

What Role for Human Rights in Business?

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Abstract

The Guiding Principles on Business and Human Rights (UNGPs) were endorsed by the United Nations Human Rights Council in June 2011, following the six-year mandate of the Special Representative to the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. The SRSG developed a framework comprised of three pillars: (1) States have a duty to protect against human rights abuses committed by third parties, including business enterprises; (2) business enterprises have a responsibility to respect human rights; and (3) victims of business-related human rights abuses need access to effective remedies. In particular, guiding principle (GP) 11 provides that business enterprises should respect human rights, that is, they should avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved. This article considers the implications of the Guiding Principles' framework for business; the continuing role of conventional accountability mechanisms in providing access to remedy for victims under the third pillar of the framework; and developments in 'hard law', with a particular focus on the approach by the UK, since the introduction of the UNGPs, before turning, briefly, to the future for business and human rights.

Keywords: Business, human rights, due diligence, company liability, corporate responsibility, modern slavery

Introduction

THE PREAMBLE to the Universal Declaration of Human Rights (UDHR) calls on 'every individual and every organ of society' to promote and respect human rights. As Louis Henkin, a leading international scholar, commented on this preamble, making it clear how it applies to business: 'every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.'¹ Of course, as many of the articles in this special issue make clear, the duty to protect and promote human rights lies with national governments. That said, in 2011 the UN Human Rights Council endorsed the 'Guiding principles on business and human rights' (UNGPs).² The UNGPs make it clear that businesses have a responsibility to respect human rights.

However, as this article will explain, critics point out that there is still no international mechanism for victims of human rights

abuses to bring complaints against companies. There are ongoing call for binding rules and strict enforcement around business and human rights, including the UK.

Human rights standards for corporations: the historical context

The endorsement of the UNGPs was a significant turning point for business and human rights. For several decades prior to 2011, there had been myriad failed attempts to create international standards to address adverse human rights abuses by transnational corporations. In particular, the 'Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (Draft Norms) had controversially sought to assert that state-based human rights instruments were binding on corporations. Consequently, the Draft Norms were not approved by the UN Commission on Human Rights, who said they had 'no legal standing'.³

However, the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights remained a priority, particularly given high-profile cases such as the Bhopal industrial disaster. The UNGPs were the answer to that question and were resoundingly welcomed by governments and corporations alike. The reaction of civil society was more tempered. While many NGOs welcomed the ‘protect, respect, remedy’ framework promulgated by the UNGPs, there remained a concern that the UNGPs were mere ‘soft’ law and did not sufficiently plug the ‘governance gap’.⁴

The UNGPs: a paradigm shift for business

The framework consists of three pillars; ‘the state duty to protect’, ‘the corporate responsibility to respect human rights’, and ‘effective access to remedies’. With respect to the second pillar of the framework, GP 11 provides that the responsibility of all private actors, including businesses to ‘respect’ human rights means that businesses ‘should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’. Businesses can be involved in an adverse human rights impact in a number of ways, whether through their own operations or through a ‘business relationship’ (including with a supplier, joint venture partner, subsidiary or client).

The nature of this involvement will determine how a business is expected to respond. The commentary to GP 19 elaborates: (a) where a business causes an adverse human rights impact, it should take the necessary steps to cease or prevent the impact; (b) where a business contributes to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact, and (c) where a business is only ‘directly linked’ to an adverse human rights impact through its business relationships, it should exercise leverage to prevent or mitigate the adverse impact.

GP22 adds that business should remediate victims where they have caused or contributed

to harm. To identify whether and how they are involved in an actual or potential adverse human rights impact and determine the appropriate response, businesses should have in place ‘policies and processes appropriate to their size and circumstances’, including a human rights due diligence process whereby businesses identify, prevent, mitigate and account for how they address their adverse human rights impacts.⁵ This overlaps with the responsibility of a business to carry out human rights due diligence under various other sources of ‘soft’ law, including the ‘Voluntary principles on security and human rights’, the OECD ‘Guidelines for multinational enterprises’ and OECD ‘Guidance for responsible supply chains of minerals from conflict affected and high risk areas’. The SRSR has noted that ‘the concept “human rights due diligence”—which didn’t exist before—has entered into a variety of international and domestic policy arenas’.⁶

Ongoing use of conventional accountability mechanisms

As noted in the introduction, the primary duty under international human rights law is on the state and the UNGPs do not create any new international legal obligations. The ‘corporate responsibility to respect’ is said to be ‘extra-legal’ or ‘non-legal’. Accordingly, the UNGPs are often referred to as ‘soft’ law. However, this label can be misleading. A business which does not respect human rights exposes itself (and, in certain circumstances, its personnel) to potential legal liability as well as to adverse publicity and the risk of boycotts and divestment.

