditions that sustain systemic inequality and eradicating such conditions. If we take seriously the importance of enacting and enforcing laws to protect against discrimination and to promote equality, then we must interrogate disparate impacts and disproportionate burdens borne by disfavoured or disadvantaged people and communities. The environmental justice claims being brought by people and communities that are disproportionately bearing the burden of industrial pollution, extreme weather events, and climate change while not enjoying the benefits of transitions to cleaner energy sources equitably come most immediately to mind for me.

Pillar II on the corporate responsibility to respect human rights is more complicated to construe as being concerned with systemic inequality in any meaningful way. It is less clear that the provisions of the UNGPs directed to business are an invitation to address anything that is necessarily systemic aside from business processes and procedures. Actually, corporations will often participate in existing systemic inequalities and profit from them in many ways. Finally, with respect to the access to remedy provisions of Pillar III, it is difficult to win cases or resolve grievances that take on issues of systemic inequality. At least in the legal system that I operate from, there is more focus on individual harms — the injured party or parties — not on the broader social and economic context that leads to the kinds of conditions that create sustained inequality and associated rights violations. Though admittedly, impact litigation has driven some structural changes, benefiting those with similar situations to the claimants in cases seeking redress for civil rights violations that stem from discriminatory policies and practices. Nevertheless, the case by case and contextual specificities of claims brought against business actors for human rights violations make strategies that rest solely on judicial decisions rather modest and slow moving.

Is justice delayed, justice denied? When I speak about systemic inequality and when I teach my students about equal protection of the laws, I find it is often helpful to think about the distribution of benefits and burdens in a society and who those benefits and burdens disproportionately fall to. Too often burdens fall to the kinds of people who are most vulnerable in a society — along lines of race, or class, or disability, or sexual orientation.

Could you speak to us about some of the specific examples of this you have identified in your work, for example regarding the business role in the migrant detention system in the US?

The example I wanted to share with this group goes to a systemic problem we have in the United States: our prison system. It is a place where we find disproportionately overrepresented those people who are systematically discriminated against, such as racial and ethnic minorities and people with mental illness or mental disabilities. Compounding the over-incarceration of populations who are vulnerable, we have

---

abuses in our prison system. This is not something unique to the US. Many prison systems around the world have abusive conditions that violate international human rights law. But more recently, we have turned to private prisons, where up to 75% of people who are detained in the United States for being undocumented are being held. And in the private prisons, there is the profit maximization motive to have more incarceration, to have more people in custody. And there seems to be less of an interest in or incentive to comply with regulations to ensure that the prison conditions are consistent with international human rights norms.

I think this is a particularly interesting issue to look at through the lens of systemic inequality, because we know the push and pull of migrant flows are often the result of inequalities in a place that a person or peoples are leaving to seek a better or new life. In the United States, they may find themselves incarcerated. According to prison employee whistle-blowers, we have had instances of migrant women being sterilized without their consent in private prison facilities in Georgia, and instances of solitary confinement reported in California.

I think it is important to look at the way the private sector intersects with human rights abuses and immigration policies. For example, the government is contracting with private prisons to hold people in detention and the government is contracting with technology firms to develop tools to detect people and places to target for immigration enforcement. Microsoft has been implicated in rights violations connected to the use of its facial recognition technology. Private prison facilities have been scrutinized for violating the rights of detainees. In October of 2021, there was a lawsuit filed in California on behalf of Mr. Carlos Murillo Vega, who was incarcerated and detained in solitary confinement for over 14 months by a private detention facility contractor. We do not know where these cases will go but they are able to be brought because there is new legislation, looking for accountability in incarceration.

Integrating the UNGPs would call upon us to look at what states are doing to protect vulnerable populations, ensuring that incentives are not set to make those populations more vulnerable for the private sector, and having a way for grievances to be aired and corrections to be made.

In terms of implementation of the UNGPs within companies, are there some examples of meaningful changes where there has been some measure of success?

As far as meaningful change goes, I think things are still changing and it remains to be seen. But I was encouraged that tech companies — in particular Microsoft and Amazon and some others — decided that they were not going to cooperate with local police forces and ICE (Immigration and Customs Enforcement) once public attention got called to the way their technology was being used for immigration and raids, or against protesters in last summer’s Black Lives Matter protest. The companies based their

---

36 California A.B. 3228 (enacted as Cal. Gov’t Code § 7320).
decisions on the way the technology was being used and their fear of complicity in what would subsequently become potential rights violations. That was a significant shift that was reported publicly. I do not know where the companies are standing presently on the use of that technology and what entities, including governmental entities, they will sell it to, but that was a significant shift. Indeed, there are recent reports that despite public pronouncements these companies continue to sell technology through third parties. Nevertheless, the effort to distance brands from being implicated in abuses through adding intermediaries indicates an awareness that the practice remains problematic. There are opportunities for concerned stakeholders to continue to press for change. To the extent we have seen any progress to date, I think it has been in large part due to the public pressure brought to bear on business enterprises, but the companies often reference the UNGP framework in their sustainability reports, so a rethinking of what is the responsible course of conduct where we have got systemic issues is possible.

The Black Lives Matter protests were about more than just George Floyd. They were related to broad systemic problems with policing and law enforcement in our country as well as sustained inequalities that often are more burdensome on people of colour and particularly Black people or formerly enslaved individuals who are the legacy of the United States. Those are large significant systemic sweeping questions that we would not expect a software engineer necessarily to get into, but for more software engineers than before to question and to have the consciousness that “the products that I design might be deployed in ways that are going to be inconsistent with respect for human rights” is an example of progress. I also think meaningful change is signalled in how businesses are starting to speak about rights and social issues in their sustainability reports. To be sure, the cynic could say talk is cheap, but I believe we must sustain this conversation if we ever are to create the changes necessary to address systemic inequality.

Erika George is the Samuel D. Thurman Professor of Law in the S.J Quinney College of Law and Director of the Tanner Humanities Center. She teaches constitutional law, international human rights law and seminar courses on equality, sustainability, and corporate responsibility. She earned her B.A. from the University of Chicago and her J.D. from Harvard Law School. She also holds an M.A. in International Relations from the University of Chicago. Before entering the legal academy, she worked with Human Rights Watch and practiced corporate litigation in Chicago and New York City. Her scholarship has appeared in the California Law Review, the Michigan Journal of International Law, the New York University Journal of International Law and Policy, the Berkeley Journal of International Law, and the annual proceedings of the American Society of International Law. She serves on the editorial board of the Business and Human Rights Journal. She is a member of the American Law Institute and is a Fellow of the American Bar Foundation. Her current research explores efforts to hold corporations accountable for alleged rights violations and her new book Incorporating Rights is forthcoming from Oxford University Press.

38 See Sheera Frenkel, Microsoft Employees Protest Work with ICE, as Tech Industry Mobilizes Over Immigration, New York Times (June 19, 2018), https://www.nytimes.com/2018/06/19/technology/tech-companies-immigration-border.html ("We request that Microsoft cancel its contracts with ICE, and with other clients who directly enable ICE. As the people who build the technologies that Microsoft profits from, we refuse to be complicit.")


2. Practical experiences and challenges of HRDD and systemic inequalities

James Sinclair
Ethical Innovations

Your work has involved establishing an ethical recruitment company for migrant workers, along with the ILO and others, where you saw a lot of the challenges of systemic inequalities up close. Could you talk about some of these experiences?

This is just a very practical example of some grassroots work we have been doing. In 2006, I left a fairly comfortable life as a private practice lawyer to go and work to set up this organization which is dedicated to helping migrant workers access decent work, particularly to confronting the problems that we now understand are called “bonded labour” or “debt bondage”, and issues of forced labour. We did it by setting up these sort of village-level grassroots recruitment centers in Nepal, India, Kenya, and Uganda, and then tried to help people who were working, usually in the Gulf, or in some cases in Iraq or Afghanistan, to access work in a way that they were treated in accordance with international best practices.

What we came up against from a practical perspective is what Professor Ray Jureidini rather pithily called “the culture of payment expectations.” This I think speaks to a broader issue about how the law as we often see it from a Global North context intersects with the reality of life on the ground in hard-to-reach, sometimes poorly-governed spaces, often in the Global South. We had this situation where most of the people we were talking to saw payments for jobs, whether you call them fees or bribes or whatever, as a form of job guarantee, as a way to access the market. We still hear it today when people come to us, looking for work. They often refuse to believe that we are offering fee-free recruitment — they think it is a trap, or will lead them into some sort of worse exploitation because they associate the payment of the fee with a good job. Changing that cultural norm, changing that narrative, is tough. And it has taken us a long time to get to the point where we are now getting some traction.

There is an ingrained prejudice in many societies, including in the UK and in the US, against what are sometimes, perhaps unfairly, called “lower-skilled workers.” People sometimes even think that if you’re “lower-skilled” then you brought this sort of exploitation on yourself. There is often an overlap in places like Nepal or India with the caste system, with people being specifically discriminated against because of their racial or ethnic group. All of these things can be very problematic.

There is also the problem, and it is one that we have worked on with the ILO, around discrimination against female migrant workers. There is a particularly pernicious, in my view, set of assumptions that is made about women who migrate for work. There is, as many people know, a very sort of gendered approach to migration for work, particularly from South Asia and East Africa. A lot of women are going to work in domestic work, for example, and there is an assumption that they will have been sexually assaulted during their work. So when they come back into what are often very conservative societies, there is a great deal of prejudice against them. We worked with the ILO on a program in Jordan to try and help female migrant workers access protected employment in the garment sector there. We had

some success with that, but it was relatively limited because of the commercial parameters that were placed around that particular project.

The challenge that we faced, and we still face today, is that organizations like ours are trying to be both market-maker and market-supplier. We go into the marketplace and we talk to people about the benefits of what we call fair labour. We have the initial challenge of trying to get past people’s scepticism, trying to face down what are often quite entrenched attitudes such as patriarchal attitudes, attitudes in the legal system, or attitudes at the political level, that the current system — which is enriching a lot of very dodgy people — can and should be maintained. It is not of course just in labour-source countries (as they are sometimes called), it is also in labour-destination countries where you see a lot of money changing hands between people — who are often quite powerful — to be able to exploit the workers that they are bringing over. There is a lot of overlap here, a lot of difficulty in confronting some of that.

We are seeing some shifting in the attitudes of people across this spectrum. Some of that is because of the outreach work that is being done, the greater realization and understanding of the legal norms that are now developing. Some of it has been a function of technology. A lot of the people that we recruit talk to one another on Facebook or on other platforms, so the word gets out that actually there are other better ways of being looked after.

It is our experience that these systemic inequalities are intersectional — that they overlap, change, evolve, and develop — sometimes in good ways, sometimes not. And it is a constant challenge.

In the context of designing mandatory human rights due diligence laws, you have mentioned the importance of understanding the complexity at the very bottom of the supply chain, what you call “the village-level work“. Could you elaborate on those challenges and what are some of the ways to incorporate this into the design of smart legislation, especially at the European or Global North level where we are seeing legislative developments at the moment?

Earlier this year I completed a PhD on exactly this subject. I wanted to go back, in the middle of my career, and understand some of these issues a bit better. So I went back and researched and wrote this thesis, which very much looks at this idea of what can we do to bridge the gap between — to put it in slightly crude terms — Global North laws and Global South realities. Because there is a gap.

I think that the starting point has to be to look at the lens from the other way around: What impact is this law going to have on the ground? Sometimes I think we lose sight of that, but I think we are getting better at it — there are some encouraging signs. For example, the 2019 UK government procurement guidance around modern slavery is quite a sensible document. It takes a balanced risk-management approach to these issues, it asks it suppliers very specifically to look at certain risk factors, and make sure that they are mitigating those risk factors. Obviously we have got the EU mandatory human rights due diligence laws about to land, and again, taking quite a good risk-based approach to some of this failure-to-prevent-methodology that has been coming up for the last few years. I have been banging on about it since the UK Bribery Act was passed. I think is a really good innovation to put some pressure on businesses to understand that it is their duty not just to think in a narrow way. They cannot just think in a legalistic way about what they do within their own specific business or business group. They actually have to have a broader understanding of how the world works within their broader value chain, and that actually there can be repercussions for them for failing to prevent some of these abuses.

The village-level stuff is really important because we often talk about something that I call the “first handshake”. If you want to make sure that a migrant worker is protected throughout their employment journey, you have got to be the first person they meet on that journey. If you are the second or third person, you are playing catch up. If someone has got their claws into that migrant worker and drawn them into bonded labour or forced labour, trying to remedy that situation can be really problematic and difficult. Being present at the grassroots level, as we try to be, is really important, but then you need to
connect the laws that are being passed with the organizations who are on the ground. That is the real trick.

There are certain things that we know do not work. Short-term fly-in, fly-out audits of organizations are not working. We need to figure out what we can do to try to encourage not just companies but all forms of organizations to think long-term, to think more about the relationships that they are building, and to make sure there are healthy relationships within their entire stakeholder group. These are the sorts of questions we need to be asking.

I do not have all of the answers. What I can say is the sort of things like the failure to prevent methodology can place pressure where that is needed and include meaningful penalties for failure.

We also know that some companies are trying to do the right thing. Let’s encourage them. There is sometimes a rather depressing spectacle of good companies, who we know are trying to do the right thing, putting their hands up and saying: “We found some problems in our supply chain”. And then everyone jumps up and down and says: “Look at how terrible that is”. We have seen this with some of the corporate accountability litigation that has been happening recently. The only reason why some companies are being held liable is because they made efforts to try to intervene in their supply chains. They highlighted the problem, and lawyers were then able to say: “Well, you knew about what was happening here”. As a result, liability was ascribed accordingly. What we really do not want is a situation to develop in which companies are incentivized to put their heads in the sand, which is why I think due diligence is the right approach.

We must be responsible about what that due diligence looks like and take a measured, risk-based approach to it. We must applaud those companies that are trying to do the right thing, and meaningfully punish those who are not doing the right thing. We should always have a view on what the bottom of the supply chain looks like and how to respond to it meaningfully in a practical sense. Because if you are just designing policy in a vacuum, if you are thinking about things from a sort of corporate boardroom perspective in London, or in Washington, that is not where the problem is. The problem is the often thousands of miles away. So how do we address that? That is the critical question.

James Sinclair is an international lawyer based in London. He holds a Bachelor’s Degree in Philosophy, Politics and Economics from York University, postgraduate legal qualifications from the University of Law, a Master’s Degree in International Relations and a PhD in International Human Rights Law and Political Economy, both from King’s College London. James qualified as a Barrister in 2001 and developed an international litigation practice. In 2006, he co-founded FSI Worldwide, a UN award winning fair labour organisation. He lived and worked across the Middle East, South Asia and East Africa between 2007 and 2014. He also established a law firm in the UAE.

Between 2014 and 2020 James undertook his MA and PhD, whilst continuing to advise clients on sustainable business practices. In 2018, James was awarded a grant by DFID to develop and lead the Fair Labour Alliance, a social innovation hub that develops and implements practical improvements in international labour supply chains. James currently leads the FSI consulting team, offering best practice fair labour consulting and ESG advice to global companies.
3. HRDD and systemic inequality faced by LGBTQI+ people

Daniel Berezowsky  
Shift

At Shift you have been engaging with business around sexual orientation, gender identity, and gender expression. Can you talk about how companies need to look at the structural discrimination faced by lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) people when they assess the way that they could be impacting the rights of people?

At Shift we work with companies of all sizes, across all sectors and industries, to help them conduct human rights due diligence. We help them understand how they may be impacting people's rights.  

As many of you know, the first step of human rights due diligence is to assess what rights are likely to be impacted by a company’s operations and value chain. Companies go across their activities and business relationships and start thinking about severity of risk, evaluating how grave or widespread the risk may be and evaluating remediability — how can I make something right, or is it something that I cannot put back if it is impacted. Then they look at likelihood and start thinking about business relationships, and they start discriminating among the issues so that they can focus on the most likely and severe impacts that they face.

The problem is that, time and again, we see companies looking at discrimination as one of the human rights that they are at risk of impacting, and are not sure of how to understand how grave or serious it may be. They look at the heat map that they are putting together, and start thinking: ‘I have forced labour over here, child labour over there, harassment and abuse over on that side. Where can I place discrimination?’ The problem with that approach is that while these other impacts often refer to tangible, very specific cases, discrimination often feels vague. One can be discriminated against in many ways — some of which are graver than others.

So, what we suggest to companies is that, rather than trying to place discrimination somewhere on their heat map, they use vulnerability and systemic inequality as a lens through which to look at all other risks. How are marginalized, powerless or underrepresented groups experiencing forced labour, trade union rights, child labour, harassment? What protections do we need to specifically put in place to protect specific groups, individuals, or communities?

