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## **Human Rights, Business and Meaningful Stakeholder Engagement**

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### ***What are human rights?***

Human rights are fundamental to the dignity of human beings. This is a fundamental element in human rights theories based in philosophy, political science and law, and recognised in the very first article of the Universal Declaration on Human Rights (UDHR), adopted by the United Nations (UN) in 1948.

Human rights are said to be unconditional. This means that they are not earned or based on specific criteria. Every human being has human rights simply by virtue of being human. Human rights are in principle universal, indivisible and inalienable (Donnelly 2013).

An adequate standard of living, access to education (including free elementary school), a nationality, being able to marry and to have a family are all human rights. So are freedom from discrimination, and from slavery and torture. Being able to form a trade union, to freely express one's opinion, and enjoying reasonable working hours, holiday with pay and rest and leisure are also human rights. These and many others are all set out in the UDHR and other more detailed human rights instruments, including the eight fundamental conventions of the International Labour Organization (ILO).

Human rights not only embody rights, such as to freedom of association or religion. They also encompass claims, for example to access to education or to health services. Moreover, the 'rights' term does not mean that human rights are not just about law and legal rights. Values, principles or even rights corresponding to what we refer to as human rights today were recognised in political philosophy and ethics long before they were granted formal legal status.

Human rights were originally intended as protection against the power of states. With the increase political and economic power of business enterprises, it has become common to expect enterprises to also respect human rights and in some cases to contribute to fulfilling human rights claims. This informs the adoption of detailed guidance for business as well as other actors in regard to business impacts on society through the UN Guiding Principles (UNGPs) on Business and Human Rights (UN 2011), which refer to stakeholders in regard to a company's identification of human rights risks.

### ***The connection between human rights and business***

Business enterprises can contribute to human rights fulfilment, for example when they provide vocational training, strengthen occupational health and safety awareness, or through mentor programmes that advance the employment opportunities of people on the fringe of the local labour market. They can impact human rights negatively in multiple ways. To mention just a few examples, business enterprises can harm human rights by applying discriminatory employment practices, using child labour, requiring workers to apply toxic substances without adequate protection, establishing infrastructure that involves resettling of local communities, or funding other enterprises' activities that harm human rights.

The role that human rights play for responsible business requires awareness among managers exercising a broad range of tasks. Human rights issues arise, for example, in relation to procurement, finance, supply chain management, stakeholder engagement and consultation, risk management, human resource management, communication, and non-financial reporting.

An increasing convergence of human rights guidance for business in transnational business governance instruments around concepts applied and elaborated by the UNGPs, such as meaningful stakeholder engagement, underscores the pertinence for managers to understand and manage their human rights impacts, and to identify stakeholders from a perspective that considers those impacts and the various actors that may be involved.

### ***Stakeholders in a human rights and business context***

The international human rights regime, which was mainly developed in the 20<sup>th</sup> century, focuses on states as duty-bearers. The international economic regime developed during the same period of time has provided business enterprises with extensive rights to make economic profits. In combination with the practices of many multinational enterprises and other business entities, that imbalance led to increasing concern with the capacity of business to cause harm to society, and eventually to the adoption of the UNGPs. Specific concepts and theoretical perspectives have also led to the emergence of business and human rights (BHR) as a responsible business conduct issue and academic field distinct from CSR or business ethics.

While some BHR scholarship also pays attention to the possibilities of businesses to contribute to human rights fulfilment (for example, offering vocational training or educational facilities to help bring down risks of child labour), the main emphasis in BHR is on preventing harm to individuals or groups affected by the economic activities of a company or its business partners. These are all stakeholders, but their situation differs depending on whether they are adversely affected by the business activities, or whether they are involved in the harm by causing it, contributing to it, or otherwise being involved through their own operations, products or services or those of their business partners.

From a BHR perspective, stakeholders include several that are not among those that are frequently associated with the stakeholder term in organizational studies in business management practice. This is clear already when looking at the three 'Pillars' set out in the UNGPs, which build and much preceding BHR theory and have contributed to defining much recent BHR scholarship. In referring to stakeholders in regard to a company's identification of human rights risks, the UNGPs and BHR theory have regard not only to conventional business stakeholders but also so-called affected stakeholders. These are potential or actual victims or rights-holders, whose human rights are adversely affected by business activities. Meaningful engagement with stakeholders, in particular affected stakeholders, is a key element in the human rights due diligence process that the UNGPs prescribe for business enterprises to identify and manage harmful impacts or risks of such impacts.

The focus on preventing harm informs the UNGPs and their influence on several other key instruments for responsible business conduct. This has contributed to making it clear that society expects business enterprises to know about how they impact the human rights of affected stakeholders, and address such impacts or risks adequately and comprehensively through interactions with other stakeholders.