Most commonly, this liability will arise under the domestic law of the ‘territorial state’, that is, the state where the human rights impact takes place. This may be under specific human rights law or it may be under another area of the law which does not expressly refer to human rights, like non-discrimination provisions in employment law, privacy law, health and safety law or general tort law. Some states will exercise extra-territorial jurisdiction over certain adverse human rights impacts in order to provide rights holders with access to a remedy.⁷ For example, a UK domiciled parent company

and its overseas subsidiary may be sued in the English courts for an extra-territorial human rights impact framed as a tort (or some other civil wrong). See, for example, the claim against Vedanta Resources plc and its Zambian subsidiary for injury allegedly caused by pollution from a copper mine in northern Zambia.⁸

Involvement in an adverse human rights impact may be framed as a crime (or, more commonly, complicity in a crime) under international law and prosecuted in the domestic courts of any state on the basis of universal jurisdiction, irrespective of where the crime took place. In addition, the International Criminal Court has expressed interest in prosecuting business executives associated with land grabs and large-scale environmental damage.⁹

Under the Alien Tort Claims Act (ATCA), US courts have civil jurisdiction over torts committed outside the United States in violation of the law of nations. This has been exercised to extend liability to corporations for complicity in torture, forced displacement and other war crimes. In 2018, the Supreme Court excluded jurisdiction over non-US companies under the ATCA, but there remains scope for liability for non-US executives and for US companies, which could include claims against US parent companies in relation to the activities of their non-US subsidiaries.¹⁰

A 'hardening' legal landscape

Several states have introduced legislation to make binding elements of the corporate responsibility to respect human rights under domestic law. In some cases, such as, the Modern Slavery Acts in the UK and Australia, the focus of the legislation is on specific human rights: slavery and human trafficking. The Australian Act, which took effect on 1 January 2019, requires all entities operating in Australia and with an annual consolidated revenue of over AUD \$100 million to publish a board-approved modern slavery statement within six months of the end of their financial year. The statements, which will be publicly available, will have to address the risks of modern slavery in the companies' operations and supply chains, the action they have taken to assess and

address those risks, and the effectiveness of their response.

In the UK, in addition to the Modern Slavery Act, the direction of travel is increasingly towards 'hard law'. Indeed, with respect to the Modern Slavery Act, in 2018, the UK government published updated guidance on the Modern Slavery Act 2015 recommending further and more in-depth reporting requirements, such as the expectation for statements to show progress each year and enforcement mechanisms such as fines and the ability to disqualify directors for failure to comply with the Act. The expectation is that, in time, these recommendations will be implemented. It is notable that the Home Office, the UK government department with oversight of the Act, has been assiduous in its pursuit of companies who are yet to comply with the Act.

In other instances, the legislation has been implemented in response to specific human rights violations. Following the use of a nerve agent in 2018 in Salisbury, UK, for example, two major pieces of UK legislation were amended: (1) the Proceeds of Crime Act 2002 and (2) the Sanctions and Anti-Money Laundering Bill now the Sanctions and Anti-Money Laundering Act 2018. The Proceeds of Crime Act 2002 was amended by the Criminal Finances Act 2017 to expand the definition of 'unlawful conduct' to include gross human rights abuse or violation. British authorities now have the power to seize any and all assets which are generated by conduct linked to a gross human rights violation or abuse via a civil asset forfeiture action, wherever it occurs. Gross human rights violation is defined as any action constituting or connected with the torture (or inhuman treatment) of a person on the basis that they were either trying to blow the whistle on activities of public officials, or attempting to 'obtain, exercise, defend or promote' human rights. The abuse must be carried out or instigated by, or with the consent or acquiescence of, a public official or anyone acting in an official capacity. The Sanctions and Anti-Money Laundering Act 2018 includes gross human rights violation as a reason for imposing domestic sanctions on a person or an entity. Previously, the UK's domestic sanctions regimes were confined to terrorism legislation, but the new

Act expands the power to impose sanctions independently of the international community. The UK Parliament Joint Committee on Human Rights has gone further, recommending that the government bring forward legislative proposals to make reporting on due diligence for all other relevant human rights, not just the prohibition of modern slavery, compulsory for large businesses, with a monitoring mechanism and an enforcement procedure.¹¹ That was in April 2017 and thus far no legislation has materialised.

The French approach, by contrast, ostensibly goes further again, with the Duty of Vigilance Law requiring large French companies to set up, publish and implement a 'vigilance plan'.¹² This law is said to be most closely influenced by the UNGPs. Its scope and impact may, however, be somewhat limited as it concerns only French corporations with over 5,000 employees in France and/or over 10,000 employees worldwide (including the employees of subsidiaries and controlled affiliates). Estimates suggest that only 150 to 200 French parent corporations fall within the scope of the law.