In the case of LGBTQI+ people specifically, we need to take a step back and understand the lived experience of people who face discrimination on the basis of their sexual orientation, gender identity or gender expression as they go about their day. The cultural and social stigma that they encounter; the prejudice and assumptions that are made about them. To understand, for instance, that in almost 70 countries consensual sex acts between adults are criminalized, and in six countries people may face the death penalty. And in over a hundred countries, they lack basic protections to ensure their dignity and well-being. These legal barriers and social norms make people much more likely to face abuse and violence, to have income insecurity, to rely on jobs in the informal sector rather than going and applying for a job in the formal economy. Sometimes they also result in greater mental health needs, poor access to justice, and in some cases, homelessness, or poverty.

So, how does this connect to a company, as it assesses its human rights impacts? It matters because if they understand these systemic inequalities and vulnerabilities faced by LGBTQI+ people — and how

they vary across the different contexts where they operate — then they can better understand their role in causing or contributing to impacts. Understanding the vulnerability and systemic inequality faced by different groups and individuals across their value chain is a way to turn discrimination into something tangible that they can better grasp, and seek to address.

**Following on from this, we see companies engaging with LGBTQI+ rights increasingly through diversity and inclusion and in other CSR ways. Can you provide some examples of how these issues can be integrated more into the company’s human rights due diligence with a focus on the impacts on people?**

Of course, that is a great question. In 2020, Black Lives Matter created great momentum and had a ripple effect across the corporate world. More companies realized that they needed to think about diversity, equity and inclusion (DEI), not only in a number of activities that they conduct, but as a lens through which they could assess their governance structure. All of a sudden, we started seeing a lot of DEI teams that started resurfacing. Companies started hiring more DEI professionals, and that was great to see. At the same time, DEI has a framework that may or may not coincide with the framework that is used by their human rights teams. And in certain companies, you see a lot of great work from the DEI team focused on making sure that there is a non-discrimination policy in the workplace or that there are gender neutral restrooms, or that focus on developing employee resource groups and participating at pride events.

Those are all great and very much needed activities to raise visibility, and to ensure that people can bring their full selves to work every day. But, if companies only use that lens to think about LGBTQI+ rights, they disregard risks faced by LGBTQI+ people across their value chain.

For example, let us take a beer company that has a traditional value chain: You have your raw materials that you source and transport, you get them to the processing plant, where you produce and package the beer. Then, in the upstream, you advertise, market and sell the beer, people consume your product, and then the plastics or packaging gets recycled. Think about the many LGBTQI+ lives that you may impact across that value chain, and the risks that they face. How can our decisions affect them if we understand their vulnerability and the inequalities that they face?

For instance, it may be the case that the company’s processing plant is in an area with a high prevalence of violence against transgender people. So, a decision that may seem irrelevant — such as shifting hours in a way that requires people to leave work after dark — could lead to tremendous risk for them.

So that is something that you need to think about as a company, not only when you are thinking about policies, non-discrimination, restrooms, pride events, but really how your actions and decisions may be affecting specific folks.

Another example is what happens with brand promoters. Risk may be heightened for women brand promoters who go to bars or nightclubs, because those spaces are typically sexualized. Of course, companies need to think about ways to prevent that risk to all brand promoters. But LGBTQI+ people, and specifically LGBTQI+ people in some countries, may, on top of being exposed to harassment and abuse, not have access to the justice system. If they call a cop to help them or if they try to do something about a client that may be harassing them, they may end up being re-victimized by people who are there supposedly to defend them. We need to think about that as a company. And so on and so forth. For example, when we think about recycling, we need to think about how LGBTQI+ people tend to work in the informal sector, and what might happen to them if I change my recycling approach.

That is the invitation — to marry the DEI efforts with the human rights risks efforts so that we think about diversity through the lens of risk to people. We use a stethoscope, as we say at Shift, to assess human rights risks before we use a bullhorn to promote LGBTQI+ risks and say we are doing great stuff in the case of LGBTQI+ rights.
How can stakeholder engagement play a role in this? Could you provide some examples of the work you have been doing, for example with the International Olympic Committee and other organisations?

When James said that we have to bridge the gap between Global North norms and Global South realities, that really resonated for me. Because when we talk about LGBTQI+ rights, interventions are typically designed in the Global North in the headquarter offices of companies that are working in environments where LGBTQI+ rights are typically more protected. LGBTQI+ people tend to be more open about who they are than in other contexts. But then the policy-makers use those realities to shape and design policies and programs that, when taken to the Global South countries or countries where LGBTQI+ people may be facing risks, that does not necessarily work.

So, to your question, stakeholder engagement is crucial when designing these interventions. At the same time, when we think about stakeholder engagement in the case of people who may not feel safe talking about their sexual orientation or gender identity, we should consider what risks come from the engagement itself. We may be putting people at risk simply by identifying them and asking them to participate in a consultation, asking them a question, or simply collecting their personal data.

At Shift we developed a mnemonic, and we say, “Companies, it’s important to use your BRAIN” when designing stakeholder interventions. The “B” is for bias. Companies tend to think about LGBTQI+ rights, and because we are bombarded typically with campaigns around “love is love” and same sex marriage, they tend to think that it is a one issue topic. They tend to consult with LGB folks but not necessarily with folks who are facing risks connected to their gender identity or sex characteristics.

The “R” is for risk. Companies need to make sure that everything they are doing when consulting with LGBTQI+ folks is not putting them at risk. To your question about the International Olympic Committee, when we conducted consultations with intersex athletes we had to make sure that we were consulting with them in a way that was not exposing them to risk or putting their careers at risk, because some athletes could be disqualified from participating in certain contests simply for acknowledging that they were intersex.

The “A” is for assumptions. For instance, I recall that a global company designed a survey to understand LGBTQI+ risks, and they asked something like: “Do you feel that it is safe enough to bring your full self to work as an LGBTQI+ person?” That has the assumption that everyone wants to be out at work, and that being out is simply a matter of safety. There may be very good and valid reasons why people do not want to be out at work. They might not want to disclose their sexual orientation or gender identity for several other reasons. So, what are the assumptions you are making in designing those questions?

The “I” is for incentives. It may be that you are asking questions in ways that may be putting people at risk, and they do not feel that they have the right incentive to answer truthfully. If I think that whatever I answer is going to be seen by my boss or supervisor, then I may have an incentive to not disclose my sex, sexual orientation, gender identity, or the way I am being harassed, abused, or discriminated against. Some folks may also have strong incentives to portray themselves as being more inclusive than they truly are.

Finally, the “N” is for need. That goes to some questions that I see in surveys and consultations time and again, asking people to disclose their gender identity or sexual orientation.

In some countries, it is part of what you have to ask, because of the legal framework. But more and more, companies are typically just used to asking these questions as part of their checklist, without realizing that it could be traced back to LGBTQI+ folks and put them at risk.

That mnemonic has really helped in putting together consultations. And, of course, if companies trust that grassroots organizations understand the context better than they possibly could, they have a better
shot at assessing the local situation that LGBTQI+ people are facing on the ground in specific situations, in order to meaningfully inform their actions.

Daniel Berezowky is a human rights expert and communications strategist with over 10 years of work experience in the public, private and nonprofit sectors. His work focuses on business and human rights and LGBTI rights.

Early in his career, Daniel gained experience as a consultant on public affairs for ICT multinationals, government agencies and oil and gas companies in Latin America. He then went on to work in the public sector, and eventually co-led the strategic communications task force of the Minister of Home Office (SEGOB) of the Mexican Federal Government. As a Senior Advisor, Daniel also participated in the design and implementation of human rights policies, with a focus on domestic workers’ rights and LGBT rights. In his professional path, Daniel has also gained critical experience as a human rights expert and advocate at the Inter-American Commission of Human Rights and at Human Rights Watch.

Daniel is currently an Advisor and the Communications Lead at Shift, the leading center of expertise on the UN Guiding Principles on Business and Human Rights. At Shift, Daniel drives the communications and advocacy strategy. In parallel, he offers bespoke advisory support to Fortune 500 companies, sports bodies and governments on the implementation of the UN Guiding Principles.
4. Focusing on structural inequalities in National Action Plans, the informal economy and the media

Harpreet Kaur
United Nations Development Programme

You have worked with several governments in Asia on National Action Plans (NAPs) on business and human rights. Could you elaborate on how you have brought into these conversations the importance of understanding the differential impacts and structural inequalities?

Through the UNDP’s Business and Human Rights Asia program, we provide technical and advisory support to governments and other state-based institutions on the development of National Action Plans (NAPs) on business and human rights, as well as other policy and legal frameworks.

One of our key messages to governments has been that there is no one size fits all, and the governments must assess and understand the contextual realities within their own countries. They have to look at the differential impacts of business on people within the countries and beyond. We know that gender-neutral NAPs, for example, can undermine existing state commitments to achieve gender equality. NAPs are the policy tools for implementing the UNGPs, rather than non-discrimination and equality, but it obviously has to be clearly specified that the implementation of the UNGPs must be gender-responsive. Our message to the governments who review their rules, regulations, policies is to ensure that they assess how these regulations are impacting different communities and stakeholders.

Access to remedies still remain one of the least focused areas. While conducting baseline for the National Action Plan on Business and Human Rights, the governments need to review remedy mechanisms, the differential impact they could have, and the difference in the way people can access effective remedies.

To support the NAP development processes in Asia, we have organized a series of consultations, focusing on various cross-cutting themes including gender and the environment, and specific populations such as migrant workers and indigenous people. Some of the outputs of these consultations have been really crucial in terms of how the National Action Plans are being developed and framed. It is not enough to just develop the National Action Plans. We have to think about the actions the government is planning to undertake to implement the plans and how they must respond to ground realities. Similarly, governments have to ensure that affected stakeholders have equal access to effective remedy as outlined in the UNGPs. Those are some of the key messages we have been conveying to governments, as well as looking at differential impact.

Lastly, I think the pandemic provided businesses with an opportunity to embed respect for human rights into their business values, which plays an instrumental role in enhancing business resilience to future crisis. To build sustainably, businesses must assess the impact of COVID-19 on stakeholders, including the impact on workers within their operations and supply chains. That has been one of our key messages to governments: to set expectations for businesses. Pakistan’s National Action Plan includes a dedicated section on the COVID-19 pandemic.

We have developed a rapid self-assessment on human rights, due diligence, and COVID-19 which is targeted at businesses to consider, monitor and manage their human rights impacts.

You have also been engaging with business on trainings and guidance on human rights due diligence, including relating to the impacts on people in the informal economy. How do the UNGPs apply to rights-holders in the informal economy, and how should considerations about the informal economy be taken into account in human rights due diligence?
The UNGPs apply to informal workers just like any other human beings. Governments should protect them from business-related human rights abuses. Companies, of course, should respect their rights. Through conducting human rights due diligence, companies can identify and address human rights risks connected to their business models, sellers, and the informal economy. Informal workers appear within business models, and I think that is something that needs to be mapped carefully. That is the only way that the potential impacts could be prevented, because it might be difficult to get a good sense of what is happening in a company’s supply chain if some of these risks materialize in the informal parts of the economy.

We have recently developed a Human Rights Due Diligence Facilitation Guide.43 We view it as a tool to help businesses map their supply chains and also conduct human rights due diligence, including looking at informal workers as well. Often human rights issues in the informal economy are hidden. If a company really wants to dig deep and understand how its business model impacts informal workers and their families, they really need to conduct a meaningful and ongoing human rights due diligence.

In this context, it should be stressed that current social auditing practices fall short of meaningful human rights due diligence. The Business and Human Rights Resource Center recently published a short paper that explains the difference between social audits and meaningful human rights due diligence.44 One of the paper’s key messages is that the current social auditing processes might not be fit for purpose to uncover issues faced by informal workers. It is helpful to look at differences between social audits and human rights due diligence. Social audits are often symptomatic of lead firm approaches which rely on monitoring change or expecting things to change instead of really taking shared responsibility.

Additionally, there are the people who are already discriminated against based on their gender identities or sexual orientation, and many of these are the people who are at the end of the informal economy. For example, one way they interact with the informal economy is by collecting bottles or plastic waste. Many companies are starting to manage plastics and waste, so that is one area where companies who are launching big initiatives can look at how those initiatives impact high-risk people in the informal economy. Businesses also need to look at human rights and environmental due diligence concerns, and make sure that there is effective remediation available for individuals and groups, especially if a company has been impacted and harm extends down its value chain. In some cases, and in many parts of Asia, the value chains end in the informal economy.

You have also been doing very interesting work developing a training handbook for journalists on reporting on business and human rights stories.45 One of the themes that has arisen during this conference is the question of the role of social expectations and whether and how they are changing regarding systemic inequalities in certain contexts. What is the role that the media can play in bringing attention and focus to these issues of inequalities, and the focus on people?

The author of the UNGPs, the late John Ruggie, has played an instrumental role in progressing the business and human rights movement. The UNGPs are based on policy-centric governance as their theory of change. While the UNGPs can do several things, I will limit my answer to the relevant elements for journalists.

The UNGPs employ a multi-perspective framing that tries to leverage and complement three types of government systems: status governance, corporate governance, and civil governance. Journalists fulfil a role which could fall under the third category. Civil society actors, including journalists, play an essential role in holding companies and governments accountable through the court of public opinion. Moreover, the UNGPs tried to address social norms, and Ruggie argued that to effectuate change, we need to change the social norms. But this does not happen overnight. Again, here too journalists have a really important role to play.

And the fact of whether a journalist is reporting on lifestyle, politics, education, finance, or anything else, does not matter — there is a human rights story everywhere. What are the clothes you’re wearing made of? What are you eating? Answering these questions involves looking at the supply chain. All of these issues have a business and human rights story, and behind each of these stories is a human being, a person. Journalists can play a really big role in bringing these stories to larger platforms, because journalists have the ability to see how people are impacted.

We have already seen how reporters in the media have brought about change. There was a big story on slavery in Thai fisheries and the way that it has impacted the lives of over two thousand people. Similarly, you hear about what is being reported on palm oil plantations in the region. You can also see how businesses have responded, because the media highlights not just the reputational risks but also the associated operational risks to businesses.

In addition to the trainings we have been doing, we will also be conducting trainings for journalists across Asia, in different languages, and the handbook will be translated into different languages so as to be a tool available to many, many more people.

Harpreet Kaur is a Business and Human Rights Specialist at the UNDP’s Regional Bureau of Asia and the Pacific, where she oversees a regional project aiming at promoting responsible business practices through partnerships in Asia. She provides technical and advisory support to governments and businesses on how to mitigate and address human rights risks and impacts in operations and supply chains in Asia. Previously, Harpreet led Genpact Centre for Women’s Leadership at Ashoka University where she steered the Women, Workplace & Rights agenda and designed cutting-edge programs that enabled women to lead with equality and dignity. At Business and Human Rights Resource Centre, Harpreet highlighted corporates’ human rights impacts through her research and writing. In her early years, Harpreet lead governance projects in the conflict-ridden Jammu and Kashmir in India using media and communication and supported the track-II diplomacy processes. Harpreet serves as a Council Member of the World Economic Forum Global Future Council on Human Rights. Harpreet has presented at various national, regional and international forums and published both in national & international media. Harpreet has a PhD in Anthropology from the University of Delhi, India and a Post Graduate Diploma in Human Rights Law, National Law School, India. She is a certified SA 8000 Auditor.
You have spoken about the importance of looking at the longue durée of a territory and its peoples, to consider what systemic inequality and what due diligence should look like over the long term to address this. Could you elaborate on this? What might a consciousness or sensitivity to this look like?

It is useful to remember that while we are talking about corporations and companies as institutions and as entities, we are also ultimately fundamentally talking about human actors and human beneficiaries, as well as human beings on the receiving end of the consequences of the choices those entities make. We need to situate ourselves within the context in which we’re asking these questions when we think about the significance of the systemic nature of inequality. The interconnectedness, the kind of co-constitution of both the actors themselves, the forms of oppression, and the kind of inequality that we find ourselves having to navigate becomes important. In other words, we need to think about the specific implications of the ‘systemic’ in the systemic inequality that we are thinking about.