The UNGPs take their point of departure in three 'pillars' defined by the UN 'Respect, Protect and Remedy' Framework (UN 2008), a comprehensive but succinct study commissioned by the UN that sets important theory foundations for BHR (Buhmann forthcoming/2021): (1) the *State Duty to Protect* human rights against harmful impacts by companies; (2) the *Corporate Responsibility to Respect* human rights, and (3) *Access to Remedy* for victims, that is, stakeholders adversely affected by business activities. The three pillars address diverse actors. This has implications for perceptions of stakeholders in terms of who can affect or be affected by the achievement of the organization's objectives (Freeman 1984: 46). It is evident already on this basis that governments and other authorities as well as potential or actual victims of human rights impacts are important stakeholders for business enterprises from a BHR perspective. This is elaborated in the following.

The corporate responsibility to respect human rights applies to all companies, irrespective of their form and irrespective of the efforts of states. In order to discharge that responsibility, companies need a human rights policy; they should undertake human rights due diligence as a management approach to identify and manage

the actual or potential human rights harms that they might cause; and they should provide remediation in case harm occurs. Contrary to the financial and legal liability due diligence approaches that are typically used by firms to identify and assess risks to the firm, human rights due diligence aims to protect society from the harm caused by the enterprise.

Stakeholder engagement is part of due diligence, and meaningful engagement with affected stakeholders is a particularly important activity.

Governments have a duty to protect human rights against abuse caused by business through law, policy, and other relevant means. This includes 'smart' regulation that mixes hard and soft law, incentives, reporting and disclosure in order to promote proactive self-regulation within business organisations and reduce their adverse human rights impacts as well as providing ex-post accountability. The business partners of an enterprise are important stakeholders not only from an economic perspective. From a BHR perspective, suppliers, sub-suppliers, own employees and those of suppliers or sub-suppliers are important stakeholders. Suppliers may cause human rights harm in which the company may be involved. Workers may be affected by the harm. Similarly, security providers, such as private security companies, as well as investors and financial institutions that provide capital for the business enterprise to function are important stakeholders. In some cases even buyers of the company's products may be stakeholders from a BHR perspective. Potential or actual victims of business-related human rights harm are key stakeholders as these are the ones whose human rights are adversely affected by the company.

The identification of who is a stakeholder and the role of that stakeholder depends on the perspective taken. Whereas the perspective is frequently that of a company in business practice and general stakeholder theory, in the BHR context, the perspectives of potential or actual victims, governments or business relations should also be considered. Viewing stakeholder issues from a perspective different to that of the company can fundamentally alter the analytical findings and provide insights of use to the company's own identification of salient stakeholders and their concerns, and therefore potential or actual risks or harm.

### ***Rights-holders and stakeholders***

In part inspired by Freeman's definition of stakeholders as any group or individual who can affect or is affected by the achievement of the organisation's objectives (Freeman 1984: 46), a diverse range of stakeholder theories have evolved to provide normative, instrumental or descriptive approaches to stakeholders and stakeholder management. These theories typically have regard to management and corporate strategy, often with the aim for the organisation to identify risks as well as opportunities, in particular with regard to financial issues and profits (Berman et al. 1999). They are also frequently top-down, with the company's management deciding who they consider to be a stakeholder and how they wish to be involved with that stakeholder. Stakeholder theory typically relates to the immediate stakeholders of organizations, such as shareholders, suppliers, employees, customers and local communities (Friedman & Miles 2006).

In the BHR context, rights-holders (who may be or become victims) are prime stakeholders in the sense that their human rights are or can be affected by the achievement of the objectives of the organisation who causes harm to them. Some theoretical contributions and studies, including the UNGPs, acknowledge this by referring to victims as affected stakeholders. The human rights literature prefers the terms rights-holders or victim(s). In the BHR context, potential or actual victims are often employees and local communities, but any individual whose human rights can be harmed by a company's actions falls within the category.

The BHR literature's deployment of the 'affected stakeholder' term can be understood as an effort to connect to managers and management scholars who are familiar with the term 'stakeholders' as referring to core actors for successful business management and risk management (Buhmann 2017). The focus, however, is on stakeholders quite removed from the company itself, such as host communities for natural resource mining or minerals processing. From a human rights perspective, 'affected stakeholders' suffering business-

related harm are rights-holders or victims. ‘Affected stakeholders’ whose human rights are at risk or adversely impacted by the business enterprise are rights-holders.

Victims are often represented by civil society organisations. These are stakeholders in a dual sense from the perspective of business enterprises: they are representatives for victims, and they have interests (stakes) in their own rights as organisations whose operations and realization of their goals are affected by and can affect the actions of other organisations, such as those of companies.

Local communities are included in Freeman’s (1984) ethics based understanding of stakeholders along with owners, customers, suppliers and employees. Evan and Freeman (1993: 82) observe that communities as stakeholders have a claim to participate in decisions that substantially affect their welfare, and to have their human rights respected. A related approach is reflected in the UNGPs’ emphasis on meaningful stakeholder engagement as an element in the due diligence process and the identification of solutions.

