

Human rights obligations of enterprises under public international law

ABSTRACT

Subject of research: It has long been recognized that business can have a profound impact on human rights. Companies do not have the same legal duties as States under international human rights law. However, there has been a long-standing debate about what responsibilities companies do have for human rights.

Purpose of research: In the age of globalization which results in developments of transnational and multinational corporations there is a need to define companies' obligations in the area of human rights and determine the timeless rules that can be accepted by every culture.

Methods: The main method used in the paper is formal-dogmatic. The paper focuses on analyses of the non-binding provisions of international human rights law especially on the UN Guiding Principles on Business and Human Rights.

Keywords: human rights, business obligations, labour norms

1. Preliminary remarks

The impact of business, or more precisely, the impact of activities undertaken by private sector entities (national and international corporations, multinational and transnational enterprises) on human rights are undisputable today. Activities of business enterprises affect the human rights of employees, consumers and communities wherever they operate. This influence can be both positive and negative. The

positive impact can be displayed, for example, by increasing access to employment, improving public services, or more generally, by delivering innovation and services that can improve the living standards for people across the globe. On the other hand, the negative impact can be displayed, for example, by destroying people's livelihoods, exploiting workers (underpaying them), displacing communities or polluting the environment. Consequently, business can have a profound impact on human rights (*The UN Guiding Principles*, p. 2).

International entities as well as national corporations play an increasingly important role at international, national and local levels. There are multinationals which now wield more economic power than some states. Nowadays, in the whole world there are hundreds of transnational and multinational enterprises (*J. Madeley*, 2003, p. 36). These corporations are based in one country, manufacture their products in another one, and pay taxes somewhere else. "The 300 largest corporations account for more than one-quarter of the world's productive assets. They hold ninety percent of all technology and product patents worldwide, and are involved in seventy percent of the world trade. They directly employ 90 million people (of whom some 20 million live in developing countries) and produce 25% of the world's gross product. They are active in some of the most dynamic sectors of national economies, such as extractive industries, telecommunications, information technology, electronic consumer goods, footwear and apparel, transport, banking and finance, insurance, and securities trading" (*D. Weissbrodt*, 2005, p. 281). Multinational corporations are increasingly seen as excessively large and powerful, and as having experienced a drastic increase in their power and impact (*J. Madeley*, p. 36).

International human rights standards have traditionally been seen as the responsibility of states and their governments. States must prevent, investigate, punish and redress human rights abuses that take place in domestic business operations. This means that companies do not have the same legal duties as States under international human rights law. States are still under an obligation to regulate relations between the State and individuals and groups. But with the increased role of corporate entities in global aspects the issue of business' impact on the enjoyment of human rights has also been placed on corporations.

In the age of globalization, which results in developments of transnational and multinational corporations, there is a need to define companies' obligations in the area of human rights and determine the timeless rules that can be accepted by every culture. The main method used in the paper is formal-dogmatic. The paper focuses on analyses of the non-binding provisions of international human rights law especially on UN Guiding Principles on Business and Human Rights.

2. International non-binding regulations

In today's state of international law there is no comprehensive settlement of business-wise issues in relation to human rights in the form of a binding international agreement. Existing sources in the form of corporate codes of conduct, guidelines for multinational enterprises, shareholder resolutions on ethical investing are only *soft law* (E. Karska, 2015, p. 114). There is a number of non-binding international guidelines addressing business and human rights. Over the past decade, many activities in the area of business and human rights were undertaken by different organizations and institutions. Special actions were undertaken by the Organization for Economic Cooperation and Development (OECD), the International Labour Organization (ILO) and the United Nations.

In 1976, The OECD adopted the Guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws. The updated Guidelines were adopted on 25 May 2011 (*OECD Guidelines for Multinational Enterprises*, 2011, p. 3).

In 1977, the ILO developed its Tripartite Declaration of Principles Concerning Multinational Enterprises, which calls upon businesses to follow the relevant labor conventions and recommendations. The Declaration provides direct guidance to enterprises on social policy and inclusive, responsible and sustainable workplace practices. The Declaration was elaborated and adopted by governments, employers and workers from around the world. The updated Declaration was adopted on November 2000, March 2006 and March 2017. Its principles are addressed to multinational enterprises, governments, and employers' and workers' organizations and cover areas such as employment, training, conditions of work and life, industrial relations as well as general policies.

The next initiative was the United Nations Global Compact, which was proposed in January 1999 by the U.N. Secretary-General Kofi Annan. The Global Compact is the leading global voluntary initiative for corporate social responsibility that also addresses the issue of business and human rights. Global Compact aimed at getting business leaders to voluntarily promote and apply within their corporate domains nine (since 2004 ten) principles relating to human rights, labor standards, the environment, and anti-corruption (*The UN Global Compact's ten principles*).