I want to invite us to take a step back and think about the company as a concept, as an instrument in and of itself that is enabled by the law. A company is not necessarily an immutable truth, but rather, it is a fiction that then specifically enables action. At the core of the broader context that we are speaking about is fundamentally a fictional construct of the law.46 I think that when we start to look at what this distinct personality facilitates, what due diligence opens the door to, we need to consider the company’s role and power outwardly, but also from the inside — what constitutes the company and what its legitimate parameters are.47

To contextualise this further I’d like us to think about the fact that the most characteristic feature of companies, especially transnational and multinational companies, is their distinct legal personality. Companies are putatively separated from what are described as their organs — whether they are directors or shareholders. So by design, a company is separated from its human actors, and emerges as an actor in its own right. In navigating the concept of systemic inequality, we ought to investigate how the design of the company itself leads to the potential obfuscation of human actors, who would otherwise be accessible to human accountability and recognize how the consequences of this obfuscation will affect other human beings.48

To situate this problem, we need to look at the longue durée of systemic inequality, and I would like to draw on Africa and more specifically South Africa as an example. While it may seem abstract at first, I am hoping to answer the question by tracing systemic inequality through to the current moment.

The colonization of South Africa is often attributed to the Dutch, but it was in fact actioned through the Dutch East India Company, which operated as a distinct legal person that was both sovereign and

---


48 Charmika Samaradiwakera-Wijesundara ‘Reframing Corporate Subjectivity: Systemic Inequality and the Company at the Intersection of Race, Gender and Poverty’ (forthcoming) Business and Human Rights Journal, Cambridge Core Special Issue on ‘Gender and Business and Human Rights’.
merchant.⁴⁹ (This formed the underpinning of the current legal system and corporate commercial law as it continues to operate). This is at the southern tip of Africa; if you go north, we may observe a similar pattern. We see the United Africa Company (which was made in the image of the English East India Company), which later became the Royal Niger Company having sold its interest in the territory — that was known for enslavement of people and the slave trade at the time and later the palm oil trade — to what became the predecessor of Unilever.⁵⁰

So what might seem like a distant past, and gets cast narratively as a historical truth of the past, is actually a reality that still has very clear material and psychic consequences today. There has, at various points in time, through various institutional interventions and scholarship, been the recognition that this kind of systemic legacy is more than simply a kind of purely historical or background issue. It is one that has real, entrenched, contextual implications.⁵¹

An example of this recognition is found in the report of the South African Truth and Reconciliation Commission, particularly the hearings on business and labour, which stated that the companies in apartheid South Africa were instrumental in the design and implementation of apartheid. Importantly, there was also recognition that there was systemic benefiting by all companies from the racialized (and, we may add, gendered) structures of society.⁵² There are litigations of examples that can be seen — such as mention that was made in the preceding sessions of Shell’s operation in Nigeria.

What we see are clear or conspicuous links between the systemic operations of corporations in territories (and contributions to systemic inequality) and their distinct legal personalities. Notwithstanding this, interventions do not really speak to the actors, either in terms of individual actors or the systemic operation of the concept of the company itself, nor how they are utilized to perpetuate systemic inequality and obfuscate accountability. Therefore, in a circular fashion, the legitimacy of the corporation and its parameters have gone largely un-interrogated. The takeaway point that may be useful to navigate when dealing with the question of due diligence is that we’re not simply dealing with businesses and corporations as amoral or neutral instruments or actors independent of context. Instead, we are dealing with concepts and actors that are implicated in the very structures of society — social, economic, and political relations — and the very identities that have emerged, around which oppressions are structured.⁵³

So, to take a systemic intersectional approach seriously necessitates looking not simply at an intersection of identities, but the dynamics of power that produce them.⁵⁴ Particularly how the corporation exists not just as an individual corporate actor, but also as an entity behind which there are human actors with normatively charged interests that have contributed to those dynamics.

——

⁴⁹ Geen The Making of the Union of South Africa (1946) 7.
Speaking to the question of consciousness, I think that as a starting point, we need to consider corporations’ historic roles as they have operated in particular contexts. Again, thinking of corporations as individual actors that may be traceable as such, as well as systemically in terms of who ultimately benefits and at whose expense, is important. Both conceptions have come up thematically throughout the conversation thus far. It is important to look at how they directly facilitate and contribute to existing inequality, and not to assume that they have not had a hand in or do not benefit from it; and how they continue to operate in this fashion and how due diligence and intervention then is not simply a question of compliance but potentially calls for a re-evaluation of the entire structure.55

Following on from this, what is the importance and role of the corporate structure? Insofar as we are talking about systemic inequalities which are inherent in systems and structures, could you elaborate on what the business’ relationship to inequality is, and whether there are forms of business that could overcome these structural barriers?

When looking at corporate structure, it is interesting to look at the vocabulary that gets deployed, and how sometimes even in progressive or critical contexts, form and substance get abstracted. What may seem like restructuring, or a critical reconsideration of structure, simply becomes a reconfiguration of existing dynamics.

The first thing to interrogate is the structure as it relates to substance. I think this speaks to the systemic nature of the question. Thinking about due diligence can involve not just how the corporation interacts with external actors, but also how the corporation itself is constituted, what its legitimate parameters are, and what authorizes those parameters in the first place.56 This involves considering, both on an interpersonal level (if we think about labour conditions and dynamics of power) and on a structural level (if we look at some of the fundamental kernels of what becomes a definitional element), what makes a corporation a corporation. For example, limited liability arguably receives less attention than some of the broad umbrella structural issues; but is so clearly interrelated to them. If you think about limited liability of corporations, essentially that veil that separates the organs of the company from the company as an independent entity, the purpose of the veil is often described as a limitation of risk. But what this actually translates to, as others have argued, is a displacement of risk and liability.57 The question then becomes, where does this liability go?

We can see, as some of the contributors suggested, that the risk is clearly transferred onto society — onto not only those that are vulnerable but also those that are systematically rendered vulnerable.58 Restructuring is not simply about reprioritizing whether profit should be a primary obligation, which of course has received attention, or whether profit should be the primary consideration of a corporation. It is about re-evaluating and re-inventing something as fundamental as limited liability and the acceptable parameters of that. Recall that the current form of the structure of the corporation enables this, but it does not theoretically have to do so, or have to do so in the blanket sense that it currently does. In other words, how can we reimagine the corporate structure? To some degree that speaks to Erika’s contributions in this session about thinking about economic relations as a whole. How could we potentially reimagine the structure such that it actually facilitates accountability, instead of having to think about how to work around this constructed entity that by design obfuscates accountability?

55 Samaradiwakera-Wijesundara (note 48) above.
56 Samaradiwakera-Wijesundara (note 48) above.
It is possible not only as an external imposition, if we think about state intervention, legislation, and the things that are arguably already mandated by the current soft law and in some national contexts as well. We need to think about what has also been referred to as a will (as contemplated by good faith due diligence), if it exists, to truly centre the “human” in “human rights” (and do better, as it were). Corporations themselves can be more specific about the parameters, their tasks, and what becomes acceptable and write that into the design, instead of allowing for the kind of ambiguity and range that gives rise to grey areas that allow for the kind of excesses we see.\(^5^9\)

I would like to harken back briefly to the South African example Bonita had raised in the first session, regarding Cash Pay Master Services (CPS) in the context of social grants.\(^6^0\) It is a clear grounded example of the otherwise potentially abstract theory I have been navigating so far. You have a private actor performing public services, affecting the most vulnerable members of society. So an example of where the wealthiest and most privileged benefit from extractive behaviour off of the most vulnerable, those that have been systematically rendered vulnerable. Significantly, what we see is when the question of accountability arises, the corporate entity at the centre of it becomes liquidated. It is dissolved, and there is no one to go after. This does not mean that the gains disappeared into the ether. It is quite clear that there are human beneficiaries as much as there are very human victims and survivors of those consequences of corporate conduct. But the implications of the absence of redress against those that benefited is that the absence of accountability is not accidental, but in accordance with the corporate structure. If we go back to the limited liability that stems from juristic personality, we can see, even at the basic corporate law 101 level, that there is scope to engage with what the implications of diligence, and particularly due diligence, are in establishing risk, pre-empting it, and proactively preventing it on a corporate structural level.

To be optimistic, this is an opportunity to look at due diligence as more than an intervention that gets co-opted into a box-ticking exercise. We can look at it as something that calls for very serious interrogation, a reimagining of the corporation essentially and its justifiable parameters.

Charmika Samaradiwakera-Wijesundara is a lecturer at the University of the Witwatersrand, Johannesburg (Wits) School of Law. Prior to which she was a Research and Teaching Associate at the Wits School of Law and associated researcher of the Business and Human Rights Programme of the Centre for Applied Legal Studies. She completed her articles of clerkship in the Corporate and Commercial Law Department of Edward Nathan Sonnebergs Inc (subsequently ENSafrica) and is an admitted attorney of the High Court of South Africa. She graduated her LLB (with distinction) and LLM (by dissertation) at Wits. She is currently a PhD candidate on a joint programme with Wits and the Erasmus University, International Institute of Social Sciences, The Hague. She was the vice-president of the Law Students’ Council and awarded the Law School Endowment Appeal Prize by Wits. She is an Abe Bailey Fellow, member of the Golden Key International Honour Society and a graduate of the Robben Island Museum Young Leaders Academy. Her research areas include Jurisprudence (Critical Race Theory, Decolonial Approaches, African Philosophy and Feminist Theory); and Corporate & Commercial/Company Law (Legal Personality, Corporate/Juristic Personality, Legal Ethics and Business & Human Rights).

59 Samaradiwakera-Wijesundara (note 48) above.
60 AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12.
6. HRDD and systemic inequalities within international investment law

Barnali Choudhury
University College London

One of your many areas of expertise is on international investment law. How do the inequalities within that system contribute to human rights problems?

One of the main contributors to inequalities within international investment law is really the rules themselves, the legal rules that are contained within that system. And these rules, they contribute to the privileging of foreign investor rights over other issues, namely things like human rights issues or environmental issues. In many ways, they also exacerbate pre-existing inequalities between developed and developing countries.

The principal problem with these investment rules is that they constrain governments’ rights to protect human rights or environmental interests, and we already know that these things are often done to address problems of inequality. Specifically, I would say that there are two legal rules that are found in these treaties that investors have most often relied upon, and that often have resulted in these investors’ interests trumping other interests (particularly human rights and environmental interests).

The first is the requirement for the state to provide fair and equitable treatment. This can mean myriad things, including things like protecting the investors’ legitimate expectations that they had a right to a stable investment environment. The second rule would be that a state cannot expropriate investors’ property, unless there are some conditions that are fulfilled. The codification of these legal rules and investment treaties ensures that property rights for investors are protected through an enforceable system, involving the use of international law, but curiously there is no similar protection through this same system for human rights or environmental rights issues.

It is probably not surprising, then, that when investors seek to use these legal rules and investment arbitration to protect their property rights, there is this tendency to diminish or to even negate the human rights or environmental rights that are at odds with these property rights. In an earlier period, this resulted mainly from investor claims for expropriation. But today, most of these issues arise from fair and equitable treatment claims.

We can actually look at a real-world example that highlights these issues. In Colombia, there is a region known as the Páramo de Santurbán, which is a mountainous region. This region is a natural and fragile ecosystem and it is the source of water to the local community. The region is really rich in flora and fauna, and it contributes to the local community’s right to a healthy environment. But the area has drawn in many mining companies, due to the area’s well-endowed mineral reserves, and often these mining companies have infringed on the rights of the local communities as well as the government’s efforts to protect the environment. For this reason, the local communities have often fought to ensure that mining companies’ activities in the area are limited. They have even made proclamations or declarations that it should really be “water before gold.”

In the midst of these communities fighting to protect the Santurbán region, there has been an investor, known as Eco Oro, which brought an action against the Colombian government. It was arguing that the regulatory measures that the government undertook to protect the Santurbán ecosystem violated the investors’ right to both fair and equitable treatment, and that those regulations constituted an expropriation as well. We recently had the decision from the arbitral tribunal, and it found that the Colombian government had actually adopted these regulatory measures to protect the Santurbán ecosystem. So the regulations that the government took were actually legitimate in protecting the environment. Thankfully, the treaty had an exemption provision which said that the types of measures
that the government took could not be considered expropriation. For that reason, the tribunal was unable to find that an expropriation had taken place.

However, the tribunal did find that there was a breach of fair and equitable treatment, and the tribunal found that the government’s actions in effectively delimitating the Páramo area were arbitrary, and that they were effectively inconsistent with meeting the investors’ legitimate expectations of a stable regulatory environment. There was another provision in the treaty between Canada and Colombia (the investor was a Canadian company) that provided that the legal rules for this dispute could contain a general exemption that would prevent government measures designed to protect issues like human rights and the environment from being considered within the scope of the treaty. Yet for some reason, the tribunal found that this exception did not relieve Colombia from having to pay compensation to the investors.

The tribunal made some comments — which I think are a bit suspect — that environmental protection and investor protection issues are not actually subservient to one another, but rather have to coexist in a mutually beneficial manner. We have actually seen similar comments like this from other tribunals, where they have effectively said that human rights issues are not more important than investor protection.

In effect, we have here legal rules of investment arbitration confirming that when investor protection and human rights or environmental issues conflict, the rules will favour investment over these other issues. Therefore, when a government enacts measures designed to improve issues of inequality in relation to the protection of indigenous rights or human rights or environmental matters — or frankly any of the topics that the other panelists have talked about — when these kinds of issues intersect with investment issues, we will likely be in a situation where investment rules are going to prevail and investment will win.

Now, these kinds of issues become even more problematic when we talk about the disparities that already exist between developed and developing countries. As we can see, in many of these investment arbitrations, the human rights or environmental issues that are often being downplayed or negated by arbitral tribunals are those that exist already in a developing country, which are probably countries that are struggling to improve situations of inequality. If we combine negation of these issues with the large awards that investors — often from developed countries — can walk away with, then we can end up in a situation where a developing country is using scarce resources to compensate foreign investors rather than alleviating inequalities within their country.

These are all consequences that are resulting from using the legal rules of an international investment arbitration. If you are interested in learning more about these issues, I urge you to read the latest report from the UN Working Group on Business and Human Rights, which has made similar elaboration about these issues.61

**Following from this, could you elaborate on the inequalities in the arbitration of international investment disputes, and in the way the system is administered?**

I have already talked about what I would call the substantive issues in international investment law that are problematic and that are probably contributing to inequalities, but I would say that the procedural issues within investment arbitration contribute equally to inequality as well.

Part of the reason for this is because many of the issues that really contribute to inequality are really what I would call public interest issues. It is a bit odd that we are dealing with public interest issues in the context of international investment arbitration, because investment arbitration is really not a democratic

---

system, and one would think that when one is dealing with public ideals it would be done within a democratic system.

One of the first procedural problems is that the adjudicators of these disputes are neither democratically elected nor appointed by democratically elected individuals, which is what we would normally see when there is a system of adjudication. Rather, what we see is that the people adjudicating these disputes are private individuals whose primary qualification is that they have worked in the area of investment arbitration. Moreover, since there is no tenure in these positions, these adjudicators can continue to work as arbitration lawyers. In effect, they can be what is known as “double-hatted”: they can work as an arbitrator in one dispute and then they can work as a lawyer in another. What this means is that they can be drafting their arbitral awards to align with the position that they are taking in a dispute in which they were working earlier.

There is also no requirement that these adjudicators have any special knowledge of general international law. Rather, their only experience is usually drawn from the private world of commercial arbitration. What we have seen in many of the disputes is that the lens through which these arbitrators view these disputes, relating particularly to issues like human rights or environmental issues, is seen only through the narrow lens of private arbitration. And if you do not trust me on that conclusion, have a read of the Eco Oro decision that I talked about.

These kinds of disputes also really do not provide for much transparency. Because these decisions often implicate issues about public ideals, this seems to be a little at odds with a system that operates under partial or even total confidentiality. Indeed, we have seen in some cases that the final arbitral award is never even publicly released. There is also a limited role for amicus curiae, who would be the ones to maybe offer some greater public input into these disputes. For example, in the Eco Oro decision that I referred to previously, all the amicus curiae were denied standing in the case. This means that the local community, who probably would have been the one most affected by the dispute, really had no opportunity to offer its voice in this matter.

Finally, there is no appeal available in these arbitrations. This means, if we can go back to the Eco Oro decision, even though there is now, I would say, pretty widespread recognition among the investment arbitration community that the tribunal’s failure to respect the general exceptions provision for environmental matters might have been suspect, there is no avenue to reconsider this issue. At the same time, despite the fact that there is not really any type of precedent system in the area of investment arbitration, we have seen that arbitral tribunals will consider other arbitral decisions in drawing up their judgments. What this means is that the effectively erroneous jurisprudence from decisions like Eco Oro is destined to be repeated and relied on again.

