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The Alchemy of Business & Human Rights (Part V): The Culture of Change

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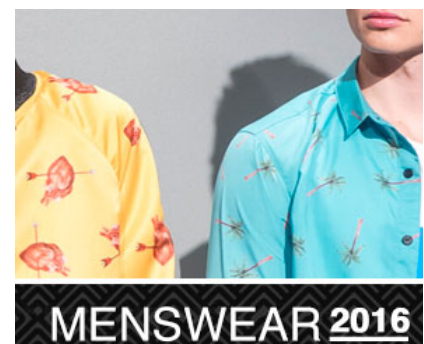
Aaron Marr Page

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This blog series has been examining the booming new field of **Business & Human Rights (BHR)**, which has revolutionized how the world's leading multinational corporations are talking about and engaging with human rights. After looking at how BHR sparked early momentum with [a new, collaborative spirit](#), we detoured into some concerns: how corporations are [using their BHR leadership to push the human rights agenda](#) in interesting but also self-serving ways; how “civil society,” the traditional driver of the human rights bus, [has potentially been marginalized](#) by the lack of any articulate role in the [UN Guiding Principles on Business & Human Rights](#) (UNGPs), the foundational text of BHR; and how one of BHR's key innovations, a company response mechanism hosted by the [Business and Human Rights Resource Centre](#) (BHRRC), was [susceptible to power dynamics](#) that at times allowed corporations to re-frame disputes and avoid the accountability.

There is a tug-of-war here between old and new models of human rights advocacy, between civil society groups used to setting the agenda and new business community entrants. BHR academics have their own way of describing this: Professor John Ruggie, the architect of the UNGPs, designed them to reflect a model of “polycentric governance” — overlapping but distinct regulatory systems, formal and informal, operated by governments, civil society, and the business community, respectively.

Perhaps the central BHR insight was to recognize the untapped potential in the area of corporate governance; to recognize that modern business, stocked by professionals who grew up with notions of corporate social responsibility, is genuinely driven to be part of the human rights solution. Critics of corporate



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governance solutions dismiss them as non-binding and therefore meaningless, whereas Ruggie and others maintain that business embrace of the UNGPs changes the “social norms and expectations” in the corporate governance space, and that, once cemented, the norms are just as binding determinants of behavior as any law, if not more so.

Yet corporate governance is only one of (at least) three governance systems, and Ruggie’s defense to human rights-purist critics is that they should continue their work apace, either supported by the UNGPs or at least unhindered by them. Ruggie [views](#) this work as “civil governance,” a system “employing various social compliance mechanisms, such as advocacy campaigns, law suits and other forms of pressure, but also partnering with companies to induce positive change.” On his assessment, this system hasn’t had “the slightest difficulty in using the UNGPs as a tool to press for changes.”

But if the UNGPs are capable of profoundly shaping “social norms and expectations” in the corporate governance space, we have to give them credit for the same power in the civil governance space (unless that space resists UNGP uptake, as it has to some extent). So what has been the experience of “traditional” human rights advocacy in the BHR era?

Campaign victories

Without much competition, the most prominent BHR-based advocacy campaign has been the [Behind the Brands](#) (BTB) campaign launched by [Oxfam](#) in 2013.

Oxfam assessed the social and environmental policies of the world’s 10 largest food and beverage companies to evaluate where companies stand on policy in comparison with their peers. We challenged them to begin a “race to the top” to improve their social and environmental performance.

