

Human Rights and the Global Economy. Interdependence in the context of unequal power relations

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Human rights and the global economy are interconnected. The economy is not only essential to prosperity worldwide. It can also contribute to the dissemination of internationally agreed human rights standards, for example labour rights. However, the relationship between the global economy and human rights is complex. The predominant economic system causes considerable harm. Weaker regional and national economies cannot compete with global players, and marginalised groups or individuals rarely benefit. Far too often, the political frameworks at the international, regional and national level allow companies to put profit above people's rights or environmental concerns.

In the last two decades, we have seen growing efforts within the international human rights regime to address existing governance gaps more systematically and effectively. But why are universal human rights still not better protected by states and the international community? What role do unequal power relations between states, the economy and civil society play? How can they be challenged? What should be done about conflicting international regimes? And is the non-binding nature of the current instruments on business and human rights really the main challenge? These questions were discussed by a group of international experts from various professional and academic backgrounds during the International sef: Expert Workshop in Bonn in September 2017.

The normative frameworks of the capitalist economy and human rights differ substantially. In a capitalist world, competition and individual profit maximisa-

tion are core values. But maximising profit is not the same as maximising human well-being. On the contrary, it usually produces human costs. The human rights framework, by contrast, is based on the principle that all human beings are free and equal, and that they should be able to live a decent life in dignity while respecting the rights of others. So how do business and human rights fit together from a normative point of view?

With regard to states' responsibility, one speaker argued that the normative framework established by the United Nations (UN) should be the globally accepted reference point which the member states need to live up to. Most UN members have ratified the UN's core human rights instruments. Another global framework widely accepted by UN member states is the 2030 Agenda for Sustainable Development.

Good possessions vs. bad possessions?

From a philosophical perspective, it is important to note that there are different forms of capitalism, some of which include a social component, for example. With respect to human rights, aggressive neoliberal capitalism seems to be the most problematic. It fosters selfishness, competition and consumerism. In the end, it has negative consequences for the wealthy as well, such as climate change and global insecurity, one speaker argued. She reminded the workshop participants that in traditional Franciscan thinking, wealth and power were evil. This thinking

was challenged by the papacy, which argued that everyone needed to possess food and water. But then, is there a distinction between good possessions and bad possessions, she asked. How much possession is allowed? Is de-growth the new Franciscan ideal? And is free will a possession too, leading to autonomy and individualism? Human rights are, first of all, individual rights granted by the state. But how about economic actors? Should their extensive economic rights be accompanied by duties?

Inclusion without hijacking

Traditionally, companies were economic non-state actors with a limited role in international law, as one expert explained. In this perspective, they are neither duty-bearers nor participants in rule-making. But the CSR debate in the late 20th century turned attention to the fact that business is harming human rights. Many companies today have higher revenues than the national GDPs of countries as diverse as Sweden, Malaysia and Nigeria, as one speaker pointed out. This economic power translates into political power, according to many of the participants. And with power comes responsibility. Gradually, therefore, companies have been increasingly included as duty-bearers in the international human rights framework. But why are these instruments still so weak? One expert had an answer: because states do not agree on the compliance regimes to be included in the normative frameworks.

Looking back at the business and human rights debate since 2005, one question remains: how can power imbalances in multi-stakeholder regulatory processes be addressed? While agreeing that business needs to be consulted, a civil society representative feared that law-making processes could be hijacked by the business sector exerting its excessive influence and power. How can inclusion be ensured without hijacking, she asked.

Stronger proceduralisation of multi-stakeholder regulation may be a way to balance power in process and outcome, another speaker argued. We should think much more about how multi-stakeholder processes are designed. If processes were open and transparent, business could not simply hire the most expensive lawyers to influence policy-making. Furthermore, lobbying would lose its legitimacy if the business community were more openly involved. This argument was opposed by another civil society representative, who referred to a recent study on companies' influence. It showed that companies have a dual strategy – they are engaged in open processes and, at the same time, continue with their aggressive “behind closed doors” strategies, e.g. against the Dodd-Frank Act. So involvement and transparency do not provide any guarantees that hidden actions will be prevented.

Ethical principles not only for business

Another participant emphasised that lobbying should not only be seen as a negative thing. Every group lobbies for its interests, and the business community is expected to actively engage in the policy discourse. Furthermore, businesses are run by people who want to enjoy their human rights as well. They do not intend to harm their communities or their employees. Another expert reminded the participants that today's scale of inequality and environmental loss endangers nations as well as business. He argued that the business sector has a major role to play in humanising the market; not all business actors ap-



plaud neo-liberalism and deregulation à la Trump. But are human rights really the right instrument to deal with economic inequality or climate change, another participant asked, warning against overstretch.

