

The Anna Lindh Lecture 2016

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# **Business and Human Rights – Can Business Meet the Challenge?**

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Dear friends,

I want to thank the Raoul Wallenberg Institute for having invited me to give this year's Anna Lindh lecture. I am deeply honoured.

Raoul Wallenberg, a businessman, as we all know saved tens of thousands of Hungarian Jews in the second half of 1944 by issuing Swedish passports permitting them to leave Hungary. In so doing he took great personal risks. Raoul Wallenberg's brave achievements are an illustration of the common saying that "One man can make a difference", a motto that in his case carries very special relevance. Raoul Wallenberg showed us the importance of brave and decisive action when human rights are being violated.

The current situation in Europe characterised by widespread Xenophobia is deplorably similar to the situation at the time before the Second World War. As was the case in the 1930's, we are today – in a global perspective – facing strained economies, armed conflicts and difficult living conditions in many parts of the world. As so often, such occurrences are combined with cold anti-democratic winds. Anti-democratic and xenophobic politicians gain popular support in many countries, as they often tend to do in times of economic distress,

large scale unemployment and huge migration of people. Dark political forces thrive on this. Decent politicians of all democratic political convictions have a tall order in uniting against the dark forces in more than 50 shades of brown.

If Anna Lindh had not been so tragically killed, I am convinced that she would have made a visible difference. Humanitarian values were deeply embodied in her work. Her enthusiasm and true engagement for human rights would have been a strong force in upholding democracy, rule of law and human rights. Unfortunately, that was not to be the case. Fate would have it otherwise.

The world is currently facing several legal and humanitarian challenges with human rights implications: From the war in Syria, the refugee crisis, climate change and terrorism, to the weakening and impairment of democratic values in Europe and elsewhere. They are all essential for the future of our children and for our planet. And they are closely linked to the continuing globalisation process. I have chosen to speak on a subject linked to the current challenges and globalisation under the title:

### **Business and Human Rights – can business meet the challenge?**

In discussing that subject

- I will briefly address the rule of law and human rights concepts,
- Talk about the background to and the content of UN Guiding Principles on Business and Human Rights,
- Touch upon legality versus soft law and how to achieve effective protection for human rights in business, and
- Finally, discuss the role of the bars, law firms and the individual lawyers in recognizing and upholding human rights.

### **The Rule of Law and Human Rights**

I would like to start by reminding us that philosophers and politicians discussed rule of law and human rights already a thousand years ago. Among these was Aristotle with his idea about justice. And, even some hundred years before that, King Solomon advocated in the Book of Proverbs:

*“Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy.”*

The development of rule of law and protection for human rights normally come into focus after humanitarian crises. After the horrors of the First and Second World War a major step forward in the protection of human rights was taken by the creation of the United Nations and the Universal Declaration of Human Rights. The international community decided to establish universally applicable norms in order to prevent similar tragedies from reoccurring in the future. Through the UN, the concept of the rule of law was given a content which was largely accepted by most countries.

The former Secretary General of the UN, and a former Anna Lindh lecturer, Mr. Kofi Annan, offered an excellent formulation of the Rule of Law ideas. He said:

“For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, **and which are consistent with international human rights norms and standards.** It requires, as well, measures to: ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

The definition points out that the rule of law should be seen as encompassing a systematic protection of human rights, guaranteed by law and conventions. And equally important, it requires that the application of the law must be fair.

This is important in the context of Business and Human Rights.

The human rights as described in the UN Declaration, as its title makes clear, are universal in nature. At the end of the day the essential elements of the rule of law concept and the human rights are nothing you can pick and choose from at your own discretion. It is not an à la carte menu.

So, human rights need protection. That protection is needed, not only from the national and international legislator and the judiciary, through a sound application of the law. The human rights also need protection by civil society and – increasingly important – by the globalised and influential business community. This is especially essential, in times when different strong actors, every now and then, advocate that the human rights related conventions are not applicable any longer, because they originate from another era. Globalisation has lately and very clearly revealed how disparate and sometimes conflicting value-oriented goals, such as collective security, protection of human rights and international criminal justice, have been enforced.