In effect, we have a system of dispute resolution that is really not open to the public, or to the local communities that are being affected. It is being staffed by adjudicators who may or may not have knowledge of general international law. It does not really offer any recourse to an appeal. And it is framed through the narrow lens of investor protection. Given these shortcomings, it is probably not surprising that this system perpetuates problems of inequality.

Barnali Choudhury is a Professor of Law and the Director of the Jack & Mae Nathanson Centre on Transnational Human Rights, Crime and Security. Prior to joining Osgoode, she was a Professor at University College London and academic director of UCL’s Global Governance Institute. She remains an Honorary Professor at UCL.

She is an internationally recognized expert on business and international economic issues, particularly as they relate to issues of human rights. She has

She is regularly invited to give talks and has presented her work throughout Asia, Europe, the Middle East, North America and at the United Nations. She has visited at New York University, University of Cambridge, University of St. Gallen, University of Otago, and at the Max Planck Institute for Comparative and Private Law. In addition to numerous academic citations, her work has been cited by the United Nations, the UK’s House of Commons, the House of Lords EU Select Committee, international arbitral tribunals and relied on by governments and international non-governmental organizations.
Panel 3: The Status Quo and Lessons Learnt

1. Framing inequality, dignity and human rights, and bridging the gap

Thabisile Phumo  
Sibanye Stillwater

You have over two decades of experience in the mining industry in South Africa and surrounding countries, but you also have that experience from your work at the UN in refugee camps, with gender equality and in academia. Could you start us off with the big question regarding the way we frame inequality? You have spoken before about how dignity is central to equality. What have we learnt about the way we think about inequality and dignity, in industry and society more broadly?

Dignity is central to equality. At a basic level, it is really about recognizing humanity. It is really about recognizing that everyone has to have the opportunity to exist without being subjugated or being deprived of the ability to have quality living or livelihood for that matter.

If I look at it from a business perspective, it is important to appreciate that business is part of the environment in which it operates, so its whole value chain is linked to how society is treated. So, the higher the ratio of inequality in a context, the more difficult it is for that business to truly be successful, to truly ensure that the population that it impacts can begin to grow in tandem with the growth that the business espouses.

What I like about what was said now, is about where we are today. Many years ago, inequality issues were taboo. Right now we are able to put everything on the table. There is much more of a spotlight that is shone on some of the issues that talk to inequality.

I want to almost bring us back to say it is not so much about what we read out there, because sometimes we get lost in the hype of it. It is about people. It is about understanding the human need for someone to be recognized as deserving of a fair existence. And those who are in a position to do so, removing the systemic barriers that stop them from being able to be in an equal society, that enables them to reach their full potential. And lastly, for me, it is about the moral question to all of us: Being comfortable with others getting less than, in an environment that could potentially create the much-needed balance.

In terms of the wider structural challenges that perpetuate inequalities in society, you have mentioned the difference between closing the gap versus building a bridge. Could you elaborate on this idea and what the role of industry is in doing this?

There needs to always be a recognition that inequality was historically engineered in a lot of our contexts. Therefore it is important as we look at issues of inequality to appreciate that it is not going to take a short space of time to fix inequality. We are going to have to deal with the fact that it needs to start with a shift in power, a shift in awareness, and a shift in resources.

People are so linear in the way they look at human rights issues. We need to broaden our framing and understanding, and begin to look at the fact that it manifests itself in so many different ways. When we look at the gross violation of human rights, we should not miss the opportunity of the structural inequalities that continue to nestle it and ensure that it continues to this day, as Grace has alluded to.

That is why I talked about the need to be cognizant of the fact that the gap is too big. And therefore, while it is not insurmountable to close, should our reality be closing that gap? With all the structural designs and the webs that are so deep in the different contexts, should we not begin to talk about a shift which talks to building that bridge rather than closing the gap, where people who are in a privileged
position can begin to move closer to the reality of those who are not privileged. This will enable them to move closer to the reality of discrimination.

So that, to Mustafa’s point, people can begin to be aware that something as simple as a wage gap that is inequal is a human rights issue. Because people tend to look at security issues, somebody gunning someone down, people having been displaced, because those overt human rights issues are easy to identify. It is the covert ones that are endemic in our society, endemic in the structures in which we operate, that I really think we need to put an effort in to deal with.

Yes, the frameworks aren’t perfect, but it is the framing in which we need to begin to look at these things. So that we begin to understand human rights from a local context. From what the need for equality looks like for those who are experiencing inequality. We sometimes tend to externalise standards at the expense of social contexts which actually carry a lot of this inequality that we are talking about. You could talk about cultural rights, you could talk about all those things. And we begin to then ask to what extent some of the rights violations that you find in business are rooted in the cultural rights that many people are not really cognizant of?

It is easy to say we can close that gap, but it is a big gap. It will not only require us talking about putting standards in place, but it is going to require the political and moral will to make a difference.

But if you then contextualize it with where I come from, where you have got weak governments in most cases, where you have got weak business actors in terms of the local context, you then have a situation where that gap widens.

Turning now to the impacts of business on systemic inequalities and what human rights due diligence should look like in this context. Part of human rights due diligence is making the effort to identify and assess adverse impacts on people’s rights, including on their equality and dignity.

You have mentioned that the one challenge that industry should be looking into is the systemic issues that are endemic in the process. What are your thoughts on how industry should identify and address these structural challenges?

What are some of the challenges faced in the industry? I think a lot more companies are opening themselves up insofar as human rights are concerned. The challenge obviously is the gap of awareness that I spoke about earlier. But they also find themselves in contexts that are so steeped in inequality that it becomes difficult for them to implement some of the human rights issues that they are talking to.

For example, issues of gender rights, where a company may have policies that do advocate for the respect of those rights, you may find that you operate in communities which may have been structurally designed to want inequality to thrive. And you can look at it from any perspective, outside of a cultural perspective. But then the reality is you may find that in some cases, and I will talk as myself, as a woman, that in some cases women actually prefer not to have some of those rights afforded to them on the basis of, probably religion, sometimes culture, particularly in the African context (and I am talking about South Africa, in this case.)

So the challenge that businesses find is how to then re-skill or rejoin a collective effort with the countries and contexts in which you operate, so that you can move in tandem in manifesting the new reality. It is one thing to advocate for it, but if you do not put in place the capacity for the human rights culture to thrive, you are going to be stuck with these beautiful glossy reports where we all espouse to statements, but in actual fact, it is difficult for us to move the dial towards a human rights reality. This is because there are so many endemic issues that may be barriers, that are not so obvious, that we are not looking into.
In conclusion, I think that the overt issues are easy to deal with, but we need to begin to invest time in the covert issues, particularly as the human rights movement. To engage companies, but also to engage governments about these covert human rights issues that sometimes we miss, because the lens with which we look at it in the popular media is not necessarily what everybody should be looking at. Unless you deal with those endemic issues, you will never be in a position — even as a business that is willing to move the dial. Unless you get a coalition of the willing with many stakeholders that need to help you move the agenda of human rights forward.

Thabisile Phumo is an accredited public relations and communication specialist, with 25 years’ experience in communication, stakeholder engagement and social performance. She is currently the Senior Vice President and Head of Stakeholder Relations at Sibanye-Stillwater and has worked in various capacities in the corporate affairs environment at the University of South Africa, United Nations High Commissioner for Refugees, Commission for Gender Equality and Anglo American Platinum Limited. She has also spent at 8 years as a part-time lecturer/course facilitator in corporate communications, corporate social responsibility, and stakeholder engagement. Thabisile is the Chairperson of GTSM, board member and the past President of the Public Relations Institute of Southern Africa.
2. Human rights at the margins: intersectional inequalities within the private security sector

Sorcha MacLeod

University of Copenhagen and UN Working Group on the Use of Mercenaries

You have worked on the private security sector and specifically using an intersectional perspective. Could you elaborate specifically on the intersectional nature of systemic inequalities, for example with reference to your work around racialised groups, gender, migrants, LGBT+ individuals, the homeless, and poverty?

The private security sector is often one that is looked at separately from other businesses, and there is in fact an entire regulatory system to regulate the sector.

The reality is that the private security sector is an industry that can broadly impact human rights, and in the last 20 years or so there has been a focus on those human rights issues, but it has not been from an inequalities perspective.

It is quite clear that what we are seeing is that the industry is expanding and moving into new spaces. We are seeing private security stepping into what had formerly been public spaces, and we are all more likely to encounter private security in our daily lives. That applies whether we are living in an armed conflict zone, or a transitional justice situation, or even in a peacetime situation. And a variety of human rights issues can arise from the outsourcing of security to the private sector by governments, but also by other business clients. So, other businesses have an obligation to think about their use of private security when they contract with them.

However, as I said, the reality is that whilst private security companies can have a broad impact on human rights, they definitely have intersectional impacts. We heard Professor Erika George yesterday talking about the privatization of incarceration in the US context, and this is something that we are seeing more often in many countries where immigration detention facilities and border management is increasingly being privatized. We can see racialized persons being particularly impacted. We can see migrants being particularly impacted. We can see the LGBT+ community being impacted. It can cover a whole variety of different human rights issues. So everything from simply deprivation of liberty, but also issues around physical integrity relating to torture, and the right to health, which we are seeing particularly with COVID-19, which we will talk about later.62

But what we know from the regulatory developments is that States and other regulatory actors do not think about this industry. They do not understand how, if a security company puts up a roadblock in a particular region, it might have a disproportionate or differentiated impact on women, for example, or children who are trying to get to school. They are very blinkered in the approach that they take to human rights impacts, and they take a very narrow approach to human rights impacts.

Could you share some of your findings from your research on the regulatory developments relating to gender inequality and prevention of sexual violence in this sector, and what that has translated to in practice?

One of the interesting things for the private security industry is that we have a couple of MSIs that are involved in and attempting to regulate private military and security companies: the Montreux Document

---

Nelleke van Amstel and I have been involved in the development of these MSIs and the regulatory structures and mechanisms around them: the Montreux Document and the International Code of Conduct for Private Security Providers. We decided that we wanted to look at how private military security companies are in fact addressing gender. This came from the fact that we were both working on the gender report that the Working Group on the Use of Mercenaries published in 2019. We wanted to look at how, and if, these companies are in fact addressing the gendered impacts.

It was very well-known that the private security industry is a highly gendered industry. There is a perception that you have a lot of overlaps with mercenaries and the idea that they are soldiers of fortune. And of course, this is very much exacerbated by the image of private military security companies operating in the interventions in Iraq and Afghanistan nearly two decades ago.

But the reality is that in the security industry, we are actually often dealing with very low paid, poorly trained workforces. And there are hierarchies — there are racialized hierarchies and gendered hierarchies within the industry.

I published a piece in the Business and Human Rights Journal in 2019 with my colleague Dr Rebecca de Winter Schmidt. We looked at how auditing and certification was being carried out by private military security companies, as is expected of them by the multistakeholder initiative, the International Code of Conduct for Private Security Providers (ICoC). In order to get certification by the International Code of Conduct Association (Icoca, which is the MSI), you have to be audited and get certification from third party auditors. And we discovered quite a lot of problems and gaps with the way in which companies were in fact trying to address human rights and doing their human rights due diligence. We were only able to look at publicly available information. It is a very opaque industry, and it is very difficult to actually look at what is going on on the ground.

So Nelleke and I took the methodological approach that Rebecca and I had taken two years before, to apply a gender lens to what private security companies are doing. There had also been some other developments recently. The International Code of Conduct Association produced guidance on PSEA and

---


sexual and gender-based violence and there has been increasing discussion within the industry and in the MSI around the impact of the Women, Peace and Security agenda.

So naively (looking back on it now) we went in and looked at the publicly available documents that companies have on their websites as part of their obligations of meeting the certification standards. We looked at the human rights policy, and asked whether the company had a human rights policy that just basically mentioned sex or gender discrimination. Are there any references in any company documentation to PSEA or to sexual or gender-based violence? Were there any references to gender discrimination and equality or sexual harassment in the documentation? Do their operational-level grievance mechanisms integrate a gender perspective?

We looked at 36 companies. At the time when we were doing the research, the International Code of Conduct Association had 36 certified companies. We decided to look at them, because these are the companies that are supposed to be at the highest standard. They are supposed to be gold star companies. They have achieved a certification standard, and they have then been certified by the International Code of Conduct Association.

The results were pretty horrifying. Of the 36, 20 did have a human rights policy that referenced sexual and/or gender discrimination. That is good, in the sense that the International Code of Conduct explicitly requires them to address that, but there were no human rights policies available publicly for eight of the companies. So we could not actually even see what was going on as far as gender was concerned. Another six did not reference gender at all in their human rights policy. We can see similar problems with the documentation in terms of reference to PSEA, reference to sexual and gender-based violence: thirteen did mention it, thirteen did not mention it, eight had no documentation at all.

We wanted to know, are there references to gender discrimination, inequality or sexual harassment in the company documentation? And again, this is something we would expect to see because the Code of Conduct requires it. Twenty did have some sort of reference, six did not, and there was nothing available at all for eight.

Then we come to the operational-level corporate grievance mechanism. Here we were thinking about UNGP 31 in terms of what makes a good corporate-level grievance mechanism, so in terms of accessibility, in terms of legitimacy, transparency, all of those human rights elements, and looking at it through the gender lens of the colleagues in the Working Group of Business and Human Rights.

Out of the 36, 27 had no apparent gender perspective in their corporate level grievance mechanism. And even more concerning, there were no accessible grievance mechanisms for seven of these companies. Now, as I said, these are supposed to be the crème de la crème, the gold star companies.

---


71 MacLeod and Van Amstel (n 68) 3.


73 MacLeod and Van Amstel (n 68).
So we probably overestimated what companies were doing. There are some real concerns there about what companies are doing to address gender issues.

And as I said in my first intervention, one of the problems for the industry is that the International Code of Conduct looks at human rights in a very narrow way. As mentioned by Thabisile Phumo, there is this very narrow conception of what human rights say. The International Code of Conduct mentions six human rights. It mentions the right to life, the right to be free from torture, it talks about detention. It makes some reference to human trafficking, child labour, forced labour. And there are the discrimination provisions. And that is it. So the industry tends to think about human rights from this very narrow perspective.

There was a question in the Q&A asking about how we can deal with this practically. Well, I think one of the key things is that the Code needs to be broader in its references to human rights. And that the companies and their clients need to understand that human rights are to be understood broadly, and not narrowly.

Your work has also recently focused on the impacts of the pandemic. You have found that these inequalities were not new, but were in fact exacerbated by the pandemic. Could you elaborate on these findings, and what we can learn from this going forward?

Too often it happens that the security industry tends to think: We can only violate human rights if we are standing there with a gun. And that is not the reality. We have seen this really coming to the fore and coming to light with COVID-19. As I mentioned earlier, we have these companies moving into new spaces during COVID-19 in that they are guarding vaccination facilities, hospitals, quarantine hotels and quarantine facilities. There are a couple of different things going on. We see that the security guards themselves are being put into very dangerous positions. The UK Office of National Statistics published a report last year that showed that private security guards in the UK were a group of workers that were second only after medical personnel in terms of mortality rates due to COVID-19.74

And so you have a racialized, poorly paid workforce, that is additionally being put at risk. You can see the same thing happening in private prisons, and in privatized migration detention facilities.75 You see the guards that are in these positions. They did not have proper personal protective equipment (PPE) early on in the pandemic. They were in facilities where there was no capacity for social distancing. All of these different things. So you have that side of things with COVID, because it is not new that this is an industry that is poorly paid, poorly regulated and very problematic.

From a broader human rights perspective, COVID-19 has illustrated the lack of proper and effective regulation of the industry. It really highlighted how marginalized groups can be particularly impacted by private security.76 Mustafa Qadri has already mentioned curfews, which are a tool that states have used during COVID-19. And of course, that can have a particular impact on homeless people, for example, who are on the streets and cannot observe a curfew.

We have also seen evidence that there has been collaboration and complicity between public security and private security, where families have been evicted from their homes in the middle of a pandemic.77 Which of course has huge implications on the right to home and family life, but also on the right to

75 MacLeod (n 62) 9.
76 ibid 8-9.
77 ibid 12.
health. How can you socially distance, how can you meet curfews, if you have been evicted? We have also seen similar situations where private security and public security have operated together to evict minorities or indigenous communities from their land. So we have seen an increase in land grabs in certain parts of the world. That is an aspect that is ongoing.

Just to give you one final example of how marginalized communities can be impacted. When it comes to privatized prisons and migration detention facilities, we have seen women, we have seen the LGBT+ community, and racialized persons experiencing particular problems. In the United States, for example, we have seen trans women and gay men, some of whom are HIV positive, not being able to get proper access to health care. So trans women are not getting access to hormonal treatment, or not getting access to HIV medication. We have seen persons with disabilities also not being able to get proper health care within these privatized detention facilities that are being run by private security contractors.78

So what the international community needs to look at is properly regulating the industry, and properly engaging with the international mechanisms that already exist. There are only seven countries that are members of the International Code of Conduct Association, which is extremely poor. We are somewhere around 100 company members, and 45 certified companies.