Should lawyers have a set of ethical principles, such as the Hippocratic oath in medicine, one participant asked. According to one participant, this would prevent them from collaborating in tax avoidance, for example. But then, would this also hold true for law-makers? Or would they ultimately be hijacked by business interests if there was a genuine political will to give priority to human rights?

The need to challenge unequal power relations

Worldwide, an increasing market concentration can be observed, leading to immense power in the hands of a small number of very large companies. This is particularly evident in the field of trade and investment. This correlates with the fact that inequality within states is growing while inequality between states remains high. The decline in interstate inequality is the result of economic growth – but only in China and India.

Inequality plays a major role in trade agreements, as one expert pointed out. These agreements are driven

by large companies and developed states. Key issues affecting the population in developing countries, such as farmers' interests, are not addressed. And lately, new issues have been included in these agreements, such as service sector liberalisation, intellectual property rights and government procurement. E-commerce is playing an increasing role, driven by powerful actors such as Amazon and Alibaba. In the long run, the poor are most likely to lose out, one speaker said, because new instruments and rules are designed to benefit the powerful. Unequal structures at the global level interact with inequality on the ground. Low wages in the garment industry as a result of globalisation are one example.



What is powering inequalities?

There was growing recognition that inequality – like environmental degradation – is a key challenge to the economy, one speaker claimed. However, at least three factors are furthering power inequalities:

1. **Corporate law/governance:** An extraordinary shift towards maximising shareholder value drives corporate misbehaviour. All that counts is the cheapest price along the best timeline. Negative impacts are pushed towards the end of the production line.
2. **Increasing timidity of government regulators:** Governments provide no incentives for corporations to respect human rights. Instead, they ask corporations if they want regulations, and if so, what kind of regulations these should be.
3. **Impunity:** For most abused people, the legal system does not work; they have no access to effective remedy.

There is a glimmer of hope, however, as some companies have started to change their behaviour, recognising that it is not sustainable. More leading companies need to speak out for regulations that allow scope to deliver on human rights, one expert postulated. Regulation that brings everyone up to the

top performers' level is needed instead of regulation that brings top performers down to the lowest common denominator.

States as human rights abusers

But what is the role of the state, then? From a Southern point of view, states traditionally were human rights abusers, one speaker explained. This is why governments from the Global South do not speak out for extraterritorial obligations in international human rights law, for example. However, in international relations, Northern countries often fail to respect human rights as well. Here too, power relations are very unequal as the skills of Southern governments in international negotiations are still underdeveloped. Northern countries seem to advocate for human rights only in voluntary agreements such as the SDGs. In binding agreements in fields such as trade and investment, there are still no provisions to prevent human rights abuses.

The human rights framework and the right to development should always come first; other frameworks should be subordinated, one speaker said. She therefore advocated for human rights impact assessment in trade agreements. With regard to development, flexibility within free trade agreements is essential to enable governments to create policies for the benefit of vulnerable groups, through redistribution, by giving preference to women producers, etc.

Are impact assessments a promising strategy?

Impact assessments are incredibly complex and difficult, another expert replied, warning that we must be mindful of what human rights are really suited for. Far too often, information gathered in supply chains is problematic as it does not reflect workers' reality. There is therefore a danger in focusing on instruments such as these. We need to think in new ways, another expert claimed, for example by advocating for assessments where labour organisations, rather than industry or states, take the lead.

Detailed human rights assessments should come as a second step only, one expert suggested. A checklist approach could be the first step to ensure that states at least ask about human rights. Others agreed that human rights assessment is very time-consuming and that it is unrealistic to expect that governments or companies would do this properly. We should therefore think of other approaches to highlight risk areas and to hold states accountable. Another question to be asked is what follows if supposed negative impacts prove to be true.

New cross-border instruments could be one way forward with regard to global value chains, one speaker suggested. One option is to implement international labour inspections, following the example of the European Convention for the Prevention of Torture, which obliges its signatories to open their prisons for international inspections.