## **Globalisation**

The somewhat worn out term “globalisation” is not a recent phenomenon. The very strong global business expansion started in the sixties. As a result of internationalisation and globalisation business has become extremely powerful. More than 70,000 multinational corporations, 700,000 subsidiaries and millions of suppliers dominate world economic growth. Some of the international conglomerates are in terms of money and liquidity far more resourceful than many countries even in the Western world. Out of the fifteen largest budgets in the world, six are states and nine are corporations. The fifteen largest multinational companies each have a budget that exceeds the GDP of more than 120 countries.

The globalisation of the world economy allows states, multinational corporations and other powerful non-state actors to exploit weaker economies.

States with high technical and scientific level, advance power and wealth much more than others. The less advanced states are often victims of exploitation by the states more skilled in science and technique.

At the same time, developing states are in large measure seriously harming the environment. The number of failing states will most probably increase. This is a dangerous development, also in the light of a world population expected to increase to 9.3 billion in 2050, whereof an estimated 1.4 billion are below the hunger level. This may end up in very serious problems including violence and increased and uncontrollable migration.

Globalisation has transferred influence from the national legislator to international organisations and it has made it possible for business to influence governments and legislators.

But, globalisation also offers various possibilities to contribute to society at large and to pursue good causes. Business contribution to social welfare and protection of human rights deserves respect. Some Swedish companies are setting very good examples. But, we do also see examples, where businesses cynically disregard social responsibility in choosing unrestrained profitability at the expense of human rights.

The combination of weak or non-existent national legislation, inefficiency in the adherence to regulation and lack of supervision, as well as absence of remedies for holding the companies responsible, can be devastating to large groups of people, particularly in the developing world.

Indigenous people are more vulnerable than many others and suffer too often from extensive discrimination. The societies affected, do sometimes not only lose their right to land and water. They are commonly and systematically denied information. And, governments often hesitate to stand up for those whose human rights are violated. States are too often in companionship with the commercial ventures, also when they violate human rights. This is particularly serious in the sectors such as oil, gas and mining. Industries in these sectors

too often infringe the natural resources belonging to the already very poor. There are figures indicating that such infringements represent as much as 30 percent of all accusations related to business violations of human rights.

The expansion of multinational enterprises guilty of severe human rights abuses is facilitated by globalisation. Such abuses came to extend far beyond labour rights and non-discrimination. The water contamination, deforestation, overexploitation of natural resources and soil erosion that took place due to Texaco's oil extracting practices in Ecuador is but one eminent example. Later Nike was criticised for allowing sweatshops. The Ivory Coast was the victim of toxic waste dumping and diamond retailers were fuelling conflict in Africa. Migrant workers and others were subject to inhumane treatment on a large scale. This deploring reality was the main reason for the then UN General Secretary Kofi Annan to initiate a huge project on business and human rights.

### **The United Nation Guidelines on Business and Human Rights**

In 2005, Professor John Ruggie of Harvard Kennedy School was appointed Special Representative to the UN Secretary General on Business and Human Rights (UNGP). He was given the task to consider the respective roles and responsibilities of states and businesses with respect to business impacts on human rights. The Human Rights Council unanimously adopted the United Nations Guiding Principles on Business and Human Rights in 2011 after a six-year long consultative process.

The UNGPs have been translated into all official UN languages. They are already considered as the global authoritative standard on business and human rights of expected conduct for all business enterprises wherever they operate, including law firms and practicing lawyers. They have indeed been successfully received.

The 2013 revisions to the UK Companies Act requiring listed companies to report on human rights issues, the 2015 UK Modern Slavery Act, and the European Parliament's 2014 directive requiring 6,000 large public enterprises to report on their human rights performance are recent examples of this impact.

The European Union has recognised the UNGPs as "the authoritative policy framework" addressing corporate social responsibility and has called upon states to implement them through national action plans. Such plans have also been adopted. The G7 Leaders strongly endorsed the framework in 2015. So have international standard setting bodies such as the OECD and the International Organization for Standardisation.