I understand that the Code is going to be opened for review next year, which I think is very much to be welcomed, and one of the audit standards is currently being reviewed.79

But there are pushbacks from the industry. One of the biggest concerns is that there has been a push towards the Sustainable Development Goals (SDGs), and also to Environmental, Social, and Governance (ESG) approaches as well. And I think this is very concerning because human rights have a legal basis and a legal foundation, and they are justiciable. We can just claim human rights. It is much more difficult to argue that you have a legal right under the SDGs. And I think this is very problematic if the industry is going to go down that route, and fold human rights into other considerations.

Could you also elaborate on some of the attempts to access remedy in cases of systemic inequalities? How could these examples inform what remedy should look like going forward, also in the design of new regulation that is taking place at the moment?

There are very few cases involving private security contractors. There are a few cases that have gone through the US courts in relation to the use of private security contractors in Iraq and Afghanistan. Of course, we saw that President Trump pardoned the Blackwater contractors who had been involved in the Nisour Square Massacre.80

There have been some other attempts to hold contractors accountable at the corporate level for human rights violations. Many of them are settled out of court, which is very problematic.

We need to see regulation at the domestic level and at the international level improved. The research that Nelleke and I did — whilst we were obviously focusing on gender — the fact that seven out of the 36 companies that we looked at had no corporate level grievance mechanism at all, obviously has broader implications for other marginalized groups. And even some of those that did have corporate-level grievance mechanisms did not take into account things like the fact that perhaps a woman might

---

78 ibid 10.
have to be accompanied to make a complaint. They did not take account of language or literacy issues, so you have some of the mechanisms that were only available in English in non-English speaking countries. That is of course hugely problematic.

Having said that, there are some signs of positivity, but they are very limited. There are some companies that are using hotlines, where somebody can call to register a complaint, and they can choose the language in which they want to make the complaint. This is definitely a useful way to structure your corporate-level grievance mechanism. It does away with the issues around literacy, it does away with the language issues.

So there are some signs of very slow progress. I think we are a long way further forward than we were prior to the Code. Some companies are moving in the right direction, but the Code itself is problematic, and it is pushing them in a very particular way. It is making them think about human rights in this very narrow way, that does not take into account systemic inequalities in any meaningful sense.

This project has received funding from the European Union’s Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No.844999

Sorcha MacLeod is a Marie Skłodowska Curie Fellow and Associate Professor at the University of Copenhagen and an Adjunct Lecturer at the Hertie School of Governance, Berlin. She has a particular research interest in the private military and security industry and she has published widely on this topic. In July 2018 she was appointed as an independent human rights expert to the United Nations Working Group on Mercenaries and is also an invited expert to the UN Intergovernmental Working Group on private military and security companies. She participated in the development of the Montreux Document regulatory process on private military and security companies, as well as the International Code of Conduct for Private Security Providers and its International Code of Conduct Association at which she has Observer Status. She also helped draft international management standards for private security operations and advises civil society organisations, governments and industry on business, human rights and security issues.
3. Examples from practical experiences in the Arab Gulf

Mustafa Qadri
Equidem Research and Consulting

You have worked on discrimination in various contexts, including relating to race, nationality and gender discrimination and also systemic marginalisation. Could you elaborate on how these issues manifest themselves in practice, and how companies that aim to apply the UNGPs framework often overlook these issues and the forces that lie behind these systemic issues?

I will try very hard to be brief, even though these things are really complicated. By way of introduction I run an organization, Equidem, which is largely a human rights investigative organization. We are relatively unique in that the investigations that we do are conducted by rights-holders themselves. And so a big part of our work is in the Arab Gulf countries, places where there are millions of low wage migrant workers.

And so our own team are themselves current or former migrant workers giving us a really intimate understanding of what they face. And what they basically report is that racial, national and gender, other forms of discrimination, is baked into the labour regime that controls the way that foreign workers that come into the Gulf are treated, both in law in practice.

And so what that basically means is that if you are a foreigner working in the Gulf, then your employer has a highly permissive system to control your movement in the country. If you want to complain about your conditions, it is very easy for an employer to cancel your visa, making up some kind of allegation against you. At the same time, if you are a particularly low wage worker from the Global South, from the moment that you enter the Gulf you are racialized.

So what does that mean? It means that if you are a Bangladeshi worker, you are most likely to be presumed to be only good for being a cleaner or a gardener and given a certain pay rate which is typically much lower. If you are a Black African worker, you are typically assumed to be the kind of person that can be a security guard or a driver or the porter in a hotel.

So the whole system is highly racialized. And what we have seen with the work that we have done, a big part of that is to provide an evidence base, to document what workers are really facing. To give workers a voice. But then to build on that to say: “Well, look, it is not just a matter of how the labour market operates, but very much about how the system has been set up.”

Some extensive research that we did last year into the impact of the coronavirus pandemic on workers in the Gulf found that obviously the pandemic was a huge impact on business and on ways of working. But beyond, that States actually weakened labour protections, so that it was easier for employers to fire low wage workers from the Global South, to reduce their pay, or even simply put them on unpaid leave for an unspecified period of time. So it meant that workers from the Global South were facing issues like wage theft and other things which are basically classic forced labour indicators.

One key takeaway for businesses is that because some businesses are so prominent in the Gulf context, they have taken steps to really integrate the UNGPs and human rights processes into the way that they operate. But these tend to focus on the really low-hanging quantitative issues, like: ‘Are workers being paid on time? Is their food hygienic? Are their working and living conditions safe?’ Those are really critical issues, there is no issue with that. But they do not, for example, look at whether: Is a worker being paid less for the same job, simply because they are African or they are a woman, or because they belong to a minority? Are workers actually being allowed opportunities for job mobility, regardless of where they come from, or based on their skill?
I have spoken to so many workers, for example, that might come from Nigeria, or Kenya, or from India, that have highly skilled qualifications. And yet when they come to a place like Saudi Arabia or the United Arab Emirates, there is an assumption by the local recruiters or employers that: “Well, you are from that country, therefore they are only good for that.” Or a woman worker working in a COVID ward, as an essential worker doing a critical job, being paid often sometimes less than half what a male counterpart is being paid for the same work. So I would argue these are some of the low hanging fruit areas where solutions are there.

And if we have companies, the biggest companies in the world that are present in the Gulf, that are widely at the forefront in many ways of the Me Too and the Black Lives Matter movement in more developed economies, then why can they not apply those same principles and practice to their businesses in the Gulf? I would argue that if they do not do that, people will start noticing that and the hypocrisy will be really blatant. So it is a real issue, but also it is an opportunity.

Obviously these are deep problems that take a long time. But those are really some key steps that businesses can start taking already.

Following on from this, is there a tendency to focus on certain issues while overlooking others in the human rights due diligence process? Are some issues more hidden or more invisible and can they be drawn out through a more deliberately integrated human rights approach?

Yes, I think that is absolutely right. The great thing with the UNGPs is that much of it is a common sense process. So it is really about mapping out your current or likely human rights impacts and doing ongoing due diligence monitoring. Well, we do not really need to do much digging to know that, for example, if you are a business in the Gulf, certain nationalities tend to be associated with certain types of work, and that certain nationalities are associated particularly with low wage work.

So one thing that businesses can do from the outset is ensuring that whatever wages are paid, or whatever conditions are provided, that these are not based on the nationality of the worker. That the human resources department or recruiters do not use the curtain of: “Oh, it is the labour market doing its job”, to excuse what is blatant racial or national-based discrimination. Or that if you have female workers in your workplace, making sure there is gender sensitization to how that works.

For example, when you have typically workers working in the city, but their accommodation is in very remote locations. Especially with women workers, there is often simply no thinking about what the gender impacts or potential risks are for them. And what happens often in the Gulf, is the approach that businesses take is that there is, for example, a curfew on the women-only accommodation site. They cannot leave their accommodation after a certain time. Often quite early, I would say 9 pm. My colleagues have spoken to women workers who have had to get essential medical services, but cannot get that because of curfew. Or it is claimed that there are not enough female staff health professionals where they are going.

So those are the sorts of things thinking ahead, obviously there are deeper issues to that, such as the legislative environment as well. But those are some of the practical things that can be done.

The Gulf States, most of them actually prohibit trade union-related rights, which we feel is a significant impediment — in the long term and right now — to workers being able to exercise their human rights. At the same time, there are a number of laws that actually really discriminate against women. This includes, for example, laws that prohibit sex out of marriage. That means in many cases, workers like domestic workers or hospitality workers, when they face sexual or other physical harm, they may actually get prosecuted rather than getting help.

Now I have spoken to many businesses who say: “Well, that is the law, how can we change that?” But in fact, you see already practices with businesses where they set up things such as legitimate worker
committees that are independent. Workers elect their representatives, and also provide safe spaces for women workers. And providing a whole range of grievance remedy mechanisms to shield them from those issues. So there are a lot of actual ways in which businesses already — despite the legislative environment being very restrictive on human rights — can actually themselves proactively address these points.

One final point is that often people in our position as so-called skilled workers, we do not just think about whether we are being paid well, or whether we are getting nice food. Those things are really important, but we think about the holistic idea of our wellbeing. Are we happy with our job? Does it feel fulfilling? Are we on a career path to better opportunities? It is often simply about businesses, employers and State authorities to be thinking about low wage workers in the Global South the way they would think of high-skilled workers. There are possibly off-the-shelf solutions already being applied for, for example, young graduate professionals, that could be adapted for workers that are much more marginalized.

It goes back to your invisibility point. Let us turn on the lights. Let us stop this invisibility. There are definitely solutions out there.

**How do we take forward these lessons learnt? Do you have some practical examples that we could learn from? Are there already some solutions that we could use in different contexts?**

That is a really tough question to answer. I think that there certainly are some places where there are lots of examples perhaps people might have. I find that in the Gulf context in terms of discrimination, that process is still a very long way away.

One thing that I have seen that is promising, although it still needs much more work, is around what I mentioned earlier on worker committees. The idea that — certainly on certain mega projects and the sort of public-facing events like the World Cup and Dubai Expo — that workers are allowed to actually elect representatives to then talk about labour or other issues that they may be facing. And those committees are, as far as I can tell, non-discriminatory in nature. So that is not a nationality-based system or that sort of thing. Now, they are not a perfect solution, but they are a critical step at which, for example, workers can have a seat at the table with executives, with stakeholders of an entire business enterprise or, the whole chain of a business endeavour. And that is a really important practical example of how those things can be addressed.

Having said that, one of the most fundamental, flagrant, but also simple ways in which discrimination comes out is in differences in wage earnings, or in the type of work workers have. Employers, we know, still tend to say that because this is about your contract, it is a private matter. That we have to, ironically, respect your privacy. We cannot really talk about that at a work committee. We have to think about other ways in which we address that, but that is one really simple way that can be done.

I do know that in some enterprises and projects they have also started to create safe spaces for women and certain minority groups. For example, in some projects — although it is highly rare, but it does happen — you have quite a rich history from South Asia of a transgender community. In a number of South Asian States some businesses — although very rare — have had the awareness to realize that we have to create a space for minorities like that to be able to express themselves, to have access to their social rights. That is something that we really have to look at building on.

Also, partially because you have in the Gulf a place that, in the middle of the summer or in the spring it is literally quite inhospitable to be working outside, that itself brings up other human rights issues. But there is already precedent in terms of creating spaces that are habitable in those difficult periods of the year.

Another really simple thing is around making sure workers have access to a social life and the services that everyone else can get. If you go to the Gulf, although it is not unique to the Gulf, the low wage
workers may work in in the concentrated areas where business activity is, or where there is a degree of wealth and opportunity, but they live somewhere very far to the hospitals and services. Even just being able to go to restaurants or to cinemas or to play sport, those opportunities are very limited. So programs around urbanising workers and getting workers more integrated into the society is actually a really simple way to, in some way, deal with that discrimination.

And you do see that in some respects there has been, in some of the industrial parks, an initiative to build shopping malls to provide sporting facilities. So that workers in particular areas, many of whom are younger men, have space to actually live a life to enjoy themselves.

So those are some of the simple ways, although there are still a lot of things really lacking. So in terms of how workers are recruiting and making that process more responsible and ethical, transparent. And also in terms of the kind of opportunities available to workers, really reducing the link between your race, your nationality, and the kind of work that you are getting.

And another point which I do not think really is that radical, is that even if the local law basically requires employers to protect their workers and their wages, if they are nationals, in a way that is quite inverse to what they are required to do with non-nationals. Well, apply the highest standards that apply to nationals, and to wealthy high-skilled foreign workers, who are predominantly white workers, apply those rules and principles you do to your entire workforce. Anyone who has worked in a Gulf context will know that even at the low wage worker level, if you have workers that are very skilled at what they do, you want to retain those people. And you have already seen with some of the governments in the Gulf, at least in terms of the language, they are talking about job mobility and skills capture. So, to apply the same rules sounds like a really simple thing to say, but apply the same rules and benefits protections that you do to nationals and high-wage workers to low-wage workers.

There is no question, there is still a long way to go. But I would argue very strongly that businesses can be real leaders in this area. And that practically any major business that you can think of, whether it is a well-known company or not, is itself exposed to this issue of discrimination in the Gulf context, and likely in many other parts of the world. So they have a moral duty to do something. But in fact, I would argue that the reputational and other forms of liability on companies are already there. So, in fact there is no real excuse for them not to be trying to address these issues.

Mustafa Qadri is the Founder and Chief Executive Officer of Equidem, providing overall strategic direction and managing all of the organisation’s projects. He is a human rights research and advocacy expert with 20 years of interdisciplinary experience in government and public international law, journalism and the non-governmental sector.
4. The UNGPs and systemic inequalities through the lens of decoloniality

Grace Mutung’u
Centre for Intellectual Property and Information Technology Law at Strathmore
University Kenya

Your work focuses on the inequalities that come from coloniality and looking at these issues from an approach of decoloniality. Could you speak to us about this, and how the UNGPs fit in with this systemic perspective?

The issues that Mustafa has raised are quite real in the country Kenya, where I live, and in East Africa as a whole. Every time you go online, you see all these cases of Kenyans or Ugandans who are stuck in the Arab world.

And maybe the question to ask is what conditions make it necessary for these workers to go and work there? How come such high-skilled workers — and you know the reason why a lot of East Africans, for example, go to these countries is because they can speak English. And we speak English because we are a former British colony — so how come with this big thing called speaking English we still, when we go out there, do not get what speaking English should be able to get you. Because it is not easy to speak English, by the way, you have to go to school. In many cases the public school system is broken, so your parents have to invest a lot for you to be able to get to a certain level. So how come after putting in all that, after following what the system tells you to follow, life still gives you these unfair cards?

I argue that it is what we are calling decoloniality. It is true that we got independence. But we are still so much ruled by the same forces that ruled our ancestors and grandparents in the last century during colonialism. So you find that we keep moving to new areas, but we have not really separated ourselves and obtained real freedom to be able to change our condition. And so, there are those workers who are working in the Arabian world.

Today I was reading a really interesting article about how, even when these big technology companies set up shop in Africa, what they are doing is to put everybody who is an engineer or who is well-skilled in the skills that are needed for the digital world, to all to come into work for them. Which means that it is still a brain drain, just that it is happening in your own country, because the production of these workers is going to these companies.

And so the question becomes then: Why is this happening? What can business do? And remember, even at the colonial time, it was still business that led us to that point, and that pushed us to that colonial economy. So why is business doing this? And what can business do better? And this is still really an open question, especially as we move into new areas.

You find that countries like Kenya are very quick to adopt new frameworks like the UNGPs. I think we were the first or one of the top three in Africa to adopt the UNGPs. But then, the UNGPs themselves, or the focus of the UNGPs has been on what we already know. Mining, land, the physical land that we know of. These are important issues and we should deal with them, but we are stopping to deal with the past, without taking note of the present and the future, which is digital.

So you find that the UNGPs, or at least how they have been applied in Kenya, have not been focused sufficiently on digital issues. Issues like the brain drain that is happening with the digital labour. On issues like the way the digital economy is making Africans consumers and not producers. There is very little making of technology that is happening in Africa. What is happening, even with digital ID, which I work on, is everything is being imported into the continent. And you are told: “From now on, use your biometrics to identify yourselves.” These biometrics are not technology that you made, but it came from somewhere else and became part of how you experience your relationship with government.
And so these are the questions that make you feel as if the UNGPs and other new frameworks are just dealing with surface-level issues. Because the UNGPs do not acknowledge that the reason why these business practices have become problematic — the reason why profit-making as the core reason for business is a problem — is related to our past, to colonialism, to capitalist extraction.

