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On 1st-2nd November 2017, Sancroft attended Innovation Forum's Business and Human Rights Conference - 'manage risk, implement policy and secure relationships,' hosted by Freshfields Bruckhaus Deringer.

The conference brought together sustainability professionals, legal practitioners, civil society, and investors for two days of debate and analysis of key human rights trends as pertain to business.

Conversation and insight was candid, and the complexities of some key issues were explained by experts in their field. The conference acted as an excellent opportunity to take stock of where the intersection of business and human rights sits in today's world.

With such an array of professionals bringing their individual perspectives on important matters, from sustainable sourcing and procurement to the living wage and modern slavery, there are new and emerging trends worth identifying and considering.

### **A changing legal environment**

The last two years have seen an increase in the number of legal cases being taken against businesses in relation to human rights issues. In 2015, Zambian villagers alleged that UK mining company Vedanta Resources had destroyed land and livelihoods through its local subsidiary company, Konkola Copper Mines. Questions were raised over whether a parent company's commitment to health and safety and other safeguarding policies could be deemed applicable to subsidiaries. Just last month, the UK High Court found that the parent company, Vedanta, indeed had a duty of care.<sup>1</sup> The ruling was significant in delineating the relationship between parent companies and their subsidiaries, especially around human rights obligations.

Further, the Bangladesh Accord on Fire and Building Safety has been regarded as a milestone in redefining the role business has in preserving human rights. A recent decision by the Permanent Court of Arbitration (PCA) in The Hague in September of this year, brought about by two global trade unions, found that companies who signed the Accord are indeed bound by its articles and dispute resolution mechanism.

For the first time, an arbitration procedure has been agreed between global trade unions and employers, with brands obliged to follow this specific resolution procedure where appropriate. As part of the process, workers' claims are first heard by a committee comprised of representatives from global trade unions and brands and chaired by a representative from the International Labour Organization, and parties wishing to appeal the committee's decisions can do so before the PCA.<sup>2</sup>

In addition, the new version of the Accord, signed in June 2017, obliges companies to pay severance to workers affected by factory relocations, and freedom of association is provided for explicitly amongst other measures that make clear the responsibilities of signatory companies.

<sup>1</sup> <https://www.leighday.co.uk/News/News-2017/October-2017/Court-of-Appeal-upholds-ruling-that-claims-by-Zamb>

<sup>2</sup> <https://www.lexology.com/library/detail.aspx?g=93ad5547-26e3-4560-87ae-5f82334b4d55>

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## Human Rights & Business – moving from the periphery

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This is not to discourage companies from writing aspirational statements and policies in relation to human rights, but to ensure that they are robust. As noted by a lawyer at the conference, there is no risk of litigation if a company is actually doing what it says it is doing.

To navigate the growing legal complexities, a more coordinated multi-stakeholder approach to human rights requirements is needed across a business. This is no longer an issue just for the corporate responsibility department, but needs engagement from teams as diverse as procurement, HR, legal and risk.

### **Digital rights, privacy, and security**

The growth in rights language has become intertwined with today's technology, and has manifested itself in a much stronger narrative around digital rights. This includes the right to privacy and freedom of expression, which has seen business more readily identify these as salient issues. The issues around privacy are constantly evolving. Silicon Valley and the companies with business models that rely predominantly on technology require huge reserves of customer data.<sup>3</sup> This evolution means that business must be aware of their duties around digital rights, and of the changing regulatory landscape around them.

With the EU's General Data Protection Regulation (GDPR) legislation due to be implemented from May 2018, companies must be aware of their responsibilities around customer data. The GDPR will have extra-territorial reach, i.e. that even international businesses operating using a data centre within the jurisdiction of the EU will be bound by the regulation. Germany is ahead of the game on this, as the first country with 'GDPR-ready' domestic laws. Businesses must begin taking steps to ensure complete oversight of this new law, and to safeguard legislative compliance.<sup>4</sup>

In addition to changing legal frameworks, companies of all kinds must be willing to actively look further than their traditional supply chains in identifying their human rights impacts, including by assessing their interaction with employees. In January 2016, in *Bărbulescu v. Romania*,<sup>5</sup> the European Court of Human Rights found that a company's monitoring of an employee's Yahoo Messenger account amounted to a violation of Article 8 of the European Convention of Human Rights, the right to respect for one's private and family life, his home and his correspondence. Although it was initially agreed by the company and employee in question that the messaging account in question was to be used for work purposes, the ruling built on existing international frameworks that mandate employers to notify employees on data collection, and to explain why said data is being utilised, to ensure privacy rights are upheld.