Business and human rights standards have been developed for specific industries, sectors, countries and human rights issues.

The UNGP framework consists of 31 principles and commentary. They are based on three pillars: 'Protect, Respect and Remedy'. I will now discuss some of the features.

States have a duty to protect against human rights abuses by third parties, including business, through appropriate policies, laws, regulation and adjudication, based on existing legal obligations under international law.

All business enterprises have a responsibility to respect human rights, which means to avoid infringing on the rights of others and to address negative impacts in which they may be involved. The responsibility applies to all enterprises regardless of their size, sector, operational context, ownership, structure or location. The responsibility requires that business enterprises avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur. Companies shall even seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they themselves have not contributed to those impacts.

Business are further expected to adopt a high level human rights policy commitment and to develop and implement human rights due diligence. Business is also expected to commit publicly to respect human rights.

States should take appropriate steps to provide access to effective remedy for human rights abuse and Businesses should use effective operational-level grievance mechanisms in order to identify and address grievances early and to act as a feedback loop. Businesses should provide for and/or cooperate in legitimate processes to remedy adverse impacts that they identify that they have caused or contributed to. Business is obligated to have process in place to remedy harm that business causes and contributes to.

The globalisation process has made it obvious that business has an important role in ensuring that human rights are respected. There are however many different ways of business contributing to human rights violations. The UNGPs classify them in three groups

Firstly, by **causation**. This arises when business actions lead directly to an impact such as exposing workers to hazardous chemicals without adequate protection, manufacturing dangerous products without adequate warnings, discrimination, to pollution of drinking water. If a business **caused** the harm the business should cease the action and remedy the harm.

Secondly, by **contribution**. This is when business incentives, facilitates or enables third party impact; e.g. when an internet company provides data about users of its services to

a repressive government that enables the government to track and harass political dissidents, contrary to international human rights standards. Another example of this is when an electronic retail brand changes product requirements for suppliers repeatedly and at the last minute, without adjusting production deadlines or prices, thereby pushing suppliers to set aside labour standards to ensure that the order is delivered. If the business contributed to the harm the business should cease the action, use or build leverage to mitigate the risk of future harm and contribute to remediation of the harm.

Thirdly, by linkage. This may occur when in business operations, products or services are directly linked to an impact even though the business did not cause or contribute to that impact; e.g. human rights impacts occur deep in a company's supply chain, notwithstanding the business's robust efforts to prevent them or the use of portable ultrasound machines by doctors to screen for female's fetuses, facilitating their abortion in favour of male children, notwithstanding prohibitions by the manufacturer on such use. Another example is a bank providing loans to an enterprise for the purpose of financing business activities that, contrary to agreed standards, result in the eviction of communities or when a business enters into a joint venture with another company that uses labour for the joint venture that is tainted with human trafficking, despite its agreement and commitment not to do so. If the business is merely linked to the harm the business should use or build leverage to seek mitigate the risk of future harm. Business is not expected to contribute to remedy when they are merely linked to the harm.

### **The UNGPs and legal responsibility**

With the evolution of the 1949 UN Declaration and ensuing UN Conventions overall norms have become more and more important. This development reduces the legislative freedoms of the national states. International law has gained power at the expense of state law by transferring increased normative power to transnational organisations such as the EU and the UN. The Westphalian paradigm from 1648 that all states are sovereign and entitled to pursue their own interests, only limited by free choice, has been overtaken by human rights and other supranational norms.

The UNGPs refer to 'internationally recognised human rights', an authoritative list of which is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), together with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

When human rights were first formally articulated in international declarations and conventions, they were primarily addressed to governments. The guiding principles however, as I already have mentioned, apply to all states and to all business enterprises. The framework imposes duties on states and lay responsibilities on business enterprises. But, the UNGPs themselves do not, impose legal responsibilities on companies.

Because business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights, their responsibility to respect applies to all such rights. Some human rights may be at greater risk than others in particular industries or contexts, and will therefore be the focus of heightened attention. Consequently, all human rights should be made subject of periodic review.