International finance and human rights

The relationship between international finance and human rights is particularly difficult. In UN financial debates, the inclusion of human rights is not usually welcomed, the argument being that such questions should be dealt with by the human rights bodies. At the same time, finance might be seen as already being included in the business and human rights dialogue. But as one speaker clearly demonstrated, finance is very different from real economy and highly specialised. At least three of its key characteristics are fundamental to its human rights impact: 1) its scale, which goes far beyond the rest of the economy, 2) its complexity and liberality, and 3) its interaction with domestic institutions of governance and power. International finance provides funding for companies, governments or projects that violate human rights, assist in the theft of public resources by public officials, trade complex derivatives that may impact rights (e.g. to food) or cause financial crises with long-term effects on social and economic human rights.

The scale of international finance makes underlying economies very vulnerable. It can quickly cause economic collapse, inflicting considerable damage on the public at large. The complexity of corporate, market and product structures has risen dramatically compared to 30 years ago. This complexity presents governments with major challenges, as even experts are no longer able to completely understand the system. The majority of financial products are socially useless, as one expert put it. The system is generating vast profits, but only for a small group of people. Furthermore, global financial flows can exacerbate existing power disparities and inequalities within states. While the assumption underlying liberalised international finance was global prosperity, what we are facing in reality is, first and foremost, a weakening of standards and an accountability gap. In many investment treaties, for example, companies have the right to sue governments for any policy change which adversely affects them, leading to a loss of governments' regulatory powers.

So how would a pro-human rights system look like? At present, nobody knows. During financial crises, everyone is concerned about protecting banks, but hardly anyone thinks about human rights. Furthermore, there is a substantial divide between the human rights logic, where every single violation counts,

and the logic of the financial system, where only high numbers are of relevance. One way forward might be the sustainability assessment of financial regulations that is currently being discussed. Furthermore, loan-giving banks' responsibility for human rights impact assessment of funded projects should be strengthened, one expert said. Another expert cautioned against putting too much hope in accountability measures. Every crisis is different, she argued. Accountability measures that would have worked for the last crisis may not necessarily work for the next one.



Towards primacy of human rights?

A particular focus of the workshop was the question whether the human rights regime should have priority over any other regimes, particularly investment and trade.

First of all, we should be aware of the progress made during the past few years. At the beginning of the debate on human rights and the economy, conversation with the trade sector was not possible at all, one speaker noted. This had changed substantially. Years ago, there was a great deal of either/or thinking – either free trade or human rights. No one seemed to understand that there were more nuances and that it was essential to ask which human rights or which kind of trade. The primacy of human rights has become an issue that can now be discussed seriously, for example in relation to investor-state disputes. Impact assessments should be used to ensure that trade agreements do not include provisions that do harm to human rights.

Human rights gaining relevance in investment arbitration

But should human rights only be used as a shield or bottom line in these agreements that serve a different objective? Or should they have constitutional status, a status of primacy, one expert asked. Another expert argued that from a legal point of view, neither of the two systems has a higher hierarchical position. The common perception is that they are two sepa-

rate universes with different legal communities. But what they have in common is the structure of legal language.

Most investment agreements are not self-sufficient systems. They include references to other bodies of law and are to be interpreted within a wider legal context. In practice, therefore, human rights are already part of the investment system, even if this was not so in the view of investment arbitration originally. This has changed, for example with regard to the right (or duty) of a state to protect the health of its population or the human right to water. In some cases, investment treaties have even been used to prosecute human rights violations, as one expert informed the participants.

Incorporating human rights into external debts

External debt regulations are a special case. External financing can contribute to development and establish conditions for the realisation of human rights, particularly economic and social rights. But this depends on loan conditions and the prudent use of funds from the borrower state. Excessive debt burdens have the potential to undermine the capacity



of debtor countries to create favourable conditions for human rights. They have to use their revenues for debt servicing instead of investment. Furthermore, retrogressive policy conditionalities (austerity measures, privatisation, etc.) and liberalisation that favours external economic actors have often worsened economic conditions instead of boosting the national economy. The result is increasing poverty, for example when public services have to be cut and people lose their jobs. This is increasingly a challenge in developed countries, too, such as Greece and Latvia. The present financial architecture falls short of these facts, one speaker said, asking for primacy of human rights. As an elaborated and universally agreed framework, human rights invoke specific legal obligations accepted by all states and accountability for human rights violations. But while most developing countries approve the consideration of foreign

debt and human rights in the UN, the majority of developed countries oppose this approach. And the World Bank and the IMF do not see themselves in charge of human rights either.