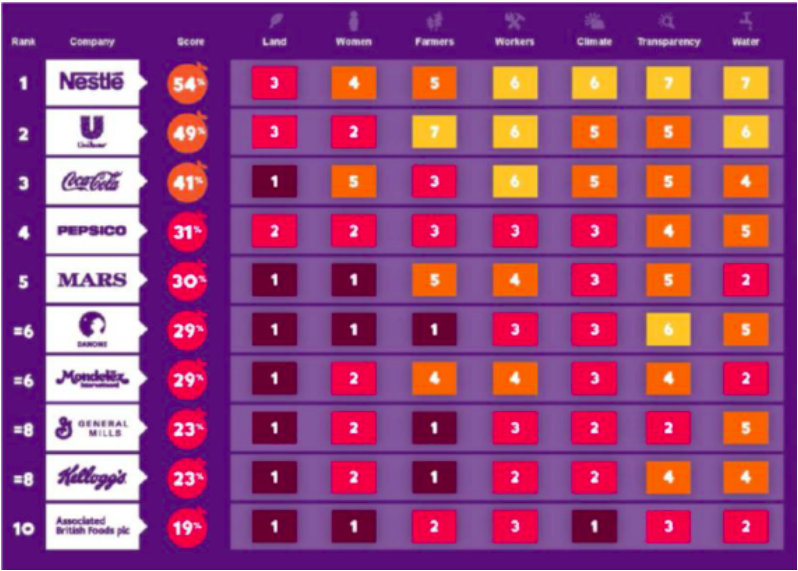
The campaign is “best in class” in all sorts of respects, including an intense visual focus on corporate brands, as seen on their [Brands page](#) which shows a vast field of familiar corporate logos: a click on any one shows you which “Big 10” company owns it, and what that company’s human rights scores are. The approach is a direct attack on these companies’ golden eggs, and yet it is a short pivot from being a valuable advertising tool: by improving their scores, companies can turn a consumer’s click on “Pop-Tarts” into a warm sales pitch about all the company is doing for women, small scale farmers, and climate change. Indeed, while a few companies initially bristled at the campaign, almost all have now come to embrace it as an important arm of their own publicity efforts. The collaborative sensibility is evident from the [Company Responses](#) to the 2016 rankings, not just from the top scorers (e.g., Nestle, ranked second: “We again commend Oxfam for the constructive manner in which it presents the complex social and environmental issues global good companies face”), but even from lower-ranked companies (e.g., Mondelez, ranked seventh: “We’re pleased Oxfam has been raising awareness for these important issues”). This is the gold standard for the sort of “partnering with

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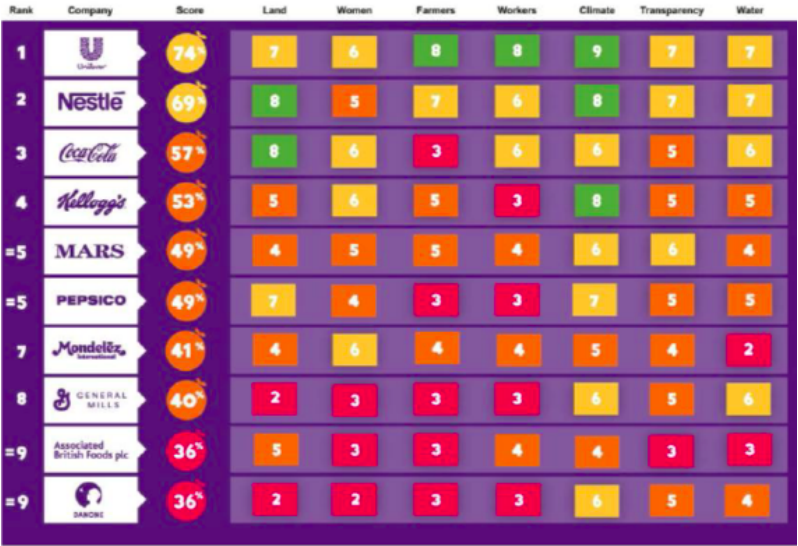
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companies to induce positive change” that Ruggie refers to and that embodies the new cooperative spirit of BHR. ?

Oxfam also claims that the campaign “has produced major wins, from improving the lives of female cocoa suppliers to ending land grabs in the sugar supply chain.” In 2013, the companies averaged only 33% positive across a range of seven sub-assessments.