The business' obligation to respect human rights exists independently of states' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. That duty exists over and above compliance with national laws and regulations protecting human rights. This said, compliance with national law is of course a keystone in the corporate responsibility to respect.

However, the UNGPs stress that businesses should respect internationally recognised human rights wherever they operate, including where domestic law is silent or unenforced. A business should therefore strive to honour the principles of internationally recognised human rights, even if they are not adequately reflected or enforced under local law. Nor should business enterprises undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.

This said, the responsibility to respect does not exist in a law free zone either.

Much of the content of the responsibility to respect was already part of hard law before the UNGPs were endorsed. Domestic law of many States had previously required business to respect human rights in numerous areas, such as anti-discrimination, workers' rights, workplace and public health and safety, and privacy. And as noted above, the UNGPs have in fact already become adopted and reflected in law and regulation, in commercial and financial transactions and agreements, and the advocacy of civil society. That trend is likely to continue.

## **Two challenging examples of today**

One industry that is of special interest, in respect of protection of human rights, is the weapon industry. Export of military equipment is regulated by national and international law, including the UN Arms Trade Treaty Export. In this field of industry, business and the governments tend to be closely linked together, in times of war as well as in peace. In the name of security, defence and foreign policy the weapon export has increased disquieting-



ly. States and business are facing, not only a moral-ethical problem, but also legal issues. But as is the case too often with human rights violations; there is a lack of efficiency and enforcement of legal responsibility.

Last month the last remaining USA manufacturer of cluster bombs is ending production due to regulatory scrutiny and reduced orders for the internationally banned munition. The bombs contain bomblets that can scatter widely and kill or injure indiscriminately. The weapons were banned in a 2008 international treaty that USA and Russia refused to sign. The White House however blocked the transfer of cluster bombs to Saudi Arabia since the Saudi military campaign in Yemen have killed at least 3 700 civilians including at least some 1 100 children and displaced nearly 3 million from their homes. The conflict has left 83 percent of the population dependent on humanitarian assistance for survival. It is worth noting, that the close down was not a result of the producing company's adherence to the protection of human rights. It was the result of a political decision due to pressure from NGOs, like the Human Rights Watch and Amnesty International.

At the end of August this year, 64 members of the US Congress asked the White House to walk back on a proposed 1.15-billion-dollar weapon sale to Saudi Arabia replacing tanks in the Yemen campaign. The letter cites Amnesty International's documentation of at least 33 unlawful airstrikes by Saudi Arabia across Yemen that "deliberately targeted civilians and civilian facilities, such as hospitals, schools, markets and places of worship." Sweden is also participating in the Saudi campaign, through the Erieye radar system. Moreover, Sweden is one of the largest weapon exporters per capita in the world. This is a feature of Swedish export, which causes deep ethical problems.

Another area, where business in companionship with politicians has failed in protecting human rights, is the environmentally hazardous industry. Climate change caused by industries increasingly affects human rights. Fossil fuel extraction for power production has reconfigured forests, oceans and mountains. Burning coal and oil have increased the temperature, causing land rise and other climate disasters including melting glaciers and migration of species and humans. 2016 is believed to be the warmest year in history. The problem is gigantic. The increasing linkage between climate change and international security is obvious and can be of help, in order to increase efficiency.

There are those who argue that the Security Council should get involved in order to impose binding obligations on all states. The climate threat can be compared to those of terrorism and proliferation of weapons of mass destruction. They have no clear geographical or time limitation. They are of global nature and will affect more than one country. But it would, in my view, be too far reaching to take the stance that climate change should allow initiation of Chapter 7 enforcement powers of the Charter.

Despite the urgency to reduce carbon emissions under the UN Framework Convention on Climate Change states have yet failed to act. The Convention on Climate Change is legally binding on the parties. But, legal liability is not allocated in any way. It seems impossible to hold anyone responsible for anything. In December 2015 by the Paris Climate Agreement, 195 states agreed on the need to limit the average global temperature rise to less than 2°C and preferably to less than 1.5°C. But, there were no hard specific emission reduction requirements or deadlines necessary to meet these targets. As so often in this area, states confine themselves to “best efforts” – undertakings. And we all know what that tends to mean. This lack of efficiency from the international political power will in the future demand more of business, civil society and the judiciary in limiting climate change.