Other states (for example Switzerland) are exploring the introduction of similar legislation. In December 2017, a coalition of Swiss civil society organisations launched the Responsible Business Initiative (RBI), a proposal to amend the Swiss constitution to require mandatory human rights due diligence for companies based in Switzerland. The RBI takes the form of a suggested amendment to the Swiss Federal Constitution, which would result in the introduction of a new article 101a 'Responsibility of business' in the Constitution. Under the amendment, Swiss-based companies would be legally obliged to incorporate respect for human rights and the environment in all their business activities, including activities abroad. This will include the obligation to carry out 'appropriate due diligence', using an approach based on the UNGPs requiring that risks be identified, mitigated, and reported upon. A referendum on the RBI will take place in February 2020 at the earliest. If adopted, it would put Switzerland at the forefront of initiatives to embed the corporate responsibility respect under the UNGPs in national laws.

All of these legislative initiatives have in common an increasing concern that pillar

three of the UNGPs concerning the need for human rights victims to have access to effective remedies has thus far failed.

What does the future hold?

Unsurprisingly, given the criticisms of the UNGPs, there are calls for a binding treaty on business and human rights. On 16 July 2018, the UN Inter-Governmental Working Group on Transnational Corporations and Other Business Enterprises (IGWG) published a draft 'Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' (the Zero Draft).¹³ In its current form, the Zero Draft Treaty would require states to introduce legislation mandating human rights due diligence; requiring businesses to insert contractual requirements requiring human rights due diligence; providing for corporate liability in crimes under international law; and a system of mutual recognition and enforcement of domestic human rights judgments under the treaty, modelled on the New York Convention which applies to the enforcement of international arbitration awards. There are, however, a number of concerns about the Zero Draft. In particular, the EU has expressed a concern regarding the scope of the Zero Draft which applies only to transnational corporations and not domestic corporations.¹⁴

As foreshadowed, there have been failed attempts to negotiate a binding instrument on business and human rights at the UN before. It is clear, however, that the notion that businesses should have a responsibility to respect to human rights and avoid human rights impact is very much embedded in corporate culture. As such, the concepts articulated in the Zero Draft are less alien than they would have appeared twenty years ago. There is a realistic chance that a treaty will come into force, albeit likely in a form which is quite different to the Zero Draft.

Notes

- 1 L. Henkin, 'The Universal Declaration at 50 and the challenge of global markets', *Brooklyn Journal of International Law*, vol. 25, no. 5, 1999, pp. 17–25, p. 25.

- 2 United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Guiding principles on business and human rights: implementing the United Nations 'protect, respect and remedy' framework', 2011; https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf (accessed 14 June 2019).
- 3 UN Doc. E/CN.4/Sub.2/2003/12/Rev. (2003); 'approved' by Sub-Commission in Resolution 2003/16, 13 August 2003, contained; UNDoc. E/CN.4/2004/2, E/CN.4 Sub. 2/2003/43; rejected by Commission in Decision 2004/ 116, 22 April 2004, contained in UN Doc. E/CN.4/2004/L-II/Add.7.
- 4 See, for example, C. Albin-Lackey, 'Without rules: a failed approach to corporate accountability', Human Rights Watch, 2013; https://www.hrw.org/sites/default/files/related_material/business.pdf (accessed 24 January 2019).
- 5 GP 15 and GP 17.
- 6 'Business and human rights: interview with John Ruggie', *Business Ethics*, 30 October, 2011; <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>, (accessed 13 April 2019).
- 7 For example, the Equality Act 2010 in the UK
- 8 *Lungowe and Ors. v Vedanta Resources plc and Konkola Copper Mines plc* [2017] EWCA Civ 1528.
- 9 Office of the Prosecutor, 'Policy paper on case selection and prioritisation', 15 September 2016; https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf (accessed 25 January 2019).
- 10 *Jesner v. Arab Bank plc*, No. 16–499, 584 U.S. (2018).
- 11 Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, Sixth Report of Session 2016–2017, paragraphs 114 and 193; <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf> (accessed 14 June 2019).
- 12 Article L. 225–102–4 of the Law states that: '...the plan shall include the reasonable vigilance measures to allow for risk identification and for prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the subcontractors or suppliers with whom an established commercial relationship is maintained, when such operations derive from this relationship' (free translation).
- 13 UN Inter-Governmental Working Group on Transnational Corporations and Other Business Enterprises, 'Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises', July 2018; <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (accessed 25 January 2019)
- 14 European Parliament, briefing, 'Towards a binding international treaty on business and human rights', April 2018; [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS_BRI\(2018\)630266_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630266/EPRS_BRI(2018)630266_EN.pdf) (accessed 14 June 2019).