The ILO, the OECD, and the Global Compact initiatives all indicate that they are voluntary, although the ILO and the OECD have established rarely used mechanisms for interpreting their guidelines (*D. Weissbrodt, 2005, p. 284*).

Further work in this field was conducted by the UN Sub-Commission on the Promotion and Protection of Human Rights (*E. Karska, p. 116*). In August 2003, the Sub-Commission approved the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights. They reaffirm and reinforce the declarations that have been made so far with regard to human rights responsibilities of business enterprises (e.g. the OECD-guidelines and the UN Global Compact) and concentrate the core guidelines and standards in this new concise document (*K-H. Moder, 2005, p. 1*). The Norms provide companies with an easily understood and comprehensive summary of their obligations under such systems as human rights law, humanitarian law, international labor law, environmental law, consumer law, and anticorruption law (*D. Weissbrodt, M. Kruger, 2003, p. 921*). The Commission did not act on the draft norms. Instead, it appointed, in July 2005 Professor John Ruggie as the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to undertake further study in the area of business and human rights. Ruggie's work led to the development of a business and human rights framework, which the Human Rights Council welcomed in June 2008 (*H. Clayton, 2011, p. 1*).

After reporting on the "Protect, Respect, Remedy" framework, Ruggie then developed "The Guiding Principles on Business and Human Rights for applying the framework. The resulting guiding principles were submitted in March 2011 and endorsed by the Human Rights Council

in its resolution on 17/4 of 16 June 2011 (*H. Clayton*, p. 2). The Guiding Principles are not binding international law. Nevertheless, they are widely viewed as the most authoritative global standard in the area of business and human rights (*S. Jerbi*, 2012, p. 1043). Thanks to the Guiding Principles, there is now greater clarity about the respective roles and responsibilities of governments and business with regard to protection of and respect for human rights. Because they are currently the most up-to-date and quite effective – as for a *soft law* – regulation in practical terms (*E. Karska*, p. 114) the further part of the study deals with the regulation of the Guiding Principles.

The Guiding Principles consist of 31 principles covering the three pillars of the framework: 1) the state duty to protect human rights, 2) the corporate responsibility to respect human rights, and 3) the need for victims of human rights abuses to have access to remedy, both judicial and non-judicial. This paper focuses on the second core principle – the responsibility of business to respect human rights.

It is possible to make different divisions of corporate responsibilities in the area of human rights protection. Nevertheless, the second pillar of the Guiding Principles are organised into foundational principles (respect) and operational principles (procedure). The first responsibility results from Principle 11, according to which business enterprises should respect human rights. Clarification of this statement is contained in Principle 12. The second obligation results from Principle 15 *et seq.*, which is an obligation to implement special internal policy and processes.

3. Foundational principles – obligation to respect human rights

According to Principle 12 “The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”

Business can affect virtually all internationally recognized rights. Therefore, any limited list will almost certainly miss one or more rights that

may turn out to be significant in a particular instance, thereby providing misleading guidance (*J. Ruggie*, 2008, p. 190). The Guiding Principles do not list the specific rights and freedoms which enterprises are obliged to respect. Instead of this, the Guiding Principles indicate *expressis verbis* which international documents are relevant to determine those rights and freedoms. At the same time the Guiding Principles point that those documents comprise a minimum of rights which enterprises are obliged to respect.

In the first place, the Guiding Principles mention the International Bill of Human Rights, which consists of three different documents with different legal binding force. The first is the Universal Declaration of Human Rights of 10 December 1948. The Declaration as a United Nations resolution has non-binding character but it is a milestone document in the history of human rights. The Declaration created common standards of achievements for all people and all nations. It sets out fundamental human rights to be universally protected. The Universal Declaration is codified in international law through (*The Corporate Responsibility to Respect Human Rights*, 2012, p. 10) the International Covenant on Economic, Social and Cultural Rights 16 December 1966 with optional protocol and International Covenant on Civil and Political Rights of 16 December 1966, with two optional protocols.

In the second place, the Guiding Principles mention the International Labour Organization's Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, and revised 15 June 2010 (*ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, 2010).