It is quite common that human rights issues related to business operations are not described by stakeholders – including affected stakeholders – in human rights terminology, or perceived as abuse of identified human rights standards. In fact, it is probably the rule rather than the exception that business-related human rights problems are not ‘nicely wrapped’ as such (Ruggie 2013). This underscores the significance of business enterprises recognizing who are stakeholders at risk of their harmful impacts, and to understand that rights-holders are stakeholders who are particularly at risk and particularly in need of the company acting responsibly.

### ***Meaningful stakeholder engagement***

A human rights due diligence process involves the identification of human rights impacts. This should be undertaken by engaging meaningfully with stakeholders, including ‘affected stakeholders’ (UN 2011 GP 18 with commentary). To properly understand impacts and develop adequate responses, a company needs to understand the perspective of potentially affected individuals and groups. The engagement must be meaningful to (potentially) affected stakeholders, taking into account their diversity of interests, groupings, concerns, cultures etc. in a way that is meaningful to them (OECD 2018: 28-30; OECD 2017). Meaningful engagement with affected stakeholders is a core source of information for enterprises to understand about their impact and its implications for those potentially or actually affected. Without such understanding, the enterprise will not be able to adequately understand its impacts in context and overlook important information to allow it to identify and manage the impacts. An ongoing process (like human rights due diligence in general), it informs the impact assessment process as well as responses and tracking of effectiveness. Moreover, poor stakeholder engagement can give rise to actual or perceived adverse impact (OECD 2017: 18).

Such engagement goes beyond the legal minimum requirements of formal consultation: it assumes active and equitable involvement of those stakeholders whose human rights are at risk, and it is dialogue-oriented. At the same time, the launch of the process as such, or inviting stakeholder to share their views and perceptions of needs to be addressed, raises expectations that stakeholders views will be taken seriously and acted upon.

Meaningful stakeholder engagement involves direct consultation with those who may be affected or their legitimate representatives, where possible and appropriate to the enterprise’s size or human rights risk profile. It entails interactive engagement with stakeholders that is two-way, conducted in good faith, and responsive. It may take place in a range of forms or settings, for example, through direct meetings with smaller groups or more formalized hearings or consultations. Two-way engagement means that parties express opinions, share perspectives and listen to alternative viewpoints to reach mutual understanding, and that steps are taken towards a joint decision-making process. Good faith engagement depends on the participants on both sides of engagement. It means that the parties engage with the genuine intention to understand how stakeholder interests are affected by enterprise activities. Responsive engagement requires the implementation of commitments that the parties have agreed to, and that adverse impacts to stakeholders are appropriately addressed, including that stakeholder views are taken into account in project decisions and

in the provision of remedy when enterprises have caused or contributed to the impact. For example, such engagement can be helpful in the planning and decision-making concerning projects or other activities involving the intensive use of land or water, which could significantly affect local communities (OECD 2017; UN 2012: 36-37, 43-33; OECD 2011 Chapter II Commentary 25).

### ***Governments as stakeholders in a human rights and business context***

Governments are also stakeholders in a BHR context. The realization of their own human rights duties are affected by business-related human rights impact. Governments are charged with political commitments and legal obligations to protect and promote citizens' interests that may easily be affected by business in positive or adverse ways. The positive ones include employment, infrastructure and community development, and business contributions to the provision of social services like access to medicine and vocational training. The adverse ones include toxic fumes, water, air and land pollution, exploitation of local natural water resources leading to reduced access to clean water for the local population, land grabbing, projects that lead to resettlements of local populations, work injuries, involuntary or insufficiently remunerated labour, decisions made without sufficient consultation and informed consent of affected individuals and groups, and a host of other impacts.

Moreover, the implementation of government policy can affect business enterprises. Through governance processes, guidance, regulation and public-private networks, governments channel social expectations and react to those, often with their own interests in mind but with an effect on the firm's social licence to operate.

Export credit agencies support business enterprises in setting up joint ventures and other operations in other countries, often in emerging economies. The reputation of an export credit agency may be suffer if the agency is associated with business-related human rights infringements due to business activities that the agency has supported financially. To prevent such harmful impacts, the agency may affect the company's activities by requiring specific actions, such as the exercise of human rights due diligence, including meaningful engagement with affected stakeholders.

### ***Business enterprises as stakeholders in a human rights and business context***

Business enterprises have economic relationships with many other economic entities that are stakeholders from the conventional economically focused stakeholder perspective.

The human rights impacts of one business entity may affect or be affected by another, making them stakeholders for each other for human rights impact purposes. In principle, this applies along the entire value chain of a company and its activities.

Institutional investors can affect a company's access to finance by taking the company's human rights records and policies into account in decisions on buying shares or providing a loan. The company's (poor) human rights performance can affect the reputation of the investor (especially if the human rights impact is severe).

A supplier's human rights performance vis-à-vis a community or the labour conditions at the supplier's factory can affect the buyer company and the perception of its own human rights performance and reputation.

The buyers and users of a product can also be stakeholders from a human rights perspective. In the pharma sector, companies have been found to have responsibility for selling drugs that have been purposely used against their intentions in order to take lives rather than (as intended) to save lives) (National Contact Point of the Netherlands 2016; Buhmann 2012).

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