By 2016, the rankings showed “clear improvements from all companies”:



The most prominent area of improvement is on land rights (the first column of scores), led by Coca-Cola, which improved its score from 1 all the way up to 8 by, in the wake of the first release of Behind the Brands, becoming “the first ever company to adopt a **‘zero tolerance’ policy against land grabs** that applies to its suppliers,” according to Oxfam. The announcement garnered significant [positive press](#), and Oxfam International’s executive director, Winnie Byanyima, [observed](#) that “something wonderful [is] happening when a Cambodian farmer, arrested when pregnant for protesting after her land was taken, can [now] call on the

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world's biggest brand to help defend her rights." Byanyima quoted the farmer directly:

Our community in Oddar Meanchey was so happy to hear about the Coca-Cola Company's promise to not tolerate land grabs in its supply chain. We have suffered so much at the hands of Coke's supplier, Mitr Phol. We are waiting for Coca-Cola to help end our hardship.

Oxfam reports that "[s]ince then, PepsiCo, Unilever and Nestlé have followed suit," leading to Oxfam's claim that one of the campaign's major wins has been "ending land grabs in the sugar supply chain." As Oxfam put it in celebrating Nestle's announcement of zero tolerance for land grabs, "[anyone for ice cream?](#)"

Zeroing in

But of course, if it were that easy I wouldn't be writing this blog. Oxfam's report on the 2016 rankings includes [a text box](#) on the "continuing demand for justice in Cambodia," which notes that hundreds of sugar plantation land grab victims in another province (Koh Kong) are still struggling to get their land back and/or just compensation. Oxfam notes that it [brought the issue to Coke's attention](#) as far back as 2013, and that "[s]ince then, Coca-Cola has been encouraging its suppliers to resolve the conflict and to help communities receive the remedy they seek." This alludes to a fact which is not mentioned directly but which Oxfam confirms: Coca-Cola **is still doing business** with these suppliers, including Mitr Phol, the supplier mentioned by the farmer above. Indeed, in the intervening years, Thailand's Human Rights Commission investigated both Mitr Phol and the Koh Kong supplier and has [issued decisions](#) confirming the "land grab" claims.

In its textbox, Oxfam is quick to add that "land conflicts are complicated, involving not just sugar plantations, but governments as well." (Oxfams also asserts, oddly in light of the campaign's core strategy of holding top-level consumer-facing companies accountable for abuses further down in the chain, that "[u]ltimately, solutions in Sre Ambel will be driven by community leaders like Sok Phoeurn, by Khon Kaen Sugar Industry (the company most directly involved), and by the Cambodian government," *i.e. not* Coca-Cola.) Coca-Cola strikes similar notes in its [Sustainability Report](#), noting that land "involves complicated issues and multiple stakeholders with competing interests." Complexity is indeed a reality, as is the fact that it often leads to paralysis, lack of progress. But, at least in one understanding, "zero tolerance" is [supposed to cut in the other direction](#). The whole point is supposed to be a clear message to the (potentially) offending party: *no, we're not interested in your explanations; sorry, but we are not going to let it slide this time; rules have consequences, period*. This all sounds harsh, but at least in some circumstances it is a wise approach, acknowledging a certain unknowability about the nature of dynamics on the ground and shifting responsibility to the party with the most direct knowledge and experience. *Here is the goal — you figure out how to achieve it.*

This is clearly not Oxfam's view of "zero tolerance." Oxfam's lead on the campaign, Judy Beals, told me that "cutting and running" was the "easy option" for the company, whereas staying in the supplier relationship and trying to induce positive change was more complicated and difficult, but held more promise of making a long-term difference. She notes that Coca-Cola pressure was likely part of the reason that Mitr Phol returned the land to the Cambodian government in 2014, along with, [Mitr Phol claims](#), "a request that this land should be returned to the original legal owners." Mitr Phol further claims to be investigating the situation and that it will "consider future action" when that investigation is complete, code for the possibility that it will offer victims compensation. Oxfam says it "will continue to push Coca-Cola to play a constructive role in ensuring communities are satisfied with the outcome." In the meantime, Coca-Cola still gets to enjoy its "8" score on land rights.