### **International law and an International Human Rights Judiciary**

There are several human rights principles and rights including International Human Rights Law, International Humanitarian Law, International Criminal Law and ICJ which involves international and national mechanisms designed to enforce violations. Unfortunately, too many state-actors and multi-national cooperation's are evading the prohibitions. Some companies because of their power and influence are in reality beyond the reach of the law. These companies have the potential to significantly impact the lives and well-being of people and the environment. The ways these companies operate often prevent the accountability of their decision-makers.

The ability, for existing and possible human rights institutions or mechanisms to prevent and mitigate the negative effects of globalisation, is limited. It will be up to the civil society and the business community, in cooperation with states that realise the challenge, to counteract the effects of states and businesses exploitation of land and people.

When overall norms are becoming more influential and courts are as well, judges in national courts may be more open to take necessary steps to uphold human rights and to prevent violations. They might be inclined to set aside traditional domestic legal principles and constitutional rights and to consider international law principles, so as to adjudicate the right of citizens to be protected from climate change impacts and other violations of human rights.

Three important decisions from last year indicate that courts around the world are willing to take a greater responsibility in situations where the government, legislator and business have failed: They are Urgenda from the Netherlands; Leghari from Pakistan; and Foster v Washington Department of Ecology from the United States. In those cases, each of the courts found that there was a legal duty on the respondent government to rein in carbon emissions or take other measures to prevent significant climate-related human and civil rights impacts. If business does not voluntarily meet environmental challenges, business will be forced to do so in the future.

The international Bar Association has issued a report in 2014: Achieving Justice and Human Rights in an Era of Climate disruption. A working group is now following up this report on a Draft Model Statute on Legal Remedies for climate change, applicable to litigation in both domestic and international fora.

### **The responsibility of Lawyers and Bar Associations**

The UN Basic Principles on the Role of Lawyers, an instrument adopted 26 years ago, emphasises that professional associations of lawyers have a vital role to play in upholding the rule of law and protecting human rights. The Bars should ensure that their members can provide legal services to all in need of them. And Bars should cooperate with governmental and other institutions in furthering the ends of justice and the public interest.

The citizens need to be aware of their rights in a democratic society. The Basic Principles are very clear on this. The Bars have a duty to educate and inform on ethical duties and human rights and fundamental freedoms recognised under national and international law. This task includes a certain responsibility to react when the rule of law and human rights are threatened. The Swedish Bar does that regularly.

But, the profession has also a responsibility in protecting human rights in giving advice to clients. That responsibility goes beyond the narrow role as a legal engineer. This is where the Ruggie principles and the UNGPs come in.

Lawyers act as counsellors to governments, to parliaments and to business clients. In doing so, they have a duty to advise the clients, as to the need for states and businesses to respect human rights and to align themselves with the UNGPs, particularly given their potential to evolving into hard law. If the legal advisors to the Bush administration, had taken their moral and ethical responsibility, and advised the President not to reinvent torture as a method for interrogation, and not to invade Iraq and if the President had listened, the world of today might have been very different.

To the extent that the UNGPs are soft law, lawyers should enhance the value of their services by providing appropriate human rights context for their legal advice and services. What is considered unethical and constituting a reputational risk today, may well be unlawful tomorrow.

The relevance of the UNGPs to broaden areas of legal practice has led a number of prominent national as well as international law firms to establish business and human rights practice groups.

The activities of Bar associations are important means for lawyers to increase their ability to help their clients to respect human rights. The goal is to; integrate the UNGPs and other

business and human rights standards into the mainstream of legal practice, and creating tailored programmes for lawyers.