According to the ILO Declaration those fundamental principles are: "1) the freedom of association and the effective recognition of the right to collective bargaining, 2) the elimination of all forms of forced or compulsory labour, 3) the effective abolition of child labour, and 4) the elimination of discrimination in respect of employment and occupation." The Declaration covers four main areas for the establishment of a social "floor" in the world of work. These principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both within and outside the ILO. Each of these is supported by two ILO conventions, which

together make up the eight ILO core labour standards (*The Corporate Responsibility to Respect Human Rights, An Interpretive Guide*, p. 89). These ILO conventions include: 1) Convention concerning Freedom of Association and Protection of the Right to Organise of 9 July 1948 (No. 87), 2) Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively of 1 July 1949 (No. 98), 3) Convention concerning Forced Labour of 28 June 1930 (No. 29), 4) Convention Abolition of Forced Labour of 25 June 1957 (No. 105), 5) Convention concerning Minimum Age for Admission to Employment of 26 June 1973 (No. 138), 6) Convention concerning Prohibition and Action for Elimination of Child Labour of 17 June 1999 (No. 182), 7) Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value of 29 June 1951 (No. 100), 8) Convention concerning Discrimination in Respect of Employment and Occupation or Discrimination Convention of 25 June 1958 (No. 111) (*The International Labour Organization's Fundamental Conventions*).

Like all agreements the above indicated conventions have to be ratified by states. Not all states have done it. For those that have not, the Declaration makes an important new contribution. It recognizes that the Members of the ILO, even if they have not ratified the Conventions in question, have an obligation to respect “in good faith and in accordance with the Constitution of the ILO, the principles concerning the fundamental rights which are the subject of those Conventions” (*ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, p. 2.)

According to the Commentary to the Guiding Principles, depending on circumstances, business enterprises may need to consider additional standards (*Guiding Principles on Business and Human Rights*, 2011, p. 14). This additional standards may include rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. There are many United Nations instruments in this area concerning the rights of: indigenous peoples (*The United Nations Declaration on the Rights of Indigenous Peoples of September 2007*), women (*Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979*), national or ethnic, religious and linguistic minorities (*International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965*),

children (*Convention on the Rights of the Child of 20 November 1989, with protocols*), persons with disabilities (*Convention on the Rights of Persons with Disabilities of 13 December 2006*), migrant workers and their families (*International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990*).

Moreover, in situations of an armed conflict enterprises should respect the standards of international humanitarian law. The International Committee of the Red Cross has published an information brochure called *Business and International Humanitarian Law (IHL)*, which is intended to inform businesses of their obligations and rights under IHL. The brochure explains when IHL is applicable, what the main purpose of this body of law is, and how businesses can conduct themselves in times of an armed conflict so as to avoid violations of the law (*Ten questions to Philip Spoerri*, 2012, p. 1134). The four Geneva Conventions of 1949 and their Additional Protocols of 1977 constitute the main instruments of IHL. Numerous other treaties address more specific topics related to conflicts, such as the regulation and use of specific weapons (ICRC, *Business and International Humanitarian Law*, 2006, p. 12). Like mentioned earlier, human rights are traditionally understood as only binding on States while international humanitarian law binds both State and non-State actors (e.g. managers and staff of business enterprises) whose activities are closely linked to an armed conflict (ICRC, *Business and International Humanitarian Law*, p. 13).

To respect rights essentially means “not to infringe on the rights of others—put simply, to do no harm. The responsibility to respect is the baseline expectation for all companies in all situations” (*J. Ruggie*, p. 194), regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts (*Principle 14*). To fulfil the obligation to respect human rights business enterprises have to: first, avoid causing or contributing to adverse human rights impacts through their own activities; second, have to seek to prevent or mitigate those impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts (*Principle 13*).

4. Operational principles – obligation to implement internal policy and processes

To fulfil the obligation to respect human rights, according to Principle 15, business enterprises should have in place: 1) a policy commitment to meet their responsibility to respect human rights, 2) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights, 3) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

The policy commitment includes the obligation to have a statement of policy in which companies should express their commitment to meet the responsibility to respect human rights. The Guiding Principles ask businesses to enumerate their human rights expectations so that they are publicly available to all members of the business organization as well as the public at large. The Guiding Principles note that, an effective human rights strategy must be acknowledged by every employee (*J. Martin*, 2013, p. 985). A business is free to make this statement in whatever form it chooses (*D. Weissbrodt*, 2014, p. 161). A statement of policy should be approved at the most senior level of the business enterprise, and be based on relevant internal and/or external expertise. The board of directors should have a significant role in the crafting and monitoring of a corporation's human rights policy (*J. Martin*, p. 985). The statement of policy should stipulate the enterprise's human rights expectations of the personnel, business partners and other parties directly linked to its operations, products or services. Additionally, the statement of policy should be reflected in operational policies and procedures necessary to embed it throughout the business enterprise (*Principle 16*).