I wasn't able to contact the affected Cambodian communities directly for this blog, but discussions with other advocacy groups in regular contact with them suggest that the communities, not surprisingly, have a far less tolerant view of Coca-Cola's and Mitr Phol's response to the situation. With deep and due respect for the Oxfam and the BTB campaign, at times Oxfam's posture can seem dangerously close to "carrying the water" for the time-honored tropes of context, complexity, constraints, and deflection of responsibility that corporations have always invoked to justify inaction in the face of human rights demands. While such invocations are not necessarily fanciful, they are usually stretched to match self-interest. A useful thought experiment is to imagine that the supply chain problem isn't about the land rights of poor people, but rather, say, E. Coli, leading to a genuine broad-scale consumer backlash, plunging sales, etc. Would Coca-Cola still be constrained to be merely "leverag[ing] its influence" with suppliers and telling its shareholders, three years later, that "[d]iscussions with these suppliers are ongoing"?

In trust we trust

The Coca-Cola/Mitr Phol situation is deeply problematic on its face. Mitr Phol's "return" of the land to the Cambodian government looks far more like an attempt to "cut and run" from the problem than anything close to an appropriate mitigation strategy — after all, Mitr Phol itself loudly claims that the Cambodian government was the key bad actor in the original land grab. For Coca-Cola, while permanent termination of its relationship with Mitr Phol might be considered unduly harsh, what about suspension of purchasing (while continuing the relationship) until the problem has been addressed, as [a number of tea companies did](#) in the wake of BBC investigatory [revelations about worker safety conditions](#) on Indian tea plantations? This approach would put the onus of delay squarely on Mitr Phol, rather than struggling farmers, and one imagines a resolution would be rather quickly forthcoming.

Yet in considerable back-and-forth with Oxfam reps, they declined to criticize or even acknowledge frustration with Coca-Cola's approach, beyond the carefully composed language in the textbox. We are left to trust that Oxfam's validation of Coca-Cola's constraints means that those constraints are indeed unmalleable, not elaborations Coca-Cola's preference or convenience. (Unlike the early days when Oxfam [claimed](#) that everything is used to assess the companies was public,

Oxfam today takes into account information drawn from its “deep engagement” with companies that it must keep secret.) Such trust is hardly unwarranted: Oxfam has unsurpassed experience and professionalism in this area, it is attentive to the issues raised by the “critical friend” relationship it strives for with companies, and it has shown that [knows how to use “the stick”](#) when it feels it needs to.

Yet we can also appreciate the extent of the challenge facing Oxfam. While its primary mission, of course, is to represent communities, it takes its mission of “deep engagement” with corporations seriously too, and as a practical matter its staff likely spends more time on the phone and in meetings with US/EU corporate managers than in remote villages. Its willingness to go deep is certainly admirable, but the moral hazard is real too. Moreover, new challenges emerge as Oxfam moves from assessing *policy* to assessing *implementation*, which Oxfam itself stresses is “complex as it involves thousands of suppliers in dozens of countries where much of the commercial activity remains hidden or undisclosed.” No matter how hard Oxfam works, it will always be a visitor to this labyrinth, in ready danger of getting lost or being manipulated by its business-world partners, who live there. Appreciation of this might suggest a second look at the results-oriented approach in the traditional, detached understanding of zero tolerance: *Here is the goal — you figure out how to achieve it.*

