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Business and Human Rights: Overcoming Old Paradigms, Pushing for New Frontiers

https://www.e-ir.info/2022/01/09/business-and-human-rights-overcoming-old-paradigms-pushing-for-new-frontiers/

FLORIAN WETTSTEIN, JAN 9 2022

In 2017, France enacted the much-anticipated Corporate Duty of Vigilance law, which requires large French companies to identify, address and report on human rights impacts across their operations and value chains, and provides an opportunity for those harmed by such impacts to seek remedy in French courts (Cossart, Chaplier & Beau de Lomenie 2017; Palombo 2019). Since then, a number of other countries have followed suit to enact their own version of such human rights due diligence (HRDD) legislation. Examples include the Netherlands, Germany, Norway and Switzerland (Krajewski, Tonstad & Wohltmann 2021; Bueno & Kaufmann 2021). In addition, legislative initiatives toward this end are ongoing in various additional countries. Perhaps most significantly, the European Union announced such legislation in 2021, although recently postponed it to 2022.

These new laws and initiatives are part of a larger trend toward improving accountability and addressing impunity of companies for the human rights impacts of their operations (Quijano & Lopez 2021). Corporate activities can have negative impacts on the human rights of people in myriad ways (Wettstein 2022). For example, child labor has been shown to be endemic in the cocoa supply chains of chocolate manufacturers (Jouvin 2021). Similarly, the seafood and garment industries have been plagued with exploitation, forced labor, and modern slavery (Armstrong 2020; Hoskins 2021). Extractive companies, which are responsible for more than a third of reported human rights violations (Ruggie 2013), frequently cause massive environmental destruction, pollute air, soil, and water and thus harm the rights of the members of local and indigenous communities who depend on agriculture and fishing grounds for their livelihoods. Private security personnel, hired to guard the premises of mining companies often have track records of excessive force and violence against protestors and potential intruders and of sexual exploitation and abuse of women in vulnerable positions (Knuckey and Jenkin 2015).

Countless people all over the world, but particularly in the Global South, have suffered the consequences of corporate abuse. They have lost their livelihoods, their possessions, their land, and their health; and they have been harassed beaten, tortured, shot, and killed for standing up for their own human rights and those of others. However, the structure of multinational companies in particular has made it difficult and often impossible for victims of such corporate-related human rights abuse to seek justice and remedy. Particularly in countries with weak institutions and a lack of independent judicial systems, victims have been in weak positions to find redress for what they have endured. In addition, the principles of legal separation between parent companies and their subsidiaries and of limited liability have often prevented them from successfully suing the parent companies of rights-violating subsidiaries in their home states (Palombo 2019; Bernaz 2017; Zerk 2006).

In response to such ‘governance gaps’ (Ruggie 2013; Simons and Macklin 2014), attempts to improve accountability systems both at the domestic and international levels have been intensified, particularly after the publication of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011. The UNGPs were the result of the six-year mandate of the UN special representative for business and human rights (SRSG), John Ruggie, who was appointed in 2005 with the goal to clarify the relation between human rights and business and the respective implications and responsibilities for both states and corporations that may derive from it (Ruggie 2013). John Ruggie’s appointment as the SRSG followed a failed attempt of the UN Sub-Commission on Human Rights to work toward a legally binding international framework for corporate human rights responsibility. The so-called UN Draft Norms failed to overcome

the fierce resistance of the private sector and Western economic powers in 2003 (Weissbrodt and Kruger 2003).

The issue of business and human rights more generally started to gain broader international attention some ten years earlier in the mid-1990s, when international oil companies, and among them particularly Shell, came under fire for their role connected to the killing of nine Ogoni activists – including the famous playwright Ken Saro-Wiwa – who were executed over their resistance and protest against the environmental destruction caused by multinational corporations in the Niger Delta (Wettstein 2020; 2022).