And this cannot be dealt with only using human rights or, as the UNGPs say, international human rights, which is quite limited. The issues that all my colleagues were talking about before, can they all be dealt with under human rights? Perhaps the UNGPs need to look into other issues, and other ways of resolving these issues.

Elaborating further on this — does this mean the UNGPs are useless? Or could they be used as tools to address and even dismantle these inherent systemic inequalities?

I was looking at the UNGPs and the 10 Plus report which considers how the UNGPs have been for 10 years. And they rightly acknowledge that there has been very minimal involvement of Global South countries, Africa, in particular. Yet these are some of the places that are affected by business, because of the multinational nature of some of the businesses that led to the UNGPs actually being formed.

And I thought that that would be one entry point for the UNGPs to really increase participation of these people who were not as active as the UNGPs were being formed.

But I also thought that it is not so much about increasing the numbers but making that participation meaningful.

For example, I also like to look at what the African Union has done in terms of thinking about making businesses accountable to all stakeholders. The African Union emphasizes the interconnectedness of rights. They emphasize economic and social rights. They emphasize the indivisibility of rights.

For example in the digital sphere, there has been a tendency to look at privacy. And it is something that is easy for tech companies to agree to: “Okay, we shall look at privacy. We shall ensure that we are very keen on how we hand over your private data to governments. We shall make sure they follow court orders,” and so on and so forth.

But you see, this is only one right. And while it is very important, there are so many other interconnected rights, including what I was speaking about. Do we have our rights to also enjoy science and enjoy the benefits of the science that is coming to the continent? Do we have a right to also be producers of the science and enjoy the economic benefits that come from our data? So much data is being produced from Africa, everybody is coming into Africa.

So, I would say the UNGPs are a good starting point because they expand the duty-bearers from just States to also businesses that are involved in former colonial states like Africa and the Global South in general. But they need to meaningfully and more deeply engage with the systems that exist, with systemic issues and systemic inequalities, including those that are a result of colonialism, of the past centuries.

Grace Mutung’u researches ICT policy in Kenya and Africa generally. Her current work is around digital rights, data protection, digital ID and financial inclusion. She is a research fellow at the Centre for IP and IT Law (CIPIT) at Strathmore University.
5. The role of multi-stakeholder initiatives (MSIs) and the corporate form

Fola Adeleke
University of Witwatersrand Johannesburg

Could you speak to us about multi-stakeholder initiatives or MSIs. What is the role of MSIs here? What have we learnt to date about the way in which MSIs are able or not able to address systemic inequalities?

At the heart of this discussion is the role of global corporations in aiding and abetting inequality. How are global corporations increasingly regarded as contributing to global inequality? For example, through tax evasion, manipulation of compliance with state regulations, amongst several other issues. And this has led to this intense public scrutiny and demand for corporate accountability. While the legal call for corporations continues to be the prioritisation of shareholder value, corporations have embraced the concept of MSIs. Which has also been promoted as setting standards for corporate accountability, including the role of business and human rights protection in driving sustainability, for example.

And MSIs often involve collaboration among various public and private actors, such as corporations, governments, CSOs and rights-holders. The participation of governments and civil society organisations often gives legitimacy to this voluntary self-regulation process, which creates perceptions of corporate accountability.

And these MSIs set global voluntary industry standards for its corporate members to follow, and often address human rights violations in specific industries. They add towards establishing a governance model to tackle a gap where a State either will not or cannot fulfil its duty to protect its citizens against human rights violations by corporations.

Yet MSIs are not accountable to the public, they are not fully transparent, and their effectiveness in realising the purported objective of corporate accountability is not necessarily fully known. Whilst some MSIs offer some narrow solutions to deal with a number of issues, for example the EITI, others use certification models to help corporations claim legitimacy and ethics in sustainability and human rights protection. And this apparently is increasing the popularity of MSIs. Yet it is clear that self-regulation in terms of this governance model is not the answer to driving corporate accountability for human rights issues.

I sit on the board of MSI Integrity, which is a non-profit in the US, working on MSIs. Recently we released a report on the grand experiment of MSIs. We concluded that MSIs can have benefits, but have failed to adequately give a voice and power to workers and communities, and have been ineffective as well to curb abuse or provide rights-holders and communities access to remedies. Our report also found that the involvement of MSIs often creates public misperceptions, and detracts public attention and resources from more comprehensive solutions.

This shows that we need to rethink the role of MSIs, and the presence of an MSI in an industry should not be a substitute for effective public regulation.

What is the role of the corporate form in the way systemic inequalities are addressed, and how could the corporate form be changed? You have undertaken research around benefit corporations and the potential that this form of corporate structure has to address power imbalances between states, business and communities. Could you elaborate on this?

To respond to that question, I will build on some of the excellent points that Mustafa already made. We know that the core goal of corporations continues to be the prioritisation of shareholder value. However, to tackle the governance and accountability of corporations, we need to expand the interests that corporations have. In the existing model of the corporate form, while shareholders are recognized as
those who hold financial interest and investments in the company, there have been attempts to broaden the definition of who a shareholder is. And there have been various options imagined, including employee ownership schemes and the recognition of benefit corporations.

However, these alternative models do not sufficiently focus on the diversity of stakeholders and inclusion of rights-holders who are affected by a company's operations in the management and governance of that company. Workers and affected communities should be at the center of decision-making. And we need to ask: What if workers and communities were empowered to influence their working conditions, and the decisions that impact their lives? What if work-based democracy was a universally recognised human rights? Mustafa has already given excellent examples of the workplace committees happening in the Middle East.

We need to ask: What if a key economic beneficiary of enterprises, who are the workers and wider communities impacted by corporations, MSIs, which I was speaking about earlier — were championed as the model to challenge? The presence of different stakeholder groups and MSIs which were intended to affect the quality of purchasing decision-making does not necessarily ensure that power dynamic. For example, a big corporation versus a local CSO, which often affects the effectiveness of the diversity in these kinds of groups.

And the effort to advance multi-stakeholder regimes at the industry-wide level offers important insights and lessons when designing new and creative effective models and policies for worker-centered corporate governance, shared ownership, and stakeholder capitalism. Which can all be seen as advancing the multi-stakeholder level regime at the company level.

For example, at the industry level, research that has been done at MSI Integrity, the organisation which I spoke about earlier, has observed that worker voice does not necessarily equal worker power, unless certain conditions relating to resourcing, governance rules and decision-making power are satisfied, which may also be materially at the firm level.

Similarly, unless appropriately structured models of co-governance and co-determination are established, it can risk the appearance of inclusivity and legitimacy, while failing to meaningfully address the underlying power imbalances between workers and management. But also by creating systems of representation and governance that will privilege a certain race, gender, nationality, sexual identity or class.

And this is not to say that the form should not be pursued, but that there is an urgent need to get the evidence — which has already been imagined in the conversations that we have been having in the last couple of days — about how to ensure that these efforts are meaningful, and how they actually result in a sharing of power and profits, rather than just being rhetorical.

Fola Adeleke’s work focuses on international economic law and human rights, information rights, open government and accountability within the extractive industry. Fola has worked in several notable institutions including the South African Human Rights Commission as the Head of Research and at the Harvard Law School Human Rights Program supervising clinical projects on business and human rights. Fola was also a Fulbright visiting scholar with the Center for Sustainable Investment at Columbia University. Fola also clerked at the Supreme Court of Appeal, South Africa. His human rights work spans across Africa and he has served as the country researcher for the Open Government Partnership Independent Reporting Mechanism and was part of an expert group reviewing the African Union’s Declaration of Principles on Freedom of Expression in Africa. Fola has also produced research for the Carter Center, the Open Society Foundation and the World Bank. He holds a PhD from Wits University and a LLM degree from the University of Cape Town.
Panel 4: The Way Forward

1. The centrality of dignity and a rights-based approach in addressing systemic inequalities

Sindiso Mnisi Weeks  
University of Massachusetts Boston

You have worked with indigenous communities and particularly women within those communities in South Africa and surrounding countries — where you have noted the risk that people are often by-passed when they do not have formal land rights, and where the state or another institutional leader is consulted and makes decisions on their behalf. You have also noted in this context the value of the UNGPs’ emphasis on prevention and consultation of potentially affected communities. Could you elaborate on the concept of systemic inequality, what it looks like in practice in these contexts, and on the centrality of the concept of dignity to equality and the human rights framework?

One of the things that really struck me when going through the UNGPs was that there was no mention of dignity. In the spaces where I work, where you are advocating for greater land rights protection, tenure security and greater protection of the rights of women within those contexts as well, you find that the way that people are treated shows that companies and the government regard those people in such a way as to not fully appreciate their humanity. They do not fully appreciate the fact that they need to be treated in the same way that you would treat people, for instance, in urban spaces, if you are going to remove them from their land in order to build a shopping mall or take away some sort of resources that they depend upon for their livelihoods.

And that is really grounded in the fact of people not having registered land rights in many places. The state is the owner of the land on record in many of these instances, and then you layer on top of that the traditional systems of law, where traditional leaders are often conceived of as the ones who need to be consulted. People who actually use, live on, depend upon that land and those resources are not treated as people who it is necessary to consult. So that is why I thought it was positive that the emphasis of the UNGPs is on prevention. Mitigation is good, and remediation is definitely very good, especially when done through legitimate processes, but even that depends upon and requires consultation with potentially affected groups, and other relevant stakeholders, and that is often missing.

So I will give just one brief example. In South Africa, there is a piece of legislation, the Traditional Leadership and Governance Framework Act of 2003, which is actually now being replaced by the Traditional and Khoisan Leadership Act of 2019. And in that legislation, there is no reference to consultation with communities. And so, actually affected communities are often overlooked when it comes to making these decisions, and that is because they are thought of as homogenous and thought of as basically subject to a benevolent dictator, that is the traditional leader or, you know, the state in partnership with the traditional leader.

So I think that this is actually a really significant concern. This is why thinking about dignity was the first thing that came to my mind: our companies, our businesses, taking seriously the equal dignity of the people who live in these spaces is central to overcoming the systemic inequalities that are built into legislation and practices concerning the dispossession of land rights experienced by people who form part of indigenous communities.

You have also commented on this distinction between the deep, systemic and structural changes that need to be put in place, as opposed to superficial responses or the “low-hanging fruit” within the US
context. Could you elaborate on this, and how the UNGPs lens, which requires a human rights-centred approach, applies to this distinction?

I was struck by something that Dominique said earlier, when she was talking about the example of Belgium, with respect to the culture of denial around racism and systemic inequality. I was thinking that is not just in Belgium. I live in New Hampshire in the US, and the Governor of New Hampshire recently said that New Hampshire does not have any systemic racism. Of course, those of us who live in communities where we see this happen, but also are familiar with the data, know there is definitely very real systemic racism here.

And I guess part of what it made me think of is that when we think about solutions, there really is a range. There are some businesses, or some people even, that are coming from the perspective where this is not a problem and we do not need to deal with it at all. Then there are others that are on the other side of the spectrum, what Jaren was talking about, with respect to some of the sorts of proactive steps that they are taking. And then there are those that are in between.

I want to talk a little bit about those that are in between, where the conception of the systemic inequalities is so shallow that they are only addressing symbolic racism. It is almost like they are still looking for the noose. And of course there are still nooses, people are still actually physically threatened by systemic racism and violence.

But there are also other forms of racism that are just as harmful but, being pernicious, are much less in your face; for instance, scholars have spoken of so-called micro-aggressions and the weathering effects of racism that result in Black people dying notably younger than their white peers. If we think about dignity, that is an important part of the human rights perspective when businesses are approaching these issues. Recognition of the full dignity and humanity of all people will help businesses to move beyond merely rhetorical commitments or symbolic attempts to address racism but actually do the work needed to overcome these gradual degrading effects of systemic racism and other systemic inequalities.

One of the things that jumps out at me in the UNGPs is that it talks about taking pre-emptive steps, such as continuous improvement. I appreciated Jaren’s points about how they are doing that continuous improvement. Additionally, continuous learning is extremely important. And in a sense, it is how businesses can get from that place of denial — where they are continuing to say that systemic racism is not real — to the point where they are actually proactively taking steps to address it.

The thing that is not explicitly said in the UNGPs but is actually really important is that continuous learning has to include unlearning. Many of the comments that my colleagues have made on the panel so far are essentially about all of that history that needs to be unlearned: all of these historically learned behaviours of business practice and business beliefs that need to be unlearned.

I think that that is really critical as part of that sustained commitment that businesses need to engage in. In terms of dealing with intersectional inequalities that are rooted in the system, and recognizing that those need to be uprooted from the very base. That token or symbolic measures are inadequate. That picking low-hanging fruit is insufficient. For example, when graffiti is sprayed on the wall and the business comes out and says: “Oh, we stand with you and we will not tolerate this. We will employ all of the tools at our disposal to address these issues.” But they are not employing all of the tools at their disposal to address the issues of inequality that are structurally embedded at the very foundations of their business formation and their business practices. That is not only inadequate but problematic.

I loved the comment made about focusing not just on responsibility but also on the opportunity. That perspective, brought together with the perspective on human rights that centres on dignity, allows or would allow businesses to recognize themselves increasingly as needing to act in good faith.
This comes back to Paolo’s point about the need for regulation. Is there a place for regulation? Absolutely. However regulation, as I think he observed too, is not going to be enough to make it all happen. And this is where I keep coming back to the place that businesses need to act in good faith. They need to recognize themselves as being active stakeholders in society and need to be proactive in doing exactly what Mary Beth was saying, namely recognizing that sometimes they are going to have to give things up in order to realize the greater good.

I am inclined to veer away from a so-called scarcity mindset and therefore adopt the perspective that the pie can get bigger and we can all share. Hopefully that is how it all shakes out, but the reality is that sometimes there will be losses. Businesses have to be prepared to — and must in fact — do the right thing, even in the face of those losses, for the sake of equality.

As part of the Q&A discussion around examples of practices of using human rights due diligence to address systemic inequalities:

One of the examples that I take away from COVID is, to Dominique’s point, that companies have stepped up and showed that they can. And I also do take Mary Beth’s point that they showed that they can for certain subsets, but did not for others, and in some instances reinforced or exacerbated the inequalities.

That brings me back to this distinction between technical and adaptive solutions to challenges and problems, which arises often with respect to conversations about addressing the climate crisis. Some of the problems for addressing the climate crisis have been technical, and we need technical solutions. However, we are at the point where most of the issues are really adaptive. We need to adapt and transform our behaviour. We need to transform our assumptions and expectations, and the way we are used to doing things, in order to actually implement the technical solutions.

That is the case with respect to businesses and human rights writ large. In many instances, as in Andrea’s examples, if you just use the tools at your disposal, if you just take the time, if you just do the due diligence, you can preventatively engage and ensure that harm does not occur – or at least help to mitigate some of that harm that could potentially happen. But in many instances that is just not happening.

I have been, in some ways, a disheartened lawyer. To be honest, I have very little faith in the law, and its ability to get businesses to do the right thing. Which is why I keep harping on about values, harping on about the fact that businesses need to stop acting in a defensive way in anticipation of having to defend themselves. They need to act proactively in a way that is values-driven.

And those values need to be grounded in something that is not just esoteric. And that is where I can see the value of the human rights framework. We have some sort of agreement about what those values are. And that is part of why I feel that the omission of dignity is actually a really significant thing, because at the very foundation of the human rights framework is that everybody is equal in terms of their dignity; thus meaning that everyone is of equal moral worth. All the history that Dominique and Paolo shared shows that we have not gotten to a point where, even within the context of talking about human rights, we actually adequately protect and respect everybody’s dignity. That is really the crucial thing.

It is not that it cannot be done. We know that it can be done. It is an adaptive question of how do we get businesses to do the right thing, proactively. Not from a posture of defensiveness, of I might get sued, or any kind of attitude that is grounded in a need to preserve my business interests. Rather from a perspective of we are in this together. As in Heather McGhee’s book The Sum of Us,81 this is a joint endeavour. We are stakeholders in society, and we should all be doing the right thing – for all our sakes.

---

Sindiso Mnisi Weeks is Associate Professor of Law and Society in the School for Global Inclusion and Social Development at the University of Massachusetts Boston, and Adjunct Associate Professor in Public Law at the University of Cape Town. She previously served as a senior researcher in the Centre for Law and Society at UCT, where she worked in the Rural Women’s Action Research Programme (now the Land and Accountability Research Centre), combining research, advocacy and policy work on women, property, governance, dispute management, and participation under customary law and the South African Constitution.