The culture of change

We can also appreciate the potential influence that new “social norms and expectations” might have as the BHR framework begins to dominate human rights advocacy regarding corporations. This may be less of an issue for Oxfam, which has unabashedly [positioned itself](#) as a “moderate”: “hard hitting enough to convey urgency so supporters will act while at the same time not so aggressive that relations with a company become too strained.” Oxfam simultaneously acknowledges the need for “room and space for all kinds of activists,” including those that choose a more “outrageous” or contentious style of engagement. But support for this “room and space” elsewhere in BHR, while difficult to measure, is certainly not guaranteed. This can be seen in less confrontational campaigning or the lack of support for those that do it: the lack of outcry when Chevron characterized the use of pressure tactics and public protests by its highly-contentious Ecuadorian opponents [as “extortion”](#); the lack of outcry when an Ohio prosecutor decided to level felony charges against Greenpeace demonstrators because [he found their tactics to be “outrageous”](#) (even though the targeted company itself disagreed and lobbied him to drop the charges).

To the extent BHR norms can be said merely to reflect a heightened demand for civility, it is hard to rail against. Yet there are times when civility bends toward complaisance, when impertinence is part of the necessary truth. This is particularly the case when the “ask” of the corporate target is significant and difficult. Oxfam prides itself on making only “realistic asks” of companies, but there is a fine line between “realistic” and “limited,” or “easy.” And so an additional question about the normative space of BHR is whether it provides sufficient support for “asks” that more deeply challenge the status quo.

This is not just about Oxfam. Returning to the question of zero tolerance, we can

see Oxfam's approach reflected in the UNGPs themselves. The UNGPs address the question of "at what point does zero tolerance mean you cut off the supplier" most directly in [the Commentary to Principle 19](#), which directs that businesses should first use whatever leverage they have with the supplier to "prevent or mitigate" the abuses of adverse impacts, and if such exercise of leverage doesn't work, or if the business doesn't have leverage and can't find ways to get it, then the business "should consider ending the relationship." Rather softly stated, but fair enough. But then it gets [a little weird](#):

Where the relationship is "crucial" to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise's business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences - reputational, financial or legal - of the continuing connection.

What this very carefully does not say is that a business must ***or even should*** terminate a "crucial" relationship even if the supplier is engaged in severe human rights abuses and refusing to stop. If in fact a business is locked in a "crucial" relationship with — *i.e.*, a dependency upon — such a supplier, well then, Houston, we have a problem. This would be precisely the business that most needs to feel pressure to "transform" or "adopt a new business model," as BHR professionals so like to talk about, in order to free itself from its dependency on abuse-driven commodities or labor. Yet the foundational BHR document seems to say that even this would be an "ask" too far out of reach.

The role of lawsuits

What about the other "social compliance mechanism" referenced by Ruggie — lawsuits? Arguably, air was leaking from these tires well before the emergence of BHR. For decades, lawyers have struggled to maintain human rights cases against corporations in U.S. federal courts, on the theory that the courts would take the precedent used to win human rights judgments against disgraced former dictators and apply it even-handedly to wealthy corporations. Was this a theory, or just a hope? Even apart from the Supreme Court's damaging 2013 [Kiobel decision](#), the best results ever reached from this litigation were two settlements, [first with Unocal](#) (on the eve of its merger with Chevron) and [later with Shell](#). These set important precedents, but also debilitating ones. The settlement values were far below what would be necessary to cover each case's decade-plus tally of fees and expenses, meaning that economically such litigation must look to donor funding or pro bono contributions by lawyers, both of which are important but are difficult to apply in hard-fought cases and have limited scalability. Outside the U.S., a few jurisdictions

once seemed to be [moving to pick up the slack](#), most noticeably the United Kingdom, where the [Leigh Day firm](#) maintains a busy human rights practice and won important decisions and settlements in the [Monterrico torture](#) and [Cape plc asbestos liability](#) cases in 2011 and 2012. But in the wake of those decision, UK authorities [quickly adjusted the rules](#) on damages and cost recovery to undermine the economic model that supported those cases. (That said, Leigh Day has [continued to reach some positive outcomes](#).) Other cases are trudging forward in [the Netherlands](#) and [Canada](#), but the overall sense is hardly one of momentum. In developing countries, the [historic Ecuadorian court judgment against Chevron](#) (which I helped litigate) seemed to open a door, but the subsequent [avalanche of retaliatory litigation](#) by the company has clouded the lesson of whether success in a developing country court can translate to success in real terms, [at least for now](#).