The ruling shows how the onus is on businesses to be transparent in how they use employee data. As one legal commentator notes, "technology exacerbates these problems." Adding, "smart phones, cheap laptops and fast internet access facilitate remote working including from home. This blurs the temporal and spatial boundaries between work life and home life as well as workplace and home."<sup>6</sup> While technology has undoubtedly empowered employers in how they manage employees, it has also bestowed additional responsibility in ensuring the protection of workers' rights.

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<sup>3</sup> <https://www.theguardian.com/world/2017/aug/23/silicon-valley-big-data-extraction-amazon-whole-foods-facebook>

<sup>4</sup> <https://www.out-law.com/en/articles/2017/july/germany-continues-to-be-on-track-to-become-first-gdpr-ready-country-with-new-data-protection-laws/>

<sup>5</sup> <http://hudoc.echr.coe.int/eng?i=001-159906>

<sup>6</sup> <https://www.ejiltalk.org/barbulescu-v-romania-why-there-is-no-room-for-complacency-when-it-comes-to-privacy-rights-in-the-workplace/>

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## Human Rights & Business – moving from the periphery

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The rapid growth in questions surrounding privacy and data embodies the fast-changing nature of technology/regulation and its intersect with human rights, and businesses must take heed.

### **The low-carbon economy and human rights**

The proliferation of green energy has had a significant impact on the way in which consumers see their carbon footprint, but a keen eye must be held on the impact of this kind of technology on human rights.

Resource extraction is central to these kinds of concern, and one pertinent example is in the area of cobalt extraction. 50% of the global production of cobalt is found in rechargeable batteries, and this is only going to grow with the proliferation of lithium-ion batteries -especially with the increasing demand for electric vehicles.<sup>7</sup> A recent Amnesty report describes how although some companies are attempting to source cobalt responsibly, the bar is incredibly low.<sup>8</sup> Amnesty notes that large companies are not adequately confronting child labour allegations within the industry, and the report concluded that many companies simply were not asking even basic questions about where their cobalt is sourced from.

Climate change is undoubtedly a human rights issue, but businesses must acknowledge that in finding a solution, they mustn't become part of the problem. Access to resources, indigenous rights, and the carbon footprints of these kind of projects themselves have all been questioned. The Business and Human Rights Resource Centre has amassed a bank of cases of where renewable energy and human rights have collided,<sup>9</sup> including a wind farm project in Colombia, a dam building project in Ethiopia, and alleged land right violations in Myanmar.

With the manufacturing of green energy products implicated in human rights issues, and the subsequent potential complications such as land rights, green energy like all other industries requires careful consideration.

It's up to businesses to do green energy with human rights as a central force; and consumer/NGO focus on this issue is growing. Environmental considerations must go hand in hand with social ones to ensure the protection of all stakeholders.

### **The modern slavery narrative isn't going away**

A central theme of the conference was modern slavery. The 2015 UK Modern Slavery Act (MSA)<sup>10</sup> has attracted widespread attention from a broad range of stakeholders, and has obliged many companies to consider their role in combating forced labour.

Overwhelmingly, the sentiment around the Act, and in particular the requirement of businesses to disclose their steps taken to ensure supply chains are free of slavery, was positive. The Act was praised by participants at the conference for being clever in its openness, in that businesses must outline the steps they have taken rather than participating in a compliance-focussed 'tick box' exercise.

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<sup>7</sup> <https://www.cobaltinstitute.org/rechargeable-batteries.html>

<sup>8</sup> <https://www.amnesty.org/en/latest/news/2017/11/industry-giants-fail-to-tackle-child-labour-allegations-in-cobalt-battery-supply-chains/>

<sup>9</sup> <https://business-humanrights.org/en/case-studies-renewable-energy>

<sup>10</sup> <http://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted>

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## Human Rights & Business – moving from the periphery

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Further, NGO attention remains focussed on the topic - and guidance on how best to undertake modern slavery reporting is becoming more widespread. The Act's ambition for a 'race to the top' relies on pressure from civil society, and there is undoubtedly increasing attention on how businesses are approaching their modern slavery responsibilities.

With many companies now considering the content of their second annual MSA statement, now is a good time to take stock of the progress that has been made in raising awareness, but also to consider next steps - and how to make sure companies who aren't currently doing enough in this space become compelled to do so.

The Act is explicit in asking companies to describe actual steps taken year on year in combatting modern slavery and forced labour in their supply chains. This puts the onus on the company to robustly identify risks and to accurately articulate their action points of the previous year. In coming up with second statements, there is a great opportunity for companies to show leadership in the area through transparency, clarity, and openness on human rights issues.

A saliency-based approach, one where risks that are closest and most pressing to a company are identified, is a good way of considering human rights issues. Not only does it encourage companies to be honest about where their most significant risks lie, and to engage with appropriate external partners where necessary, it puts people at the centre of analysis. Salient human rights assessment ensures businesses begin to see the human cost of their activities, and can begin to mitigate and take appropriate steps to remediation where necessary.