Legal obligations for enterprises

One of the main divides in the business and human rights community today is to be found between those who are in favour of voluntary agreements and those who advocate for legal obligations. For many years, the focus at the UN has been on voluntary regulation, resulting in the Global Compact and the Ruggie process with its UN Guiding Principles on Business and Human Rights. As progress in practice was rather slow, a process was initiated in the UN Human Rights Council to draft a legally binding treaty on business and human rights. This treaty is currently under negotiation.

At the beginning of the treaty debate, there was vast opposition. It was argued that such a debate would devalue the Guiding Principles. But instead, their implementation has accelerated substantially, one expert said, because of the threat of a binding agreement. He therefore came to the conclusion that voluntary agreements can be part of the solution as long as they are not regarded as the solution itself.

Critics saw a risk in shifting obligations from the state to companies. Traditionally, international law should hold states accountable, but many states have poor track records in protecting human rights. It is questionable, therefore, how much is going to change with a binding treaty, one expert said. Another problem identified with a binding treaty is its focus on transnational enterprises, bypassing 80% of the global workforce.

In practice, one speaker said, enterprises have so far focused on the implementation of the Global Compact and the UN Guiding Principles on Business and Human Rights. But developing national action plans has taken years, and there is still a lack of guidance on how to implement the Principles.

The potential of extraterritorial obligations

While everyone seemed to be in favour of creating a level playing field, the question is what the arrangements would eventually look like, one speaker said, referring to legislation in France and the UK (Modern Slavery Act). While some speakers saw potential in the private law avenue, others pointed to the problem that these national laws focus on very specific areas. This has resulted in a patchwork with different rules in every country and growing compliance costs for enterprises. At best, an international treaty could

provide a universal framework, making national regulations obsolete. Another speaker pointed to the fact that domestic law always depends on political will – but human rights are too important for that.

One result of a treaty on business and human rights could be a strengthening of extraterritorial obligations, i.e. the responsibility of states with regard to the behaviour of enterprises acting from their territory. This would give victims of human rights violations the chance to claim redress not only in their state of residence – as is the case under the Guiding Principles – but also from the home countries of transnational enterprises. This would be a positive development, one speaker pointed out, as there is often no effective remedy in the country itself. Under common law, court cases in companies' home countries are already possible, but these cases can be sent back to the country where the human rights violation took place. For companies, obligations such as these are nothing new, one speaker stated. States have always been obliged to protect human rights in relation to private actors. They have done so in domestic law and now, step by step, this law is being extended to extraterritorial operations as well.

Shifting the focus from remedy to prevention

Another speaker pointed out that courts are a terrible way to sort out disputes; most people around the world are not in a position to go to court as it is very expensive and time-consuming. Others agreed and showed their frustration with the widespread focus on enforcement. Thinking of sanctions will not help the victims; instead, we should keep the focus on corporations that do not want to do harm, rather than thinking of reputational damage or imminent court cases only.

What are the alternatives, then? One expert encouraged the audience to find ways to support corporate leaders who are looking for change. Civil society should not be so negative about business, he said. It should give reputational rewards to companies that want to progress, that want to deliver and show that it is commercially viable to act in conformity with human rights. We should all encourage these companies to fight for stronger regulations and to withdraw from business associations that pursue a different policy. He pointed to the fact that it is not only governments but also business, the media and civil society organisations that deliver normative shifts. A move towards mandatory transparency and due diligence could also be driven by corporations and

investors. Although there are a number of frontrunner companies, what has been missing so far is a core of companies which are able and willing to catch up with the leaders, one speaker added.

Mobilising for change

Awareness-raising and internal training across the different layers within companies are important to move forward in practice, one speaker said. This has to be done continuously – and it needs the CEOs' support to be effective. The mindset within companies has to move from what is a risk to the company to what is a risk to rights-holders that might turn into a risk to the company.

As an alternative to the treaty currently discussed, one speaker suggested an international agreement on modern slavery. Like-minded countries could lead the way, taking progressive companies on board, agreeing on standards to be implemented in national legislation. Companies would then have to report only once – and not to different countries.

The workshop ended with a plea for mobilising for change. Common knowledge should be used to create change. We face a great many diverse challenges in relation to business and human rights – but there are also many different ways to progress, besides a binding treaty. Consumers as well as social movements could be a powerful force to bring the issue into the public domain – and to influence political will. One expert therefore encouraged researchers and activists alike to channel their resources to wherever change is most likely to happen.

International sef Expert Workshop 2017: Participants

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