There are a lot more details, perhaps best recounted in the BHRRC's [quarterly](#) and [annual](#) "legal accountability" bulletins, which, interestingly, it develops in something of a separate silo from its other BHR work. The bulletins variously strike notes of [doom and gloom](#) or [searching for the bright side](#). The official line is that lawsuits are a necessary part of BHR, but in reality the BHR "space" for lawsuits feels just as tight as the space for contentious campaigning. Corporations [routinely demonize](#) law-focused advocates and openly insist that the courts are "not the place" for human rights claims; responses by proponents of legal approaches are scattered. Acceptance of the legitimacy of lawsuits is certainly not part of the admission price to BHR for corporations. As just one of many examples, Nestlé, a regular top-scorer in Behind the Brands, has not only vehemently resisted a long-standing legal accountability effort in California, but last year sought to kill the case in the Supreme Court by [trying to resuscitate](#) an egregious, outlier 2012 appellate decision in the *Kiobel* case that tried to establish a categorical legal rule of non-liability for corporations in international law, irrespective of factual liability or fault. The effort [failed](#), thankfully, but there was never any sense that the company's BHR reputation was going to be impacted by the attempt.

The once and future movement

As noted, civil governance is just one of many "polycentric" governance systems at play in BHR. BHR success has thus far been driven by momentum in the corporate governance area, as simple corporate endorsements of highly-abstract external codes have evolved into a more complex process of "embedding" human rights values into a much wider range of internal codes, policies, and contracts. We should want to see similar growth and depth in the civil governance and public law systems. Ruggie himself is known to make this point with the observation that there is no "single silver bullet," meaning that solutions must be found by running all systems "go."

There certainly are no silver bullets, but, to mix monster metaphors, we do have something of a zombie problem. The human rights problems undergirding capitalism have been with us for [a very long time](#). Last year I started the corporate accountability module of a seminar I teach by having students watch [John Oliver's epic take-down](#) of efforts to address sweatshop conditions in garment manufacturing. Going back decades, Oliver steps through the various bubbles of public outrage at sweatshops and child labor, often occasioned by disaster events,

each followed by a space for action that is filled occasionally by legislation or litigation, but mostly by corporate statements of regret and announcements of new commitments, policies, protocols, and requirements. Pause, then repeat. Again and again, year after year. It turns heart-breaking. We are “losing the right to act surprised,” Oliver rightly suggests.

At the end of the day, I do believe that BHR will be the future of how our global economy will understand human rights and do business across the board. But we all — and especially those within the BHR field — need to be ruthlessly skeptical of our efforts, mindful of our history. One of the longest tenured academics in the field recently told me that after 25 years, despite the surge of momentum in BHR today, he is more cynical than ever. We need to remember a fundamental tenet: talk is cheap. Even policies are cheap, compared to action, and to the sacrifices that may (not always, but often) be necessary for change. The price of BHR credibility should be far higher than what is payable in talk or policy alone. And like our skeptics, we need our zealots. We need their energy as much as their perspective, and we need to figure out how to embrace and support them while simultaneously cultivating trust with new partners.

Because while talk is cheap, it is also precious — paradoxically, the most precious thing BHR has to offer. Businesses have publicly committed themselves to a vision of human rights that is still abstract but concrete enough to lay a foundation. It is grounded in rights, not in charity. In its first five years, BHR has gathered the crowd, and set out the game plan. Now it is time to go to work.

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