Dr. Mnisi Weeks received her DPhil from the University of Oxford’s Centre for Socio-Legal Studies, as a Rhodes Scholar, and previously clerked for then Deputy Chief Justice of the Constitutional Court of South Africa, Dikgang Moseneke. She has taught African Customary Law at UCT, Law and Society at the University of Massachusetts Amherst, and for the Consortium for Graduate Studies in Gender, Culture, Women, and Sexuality (GCWS) based at the Massachusetts Institute of Technology.

Dr. Mnisi Weeks has authored Access to Justice and Human Security: Cultural Contradictions in Rural South Africa (Routledge, 2018) and co-authored African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives (OUPSA, 2015). She is also a contributing author of leading South African law textbooks on Constitutional Law and Family Law, as well as the Oxford Handbook on Law and Anthropology (OUP, 2021). Dr. Mnisi Weeks’s current projects include authoring a book on Rule of Law in Context: South Africa (Hart Publishing) with Heinz Klug and Sanele Sibanda, and a new monograph whose working title is Behind the Veil of Isidwaba: Rural South African Women Lay Down the Law. She is an in-coming editor of one of the American Anthropological Association’s official journals, Political and Legal Anthropology Review (PoLAR).
2. The importance of the understanding the historical context and examples from country visits

Dominique Day
UN Working Group of Experts on People of African Descent

One of the themes that you often discuss in your work is the historical context, particularly the historical construct of race, and how this was and continues to be connected to business. You have observed that while this context is embraced implicitly within the UNGPs, it is not really discussed in the business and human rights community. Could you elaborate on these points?

A lot of times when we talk about dignity, we talk about it within the right to life. And if you look at race and the historical construct of race, it really became a way to normalize atrocity, to normalize the taking of life, and the abandonment of the idea of certain people's entitlement to dignity in service to business necessity. And so, when we talk about race, we understand that race is not biological. You cannot do a blood test and that will tell you that I am a Black woman, and that someone else is an Asian woman. And yet, it has been a very powerful social construct.

And part of that has to do with the determination to use race as a mechanism to exploit profit opportunity. I say “exploit” deliberately here, because this idea of exploiting profit opportunity remains very accepted in our language, at the same time that the idea of exploiting people's lands and resources, intellect, families, futures, is seen as problematic. It is seen as a human rights violation that constitutes atrocity. And yet, we still continue to see, for example, hazardous waste cited disproportionately in communities of people of African descent. We still see massive injustices on the parts of transnational businesses cited towards people of African descent. So I think an interesting thing for us to look at is the historical and theoretical context where this idea of business necessity offered us a rationale, a justification, for not just atrocity but for redefining the place and the purpose of an entire people.

If you are a lawyer, like I am, these words “business necessity” mean something. They are a justification that is held up in the courts of most of our countries. They are a basis for doing things and for balancing rights, and for balancing needs, that is very common, and it is very much a part of our transnational narrative. Even things like protests, individual protest, boycotts for example, have been challenged in court because of their impact to individual business.

So, when we decided hundreds of years ago that we would like to have sugar as a commercial product, even though it had long been seen as an impossible product in that moment, because you need to literally have a workforce that can be worked to death every five to seven years, sugarcane obviously is an intensely dangerous product to grow, particularly in the pre-industrial era.

Ultimately, to make that happen, we normalize the idea of not just racial inequality, but the abandonment of dignity, the dehumanization of people of African descent, in order to not just steal, traffic and trade their labour, but also to create the possibilities of breeding farms of people who look like me. To create the possibility that any innovation, any technology, any understandings they have, could be legitimately appropriated and redirected on the grounds of business necessity, on the grounds of white profit. And this has been supported by law.

Even as we unravelled enslavement, even as we unravelled colonialist policy, the mindsets that allowed these things to proceed unimpeded, or even with support, remain. We know, for example for white women, enslaved people was a major component of the wealth of white women who often could not inherit land. So the mindsets that allowed racial atrocity to persist in business required a normalization throughout society, and we still see that today. We still see the legacies of that today. We still see those mindsets, and we can measure it and racial disparities virtually everywhere we look.
Following on from this, you frequently engage with UN Member States on specific business-related examples of inequalities that you observed during your country visits. Could you provide us with a few examples, and also what we could learn from these examples?

I think this is one of the most important things we do. We do country visits, and we are able to really talk to people in every corner of certain countries. And we hear about things that people kind of get is unfair, they get that it is problematic, they get that it is racialized, but they do not have the language, or even the context to understand that this is actually a transnational pattern of exploitation.

One thing we can learn is how systemic racism shows up, how it manifests in specific contexts. An example of this from our most recent country visit, which was right before the pandemic, we were in Peru. Mangoes in Peru were trafficked to Peru during the Middle Passage. People of African descent brought not just mangoes, which had to be transported as live plants, but also the technology to grow them, to graft, to stand up an entire agricultural sector. These were all brought to Peru, into the Americas generally, by the people of African descent who were enslaved and who yet continue to contribute in these ways. In Peru, mangoes today are a $60 to 80 million a year industry. The mango growers who are direct descendants of the people of African descent trafficked as enslaved people make $1 per mango. They grow using traditional methods and without irrigation. They are 100% subject to weather conditions, and the vicissitudes of life. There has been no economic investment in the sector that helps them, even though this is an area of considerable profit right. And at the same time, there has been no economic investment in the people who not just cultivate mango, but actually have the intellectual property, the innovation, the understanding of what this product is and what this product could be.

We do not see that people of African descent are being elevated and pushed into universities, pushed into agricultural schools, pushed into business schools. And the people, the farmers in these spaces, are asking for opportunities to be one or two steps up the market chain. And those opportunities are literally nowhere to be found.

Another example I have from Peru is the contracting. We have transnational agribusiness — and people drove hours to explain this to us — the business comes in, and ultimately they bring in sharecroppers, they hire people who signed leases for their land and must pay, and are accountable in US dollars for the lease of lands they lease. But they are paid year after year for their yields in Peruvian currency which is much more variable, much less stable. And their profits suffer as a result of that. These are people who are already being exploited. Their wells are being dug out from under them. They are working from early in the morning to late at night. And yet what they were asking for was literally fair contracting, conscionable contracting. These are spaces where we expect the State to conduct oversight. Because of course, we expect the contracting process to involve some level of market process. That ultimately the invisible hand of the market should actually ensure some fairness, when you are in privity, in contract. And yet in this case, these people had no choice, and the State’s oversight role was ignored.

I will give one more example, and transition into the lessons learned from that as well. We did a country visit in Belgium a couple of years ago. We heard — there had been testers even, to test — there were these job placement agencies, and Black folk would go in with educations, with the qualifications, and would be told: “Well, we cannot place you at your educational level because you do not look like the face of Belgium. You do not look like the face of the companies. And in fact, our employers are telling us this.”

A few weeks ago, a civil society organization in France did the exact same research. They took testers to 69 companies and found that half of them either were willing to pick job candidates that were only white, or were willing to send photos and facilitate employers’ abilities to do so. In this space, we have seen this result of a persistent downgrading. We met many people with college degrees who were working as labourers. The persistent downgrading was racialized, there was a racial disparity in place there. And
people found it very difficult not to break through the requirements of education or comportment. They found it very difficult to break through the legacies of mindset, the legacies of colonialism, where Black folk were seen as labour, as exploitable, as not part of the public-facing aspect of success and profit.

Where do we go from here? Well, it is obvious what we need to do. The disparities themselves tell us where we need to focus.

I spoke about these very examples, and another one on Belgium, recently in the UN Human Rights Council. And I was told that these claims — even though they were findings, even though we spoke specifically to people — that these claims were untrue, that there was no systemic inequality in education. That the things that every single person of African descent told us in that country were somehow stretches of our imaginations.

So this culture of denial that we have around race, the culture of denial that we have around systemic racism, its impact, and the idea that people of African descent are not somehow “less than”, continues to insulate peoples — from the discomfort of confronting race, from the discomfort of acknowledging our complicity, and also the ways that white privilege, and the ways that whiteness itself, are commodified to benefit people in many countries.

And so the lessons learned here have to do with culture of denial. They have to do with what it looks like to have your oversight, to really acknowledge the dignity of everybody equally. What does it look like to really look at what is happening, that you cannot even see in your own country? And ask yourself: How do I lean into the solution, rather than further cover up the problem?

As part of the Q&A discussion around examples of practices of using human rights due diligence to address systemic inequalities:

With respect to an evolving context and an evolving ‘lessons learned’ conversation, that might happen in a year or two around COVID.

In the COVID space, we saw really different and creative approaches to things that have been called impossibilities. People who are disabled had been saying forever that many of our work, a lot of our work can be done from home. When you look at the intersection of disability, race, gender, parenthood — the different ways that people have been able to do the same job, in some ways more productively, more creatively and with better returns for companies — became something that companies leaned into, even absent a regulatory context, in the face of this global pandemic.

We have also seen some really interesting innovations. And who did them and who did not do them was also a very interesting way of seeing who is engaged in systemic inequality. For example, UNHCR in South Sudan was setting up hotspots to try to create possibilities for both employees and services to be able to continue with less in-person engagement.

In some spaces, educational and schooling institutions were able to give students tablets, give them access to internet, give them computers. And then we know in some places that absolutely did not happen. We had a famous story here in New York a year ago where a young girl taking her advanced placement exams was told by the Educational Testing Service to sit outside McDonald's to catch wi-fi. Ultimately, a non-profit organization dedicated to education could not find a workaround, other than a child taking a very serious college placement exam in the street.

Different companies have really leaned into what it means in terms of their excellence, their ability to provide services, and the workarounds that happen in very different ways. There is a ‘lessons learned’ conversation that we are going to have in a year or so, because so little of this was subject to regulations. It became this kind of moral engagement around the pandemic, instead of a rights-based engagement
or legal-based engagement around preserving human rights, or preserving the international community, or international cooperation.

Companies have used this kind of moral engagement to construe their role as upholding a set of values, despite a global pandemic, versus being able to evade maybe some responsibilities.

**Dominique Day** is a racial equity and justice accelerator. She leads DAYLIGHT | Rule of Law • Access to Justice • Advocacy, an access to justice platform that uses training, mapping, and advocacy as tools to help organizations, communities, and individuals build intersectional racial justice globally.

Dominique is the Chair of the UN Working Group of Experts on People of African Descent, a fact-finding body mandated by the UN Human Rights Council to investigate and report on the situation of people of African descent globally. She also is a member of the 2020-22 Global Future Council on Human Rights of the World Economic Forum and the WEF’s Advisory Council for the Partnering for Racial Justice in Business initiative.

Internationally, Dominique’s policy and capacity-building work focuses heavily on racial justice. She is a civil rights and human rights attorney with extensive criminal and civil litigation experience on behalf of individuals and communities within the Black diaspora, including in post-conflict and transitional States. She holds a bachelor’s degree from Harvard University (cum laude) and a juris doctor from Stanford Law School.
3. Comparing the UNGPs framework with the Convention on the Rights of Persons with Disabilities

Paolo Vargiu
University of Leicester

Your work includes a focus on how the UNGPs apply in the context of disability rights, including academic and advisory work. How does the UNGPs framework compare to the Convention on the Rights of Persons with Disabilities (or CRPD), and how have the UNGPs changed the landscape since the CRPD?

If one takes the theoretical context from which the UNGPs have derived, and compares it to the CRPD, the step forward is magnificent.

Just to give you an idea, the CRPD is a Convention that, even though it refers to disability rights, so to the rights of individuals, it provides for a rather reactive approach. The whole thing about the “reasonable accommodation”, it is all nice and fun on paper, but then, in practice, it turns into businesses (and States) just basically reacting where they have a disabled employee or where they have a disabled audience and they need to cater to their needs.

So effectively what happens is, regardless of what some academics might say about reasonable accommodation, what happens is that there is always a question mark next to the disability rights. I have certain rights on paper as a disabled individual. Am I actually going to be able to enjoy those rights in the workplace? Or even if I am going out and use a business for a service? I never know. I will find out when I am there, because it needs to be seen whether the accommodation that I need is reasonable in terms of price, in terms of cost, in terms of benefit for the owner, for the employer, or for the State sometimes.

Whereas the Guiding Principles actually provide for a different approach, namely the proactive one — at least in theory. They are designed to think about these sorts of things first, and then possibly adapt things as they go. The moment that the businesses actually have to think about and assess the potential human rights implications of decisions beforehand, then there is room for an improvement in the conditions of disabled individuals who work for businesses, and disabled individuals who actually use these businesses for services.

In theory, the CRPD is perfect. The Guiding Principles might be perfect in theory and then turned out to be a shameful waste in practice, but the one thing that makes me think that there is a switch, is this: The CRPD is the Convention through which the UN tried to make the social model of disability mainstream. Which is still very popular amongst a lot of activists, but the social model of disability may actually already be obsolete. The human rights model of disability is the way forward because that is actually much more implementable through the UN Guiding Principles. And it is kind of telling that as a disabled individual, as a disabled activist, I see the Guiding Principles as much fitter than the CRPD to bring forward the discourse of disability rights, even though the Guiding Principles do not actually mention disability by name. It is there in the explanatory note, but it is not there. And yet, the whole reference to human rights makes it actually more suitable than the CRPD.

How is the landscape changing? In terms of massive businesses like big multinational corporations, surprisingly well. It is actually working because it is much easier even in terms of cost benefit — because it always boils down to that — to implement disability rights from a due diligence perspective beforehand, than actually to react, as the CRPD requires business to do. But then again, that is for some of the biggest corporations in the world. And I do not want to sound too optimistic because these corporations are usually known for giving with one hand and taking with some other hand. The whole disability discourse for big companies is also very nice selling point: “Oh, look at what we do for disabled”, but they do not
show you what they do for race, for gender, for other marginalised categories, and the disabled discourse itself. So you know how much they are actually doing for human rights, but from a strictly theoretical perspective it is actually pretty good.

It remains to be seen how the Guiding Principles can actually affect the small and medium enterprises, which are the large majority of companies of the world. There are countries that still have trouble implementing the CRPD and they probably do not even know much about the Guiding Principles.

However, again, in theory, the Guiding Principles are a massive step forward, and crossing fingers, the practice will follow.

**Following up on this, what do you see as the way forward in terms of using the UNGPs towards more inclusive implementation of equality by business? And do you see this as changing through the introduction of regulation that requires human rights due diligence?**

I do not want to be the usual academic that goes back to doctrinal work, but if I can refer everybody to Principle 18:

“In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved…This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders…”

So that is already a step forward there, because the relevant communities, the relevant associations, and the relevant experts are to be involved. So the due diligence aspect is actually covered by the Guiding Principles.

Regarding regulation, again, that is the pessimist in me. I think we need regulation. I think the Guiding Principles are nice first step, but we need regulation. And I am talking about national regulation, because at the international level we have the CRPD and we know it does not work as it should. Nationally, the UN Guiding Principles may actually be the way forward in terms of inspiring national legislation and regulations that require due diligence.

As we have been saying these last two days, due diligence is the key. We are not going to have anything proactive without due diligence, and we are probably not going to have decent due diligence without regulation.

There is a lot to be seen. On the one hand I am optimistic because the Guiding Principles are a step forward. On the other, I am very cautious because the moment we need regulation means that it is not going to happen by itself. I am a lawyer, lots of us are lawyers. So is regulation really a bad thing? To me, the answer is no, but I might leave you with this question.

**In response to a question from the Q&A: Examples of case studies of companies that have effectively, or at least to a good extent, used (or went beyond) human rights due diligence to engage with structural inequalities?**

From a disability perspective, up until very recently IBM had a fantastic program. They went above and beyond their obligations to not just include disabled individuals in their workforce, but also to cover one of the biggest structural deficiencies of these individuals, which is in training. IBM paid for training for these individuals, even before hiring them and after hiring them. And one of the issues with disabled individuals entering the job market is that most of them, in many countries, have actually struggled to get an education. Just like able-bodied people, there are barriers with finances, and because universities are subject to different standards, they do not have to be inclusive, surprisingly. IBM was one of those companies that will look at the market, but also give some preferential treatment to individuals exactly to
address those systemic inequalities. They tried to basically fill the gap, to an extent. Their own internal training programs were fantastic to this extent. So, IBM could be used as a standard for this.