The International Bar Association along with the American Bar Association and the CCBE, the European organisation for Bars and law societies has adopted guidelines for Bar Associations and for Business Lawyers on the Guiding Principles. The Swedish Bar has also issued guiding principles for the Swedish Bar, law firms and individual members of the Bar. We have also added a new rule in our Code of Conduct stating that lawyers may not give advice aiming at counteracting or circumventing human rights. A lawyer is obliged to strive for supporting and upholding human rights in his or her business.

### **Professional Challenges**

The duties of a lawyer are built on some core principles of the legal profession. Those are independence, client loyalty, confidentiality and strict rules on conflict of interest. Independence is the duty to represent the client without regard to irrelevant matters or interests. Loyalty is the duty solely to safeguard the interest of the client and to seek to obtain the best result within the framework of the mandate and the law. Confidentiality is an obligation to preserve the clients' secrets and confidences. The prohibition against acting for conflicting interests is an overriding principle designed to ensure independence, loyalty and confidentiality.

The UNGPs, necessary and good as they are, may however pose severe challenges for lawyers, whether they are in house counsel or independent law firms. The challenge for law firms, as business enterprises, is to meet the expectations to respect human rights, without derogating from their independent professional responsibilities as lawyers.

The UNGPs are not intended to trump legal professional codes of conduct, given the critical role that lawyers play in upholding the rule of law and supporting the administration of justice. It is worth noting that the ethical codes of the profession align with the UNGPs in several key respects.

Thus, the UNGPs do not infringe upon the right of businesses to undertake, and the obligation of legal counsel to provide, a robust defence to allegations that the business has engaged in conduct that violates human rights. Nor, do the UNGPs suggest that business enterprises (such as law firms) have responsibilities for the general human rights performance of their business relationships (such as with their clients). The framework is only concerned with identifying and addressing the specific human rights impacts that a business enterprise causes, contributes to, or is directly linked to by its goods and services.

## **To conclude**

There are two very distinctive views on how to implement human rights within the business sector. One is arguing that human rights only can be protected by international law. The other advocates that frame works by self-regulation, industry practise and market standards will automatically lead to upholding the human rights. The UNGPs are seeking to balance these two extremes.

Swedish companies like Electrolux, IKEA, Atlas Copco, LKAB, Skanska and H&M are at the forefront in following the OECD's guidelines for multinational companies, in applying the ten principles of UN Global Compact and in following the UN Guiding principles on Business and Human Rights. They are all setting good examples.

Last week the leading garment retailer in the world, H&M, entered into a global framework agreement with the world's largest sectorial trade union organisation, IndustriALL Global Union, representing 50 million workers. This agreement is an important commitment in supporting the human rights of 1.6 million garment workers, which are employed in the 1 900 factories, from where H&M buy products. This is one example of implementing the UNGPs.

## **So, can business meet the challenge to implement human rights in practice?**

To give a clear answer: Despite good examples. It is apparent that many things remain to be done on a global scale. The business community needs to find efficient working methods to implement the principles and ways of educating its employees. The most important prerequisite to be able to meet the challenge is – in my opinion – to create a culture of respect for humanity and human rights. That culture of respect needs to be fostered among business leaders and investors alike. It must also be solidly anchored among political leaders.

Many important initiatives are taken and much good work has been done. We have, I believe, left behind us the credo so enunciated by the famous economist, Milton Friedman, when he said that the business of business is business. There is, I believe, today a fairly wide spread consensus that the business of business goes further and that it also includes other interests, among them the protection and advancement of human rights.

There is much left to be done when it comes to corporate social responsibility, accountability and liability. But, I do believe that, ultimately, also business will show that it is up to the challenge. In this very important work Society needs brave politicians like Anna Lindh. We need lawyers, judges and NGOs with high integrity, like the Raoul Wallenberg Institute. And most importantly in this respect, we need wise and courageous businessmen like Raoul Wallenberg.

In that context I would once again like to quote the former UN Secretary General, Kofi Annan who, in referring to Raoul Wallenberg said;

*“His intervention gave hope to victims, encouraged them to fight and resist to hang on and bear witness. It aroused our collective consciousness. Remembering his life should be an inspiration to others to act; for our future generations to act; for all of us to act”.*

Thank you for your attention!