To identify, prevent, mitigate and account for how businesses address their adverse human rights impacts, enterprises should carry out human rights due diligence. "Human Rights Due Diligence" is an important concept for the Guiding Principles which is described in the Guiding Principles 17–21. Due diligence is a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights related due diligence is determined by the context in which a company operates, its activities, and the relationships associated with those activities

(*J. Ruggie*, p. 194). Traditionally, in corporate practice, the board's due diligence role was associated with one-time transactions such as mergers and acquisitions. In those instances, the board's function was to monitor management as it performed its due diligence for the transaction and then to make sure that all of the correct protocols had been followed. The Guiding Principles set out how human rights due diligence differs from traditional notions of corporate due diligence, laying out the essential components of what an expanded due diligence strategy would be (*J. Martin*, p. 974, 980). The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how the impacts are addressed. The human rights due diligence process should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships. The process will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations. At the same time the process should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve (*Principle 17*).

In the course of the *due diligence* process business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved. This involvement comprises the direct actions of companies as well as results of their business relationships. In this process companies should engage potentially affected groups and make use of specialized information collected internally and externally. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of human rights impact assessments will depend on the industry and national and local context (*J. Ruggie*, p. 201).

In the next step the companies should monitor the undertaken actions. In this context they should track the effectiveness of these actions. Monitoring and auditing processes permit a company to track ongoing developments. The procedures may vary across sectors and even among company departments, but regular updates of human rights impact and performance are crucial (*J. Ruggie*, p. 202).

At the same time business enterprises should be prepared to communicate externally information how they address their human rights impacts (*Principle 21*). In all cases this communication should include sufficient information to evaluate the adequacy of undertaken activities, should be understandable and available to its intended audiences.

Even if the Guiding Principles do not say exactly how businesses should engage in human rights due diligence (*D. Weissbrodt, 2014, p. 162*) they represent the most comprehensive international framework to date to ensure that all businesses apply 'human rights due diligence' of all kinds to their business activities to prevent or remedy business-related human rights violations (*H. Slim, 2012, p. 916*).

The third type of business obligation is remediation. Even with the best policies and practices a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent. Where a business has identified an adverse human rights impact, "its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors" (*Principle 22*). Remedies are only required when the business has itself caused or contributed to a human right abuse; a link through a business relationship is not enough to require that the business provide remediation (*D. Weissbrodt, 2014, p. 162*). In this regard the Guiding Principles state that business enterprises should establish or participate in effective operational-level grievance mechanisms with internal complaint procedures. The guiding principles also includes criteria for judging whether grievance mechanisms are effective (*H. Clayton, p. 2*).

5. Final comments

International human rights treaties generally do not impose direct legal obligations on private actors, such as companies. Instead, States are responsible for enacting and enforcing national legislation that can have the effect of requiring companies to respect human rights—such as laws mandating a minimum working age. There are some exceptions in different areas of law, for example IHL also imposes obligations on private actors, including individuals and companies. However, human rights treaty obligations are generally understood as falling on States only. Given that

companies do not have the same legal duties as States under international human rights law, the Guiding Principles on Business and Human Rights were developed to clarify the different roles and responsibilities that States and companies have to address business impact on human rights (*Frequently Asked Questions*, 2014, p. 4,5).

Under the Guiding Principles business enterprises have the responsibility to respect human rights wherever they operate and whatever their size or industry. Corporate responsibility to respect human rights exists independently of States' ability or willingness to fulfil their duty to protect human rights. When a business enterprise abuses human rights, States must ensure that the people affected can have access to an effective remedy through the court system or other legitimate non-judicial process. It seems clear that the Principles are only meant to be a starting point, establishing a common global platform for action, on which cumulative progress can be built, step-by-step (*D. Weissbrodt*, 2014, p. 162). Nevertheless, the Guiding Principles have been lauded for a number of successes. These include effectively engaging states and companies in a fruitful dialogue and the corporate uptake of policies aimed at ensuring corporate due diligence (*J. Kyriakakis*, 2012, p. 986). The Guiding Principles clarify the meaning of the corporate responsibility to respect human rights and provide a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. Together with the United Nations Global Compact, the Guiding Principles constitute the core framework for business and human rights, and have mainstreamed the corporate responsibility to uphold and respect internationally proclaimed human rights (*B. Dubach, M. T. Machado*, p. 1051).

It is important for the Guiding Principle to be clearly and globally disseminated to all States and businesses. From there, it will take cooperation between all of these parties to determine how to create effective (*D. Weissbrodt*, 2014, p. 162) business framework for human rights protection.

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