Paolo Vargiu is a lecturer in law at the University of Leicester. He holds degrees from the universities of Cagliari (JD), Nottingham (LLM, PhD) and Leicester (PGCHE). He is a generalist public international lawyer with a variety of research interests, focusing primarily on international investment law and arbitration, jurisprudence, literature, and human rights. His current research projects deal with the semiotics and linguistics of investment arbitration, the analysis of public international law through the lens of comic book series, and the protection of religious minorities under public international law. He is also co-leading, under the direction of Tony Cole, an ESRC-funded project on the social and psychological underpinnings of commercial arbitration in Europe. He has been a member of the IEL Collective since November 2019.
4. The role of institutional investors in addressing systemic inequalities within the UNGPs framework

Mary Beth Gallagher
Domini Impact Investments

The participants in this conference, including Mary Beth Gallagher, are not registered investment advisers. The other panelists in the event are not employed by or in any way affiliated with Domini Impact Investments (Domini).

The information presented is believed to be factual and up-to-date, but Domini does not guarantee its accuracy and it should not be regarded as a complete analysis of the subjects discussed.

All expressions of opinion reflect the judgment of the author/presenter as of the date of publication and are subject to change and do not constitute investment advice.

You engage as an institutional investor with companies you invest in using the UNGP framework, for example in the tech sector around facial recognition and surveillance, or in the climate context on forest and biodiversity. How can institutional investors seek to influence company policies and practices to align with the UNGPs and address systemic inequities?

The comments I will share are in the context of engagement and not about investment decisions and do not constitute investment advice.

As an institutional investor, we think about our responsibility. Domini is a mutual fund based in the US, and it has a commitment to harness the power of finance to advance universal human dignity and ecological sustainability. How that comes into practice really shapes what we invest in as an institution. We evaluate whether companies using the Domini Impact Investment Standards,82 to identify whether they have business models that are fundamentally aligned with those two values of universal human dignity and ecological sustainability. Are they contributing something positive to society? And we evaluate the relationship with stakeholders. How do they treat their workers, their communities, the environment, all of the various stakeholders that interact with the business every day?

The first step is evaluating which companies are fit for the portfolio. Our greatest point of leverage is to say, ‘this is not a company that we feel like we want to put our capital in’.

Once we hold a company, that is where my role comes in as Director of Engagement, where we use our tools of active ownership and stewardship to engage with companies. We would use our various tools of investor letters and dialogues to try to engage with the company to better understand how those systems work in practice, how they are aligning their business models with respect for human rights, whether they have good policies and codes in place. And how does that actually impact rights-holders and stakeholders on a daily basis? We try to gather more information about how effectively those tools are being implemented in practice to ensure respect for human rights.

When we talk about the UNGPs, we start with impact assessments and ask: “What are your greatest impacts as a business?” The role of rights-holders we have all spoken about is really central, but this goes further than consultation. We ask about how the input a company receives from rights-holders changes its practices. Is the company learning that there are certain areas of business that are just so fundamentally inconsistent with respect for human rights that it should not be involved with it? For example, that you should not produce facial recognition surveillance technology that is sold to governments and police? Or you should not deforest old growth forests that will not regenerate in a sustainable way? Are there certain practices that your stakeholders have informed the business are simply inconsistent with their responsibilities, and if so, what is the company doing with that information?

82 https://www.domini.com/investing-for-impact/impact-investment-standards
So as investors we try to use our leverage and our tools to press companies to disclose more about what is happening in practice. We can evaluate and factor that into the investment process, but also make sure that stakeholders have the information they need about how companies are behaving.

Domini as an institution also recognizes its own responsibilities. Last year we adopted our own racial justice action plan that applies to Domini as a business. It looks at diversity, equity and inclusion and different elements of our practices, how our investment standards factor in questions like systemic racism to our evaluation of business models. Our key performance indicators include diversity, equity and inclusion at the board level and in management. And how we can strengthen our own accountability to think about our role in the investment ecosystem and the control of power and wealth and privilege that is frankly inherent to the role of an investor, so that we are thinking about how we can be more accountable to rights-holders and stakeholders ourselves.

You have noted that there is often a check-the-box or symbolic response to systemic issues which actually require business model transformation, particularly in the US context around issues of systemic racism. Could you elaborate on these concerns, and what the distinctions are between the kind of responses we have seen and those that integrate a UNGPs-consistent approach?

When we are talking about systemic issues, and the way Dominique put it as “undoing the normalization of exploitation,” we are looking at really a need to completely transform everyone's relationship with their own dignity and their own access to power, and their ability to create wealth and health and safety for themselves and their families.

So an audit will not accomplish that. Compliance with law will not accomplish that. Passive participation in a multi-stakeholder institution will not shift power in that way. What we really want to understand is, as a company is taking on a human rights impact assessment — which is great, it is absolutely essential — how they bring an intersectional lens and a rights-based lens to that. A lens that looks at systemic issues, which does not give them the okay to move forward, but really forces them to grapple with the implications of their business practices. The cause, contribute, linkage analysis from the UNGPs requires doing that at depth. It is not just about your own operations. It is really about all of your business relationships and business partners.

This challenges all of us to examine where we need to give something up. It is time, if we really are going to have a more equitable society, we all really need to shift our power.

In terms of what works, there is one that I always highlight as quite meaningful. It is the Coalition of Immokalee Workers and the worker-driven social responsibility model. The reason I think it is so fundamental is that farm workers and tomato workers in Florida have organized themselves and created their own code of conduct. They have an independent monitoring system. What they are trying to do is address wage theft, discrimination, harassment, sexual violence, forced labour, all of these practices that were rampant in the farms. They use their own mechanisms to monitor and hold companies accountable. It includes business implications that if a participant company does not comply with the Fair Food code, it can lose its contracts with major suppliers that have signed up. So, it is worker-driven and it has business implications. Those are really central elements of a meaningful program: centered on the rights and needs of workers, owned and accountable to the workers, and then business consequences, where an entity might lose their access to a market or contract if they do not fulfil those expectations.

---

83 https://www.domini.com/about-domini/domini-racial-justice-plan
84 https://ciw-online.org/campaign-for-fair-food/
As investors we can encourage companies to join programs like that, which we know are meaningful. They may not yet be at scale, or present for every supply chain, or accessible to everyone right now. But investing in those models that are meaningful and consistent with the outcomes that all of us are trying to deliver is really something that we try to hold up. They can encourage companies to really evaluate and take elements of worker-driven accountability models into their own practices.

As part of the Q&A discussion around examples of practices of using human rights due diligence to address systemic inequalities:

Just to reach to what Dominique has said about the moral engagement. There is so much space for companies to opt in and out of the systemic inequality conversations. To the extent that there is a spotlight on them, or there is stakeholder pressure, or worker pressure, or they are in the press.

Part of what the human rights due diligence process gives us is an ongoing consistent preventative mitigation strategy. It is continuous, and you cannot opt in or opt out of your human rights responsibilities. During the COVID pandemic, we did see a lot of really good models of protecting workers, but often only some workers, who were easier or more valuable to an institution. We need to analy the lessons from COVID with the equity lens and challenge companies to opt in consistently — to really uphold — their rights responsibilities.

Regarding examples, right now in the US we are seeing Congress evaluate potentially transformative and monumental legislation to create a social safety net. We have not seen companies stepping up as much as they could be to support what we need. Companies could better support strong public policy that supports people who are most vulnerable and who need access to services, resources, jobs, health care. It is essential to challenge or urge companies to step into the public policy agenda in service of human rights, especially at key moments. As we anticipate the COP conference on climate next week, the US is really still evaluating what they are bringing to the table. We need ambitious, transformative climate policy, and companies need to support that. They have made statements, and they made goals for net zero by 2050, but this is where it happens. It happens in public policy that changes business models.

Mary Beth Gallagher is the Director of Engagement at Domini Impact Investments as of August 2021. Mary Beth’s diverse experience with law, financial analysis, corporate engagements and issue-based organizing enables her to lead Domini’s efforts as a voice for change. She is responsible for leading Domini’s engagement efforts with portfolio companies and broader stakeholder groups, as well as developing initiatives and campaigns.

In her previous position, she was the Executive Director of a non-profit organization representing institutional investors in stewardship and shareholder advocacy with corporations to encourage more disclosure and responsible business practices to advance systemic change. She graduated from American University, Washington College of Law in 2008 and is a Member of the New York Bar, admitted November 2009.
5. Business responses to systemic inequalities within the UNGPs framework

Andrea Shemberg
Global Business Initiative on Human Rights

You engage with business through your work with GBI and as an advisor to business, including on how business should respond to systemic inequalities within the framework of the UNGPs. What are some of the biggest obstacles for companies in this context?

One of the biggest obstacles is failure to initially ask the right question. From the UNGPs we have this idea of involvement, but involvement in what? I think it is not necessarily clear to companies that they are asking: Where do our activities encourage, reinforce, exploit, exacerbate or make worse existing inequalities? I am not sure that companies have that question in front of mind right when they do their human rights impact assessments.

It is also about when, at which point in time, does that question get asked. Dominique talked about siting for infrastructure, hazardous waste, where a dam is going to be built. We have seen time and time again that the human rights assessment comes after the company has made the agreement to do a certain project. And then maybe you are funded through a multilateral development bank. I have done a lot of work with multilateral development banks looking at how they are assessing private infrastructure projects, for example.

If you look at the details there you get to situations where they are talking about impact, and maybe impact is measured on a household level. They do not ask the question about whether when that piece of land gets monetized, does the woman of the household have access to the bank account. The money from the land from which she controlled the food production for the family gets monetized and moved into the male's bank account.

So, there are so many hidden and technical things that need to be reshaped across business. It is really important when we ask that question, and where we ask that question - it really needs integration.

Just to give a few examples. Companies should be looking at their business models. One of the cases that I brought to the UN Forum a few years ago was a case of a Kenyan flower farm that was selling to a grocery store in the UK. There was a problem with sexual harassment at the level of the fields. The problem was that the way that work was organized, the women were the lowest person on the totem pole, and their supervisors were mainly male. The women were on day contracts not represented by the union. It was a business structure that actually reinforced who had power in that society, and the managers actually took advantage of it because it was a given that they were more powerful.

It was a given that the women had a day contract and had to do sexual favours to get the second day contract. So getting at that systemic inequality problem actually caused the company to change its business model to upscale the women: to get them represented by unions, to change the gender of who is the manager and who is the worker, to try and shift, not reinforce, the idea of where the power was in that society and in that context.

Companies also need to look at their products and services. Are you exploiting vulnerabilities by what your product and service is? Often in the United States context, you have these payday lenders with exorbitant fees that are actually exploiting a vulnerability. So does that, as a product or service, make sense if they are really talking about getting at systemic inequalities, you have to ask the question.

Many years ago before the UNGPs, there was the case of some individuals trying to buy a 3D ultrasound machine. The company, through their ‘Know Your Customer’ assessment, ended up realizing that that
3D machine was not being bought by doctors, it was being bought by businesspeople. They found out that actually, it was meant for a business to early identify the sex of a baby - and that there was a high risk of female infanticide in the context - so the machines could have been used for that purpose. The question is, if the purchaser had been a doctor, would the ‘Know Your Customer’ assessment get at it? Maybe not. So, that is why if the UNGPs analysis is added and you are thinking about that, you do not have to rely on a ‘Know Your Customer’ analysis. You are relying more on what is the impact of selling, and what is this customer going to do with this machine? Where and what is the context in which we are working, and what is the culture around gender equality there?

It is also about research and development. How are you researching and developing, and for whom? And marketing. There is a very large cosmetics company now doing an entire worldwide revamp of their marketing, and also rethinking products. They sell skin whiteners. What is our idea of beauty? And all of the ways that marketing touches systemic inequalities and reinforces ideas or even creates more pernicious ones. The obstacle is really: Are you asking the right question, at the right moment of time, and in the right context? And are you seeing what is not to be seen?

Another obstacle, and I was so glad that Jaren talked about this, is getting the conversation together with human resources, but that it does not stop at human resources. In my experience, one of the big obstacles is also that at the beginning of projects or business ventures, companies often use their lawyers as their guidelines. Many people on the panel today really importantly brought up the issue of land rights. As we know, lawyers can get really nice deeds and do legal due diligence, but unless you understand the cultural context, and the systemic inequalities in which you are operating, you may think that is adequate.

I do actually quite a lot of presentations with lawyers, trying to get them to open their minds beyond law and say: It is actually quite important that you understand what the cultural context is, what the systemic inequalities in that context are. It may help you question those deeds that the government gave to you, and that you did not check with the landowners/users. And in fact, then the UNGPs give that wonderful hook of saying: This is what human rights due diligence looks like. You actually talk with the people who may be potentially impacted. You have to go check, it is not enough just to do your desk research.

Those are the obstacles. The flipside of the first question that I mentioned, which I am not sure all companies are asking, is: How are you proactively working to respond to the systemic discrimination that you are identifying? That is the second part of it, but in my experience these two questions are not yet front and centre for people in companies.

You mentioned that you talk to companies about the idea of “legacy”, for example when a company steps into a context that has its own historical, sociological and economic structures or where things have happened in the past and have not been remedied. And the big question arises: What do you do about that, and how do you conduct human rights due diligence taking all of this into account? What are some of the kinds of things that you could recommend?

I find the word ‘legacy’ is quite powerful. For lawyers, legacy is often about what the liability is from that business that you are going to buy, or when you do the merger. Legacy in the human rights context is very much about open wounds or discriminatory structures that exist in our society that continue to pervade the way we think about the world and the way we see people.

And so I have been using the word ‘legacy’ because it helps companies basically stop the assumption that they work in a vacuum. Stop the assumption that when people walk into your company, they start at zero, and they do not have any history or any bias and they do not have any of those structures affecting them. Also, when you go into a context to do business, you are stepping into a legacy. There is a history there.
So ‘legacy’ is the term that I am using to try to get companies to actually back their human rights due diligence up to before they agree to go into a project, or as they are trying to understand the new context. It is not necessarily based on the State — it could be that particular county or city where you are doing to work — and then understanding the bigger context. I am using the word ‘legacy’ to communicate to companies that this stuff sticks. You cannot pretend to have a whiteboard, and that you are starting history when you arrive.

In response to a question from the Q&A: Examples of case studies of companies that have effectively, or at least to a good extent, used (or went beyond) human rights due diligence to engage with structural inequalities?

To comment on the question: Human rights due diligence actually asks companies to engage with structural inequalities. So I would not put it beyond human rights due diligence, I would put it as part of.

A company that I am familiar with had a problem of child prostitution around one of their installations. It was a structural issue. There were children being offered up for prostitution to the workers of the company, and they were being offered by the family. And of course, it was an economic issue as well as a gender issue. The company actually worked with local communities, with NGOs, with all kinds of supporting organizations to actually get at the root problem.

That is the UNGPs’ disruption. They are trying to get companies to get more at the root problems. In that case, they really did go to structural inequalities, and they worked in a collective way to get at it. The disruption from the UNGPs was: You need to look all the way down your value chain, you need to see what your link is. The company did not cause or contribute to this, but they were directly linked to it, and they recognize that.

When we talk about legislation, the most important aspect of new legislation — and I agree that we need it — is that it encourages that disruption, and does not discourage the disruption. It would be such a tragedy if new legislation pushes companies to not know, and not show, and to close their eyes and ears to the structural inequalities that they are linked to. It does link up: Actually recognizing that the UNGPs help companies get at structural inequalities, but then we need to preserve that incentive within regulation as well.

Also, in response to what Mary Beth has said about climate. As we think about climate and systemic inequalities, it is interesting as we see institutionally and also legally in litigation, that the climate change and human rights discussions are now merging. Especially now with our new human right on healthy clean sustainable environment, and the special procedure nominated for that issue.

So I wonder if actually systemic inequalities, and an understanding of the impacts on people, is actually going to be the issue that finally allows us to talk about climate and human rights in one sentence. It has been my experience that with companies these issues are still siloed, but if we think about what the vulnerabilities are that we have to prepare for, that companies are going to have to react to, you just cannot get away from human rights.

Andrea Shemberg is Chair of the Global Business Initiative on Human Rights and advisor on business and human rights with over 20 years of experience in the field. Andrea was Legal Advisor at Amnesty International UK and the International Commission of Jurists before becoming Legal Advisor to John Ruggie, the-then UN Special Representative of the Secretary General for Business and Human Rights (SRSG). In that capacity, Andrea led the SRSG’s work on investment contracts and treaties, advised him on international human rights, humanitarian and criminal law issues and participated in the
drafting of the UN Guiding Principles on Business and Human Rights. Andrea established and led the Investment & Human Rights Project at the London School of Economics until 2016. She is a US-trained lawyer with management-side law firm experience in labour and employment law. She teaches business and human rights at graduate and law schools.