Back then, and partly still today, the idea of corporations as bearers of human rights responsibility seemed counter-intuitive at best. For human rights scholars, the idea and concept of human rights has traditionally been tied closely to states (Muchlinski 2001). In their view, the very definition of human rights hinges on corresponding state obligations, which makes a focus on business and human rights a conceptual non-starter. For corporate social responsibility (CSR) scholars, on the other hand, corporate responsibility is to be thought as private, voluntary responsibility, which does not fit well with the binding and public character of human rights (Wettstein 2020). As a consequence, human rights have remained a relative blind spot in conventional CSR approaches in the past (Wettstein 2012).

However, this traditional view on the incompatibility of business and human rights started to shift at a broad scale with the publication of the UNGPs. While not formulating any binding obligations for businesses, the UNGPs are clear in establishing a corporate responsibility to respect human rights, which is independent from governments' human rights obligations and thought to apply wherever they operate. At the same time, the UNGPs reiterate governments' primary, international law-based obligation to protect human rights against the abuse of third parties, including businesses.

By establishing a corporate responsibility to respect human rights, the UNGPs have led to a shift in the discussion on BHR, from focusing on the basic justification of corporate human rights responsibility to questions of implementation and accountability at the corporate, domestic and international levels (Schrempf-Stirling & van Buren III 2020).

Implementation challenges at the corporate level

According to the UNGPs, corporations ought to conduct HRDD in order to meet their responsibility to respect human rights. HRDD consists of identifying, responding to and communicating on actual and potential negative human rights impacts. While HRDD can be one effective means toward respecting human rights, the close alignment of HRDD with the responsibility to respect more generally has been criticized for a number of reasons.

First, HRDD is at best an incomplete approximation of respecting human rights. It is merely one means by which respect can be achieved, likely in combination with other necessary measures. Thus, conducting HRDD in and of itself is no guarantee that human rights will not be violated. Therefore, equating respect of human rights with HRDD contains the danger that corporate human rights violations persist, but without anyone being responsible for it. The risk is that the corporate responsibility to respect human rights is deemed to be met not by actually having a zero-violation record, but merely by having conducted HRDD. This, in turn, undermines the right and possibility of the victims to seek remedy for the violation (Bonnitcha & McCorquodale 2017).

Second, due diligence is a familiar tool to companies for the identification and appraisal of risk. It is applied particularly in the area of mergers and acquisition, but has become relevant also with regard to environmental and even social risks in recent years (Martin-Ortega 2014; Götzmann 2017). However, HRDD poses new and different challenges to companies. Most importantly, while HRDD is also designed as a risk-based process, its understanding of human rights risk deviates from risk appraisals of more 'conventional' enterprise risk management systems. Specifically, while 'regular' risk-based due diligence focuses on the materiality of risks for the company, HRDD is all about assessing and mitigating risks for rightsholders (Fasterling 2017). The UNGPs are clear in pointing out that HRDD requires a switch of perspective from a corporate-centric to a rightsholder-centered interpretation of risk. Hence, HRDD requires more than simply integrating a human rights focus into existing due diligence or risk-management processes. A study assessing different approaches to HRDD yielded clear results in this regard: companies with a dedicated HRDD process that addressed human rights directly and explicitly identified adverse

impacts in about 80 percent of their assessments, while companies that merely considered human rights implicitly through existing risk management processes only identified adverse impacts 20 percent of the time. (McCorquodale, Smit, Neely & Brooks 2017).

Accountability challenges at the domestic level

The UNGPs ask governments to make use of the full range of their possibilities to protect human rights in the business realm and to implement a smart mix of measures – national and international, soft and hard – to do so. Governments have generally responded reluctantly to this requirement. However, significant advances have been made in recent years in various jurisdictions, not least owed to the forceful campaigning around BHR issues by civil society organizations.

At the policy level, some two dozen governments have issued so-called National Action Plans on BHR (NAPs) and many more are in the process of doing so. While such NAPs have been criticized for being vague and non-committal (Methven O'Brien, Mehra, Blackwell & Poulsen-Hansen 2016), they do outline a basic commitment of governments to BHR and designate it as a policy priority.

However, perhaps more significant is the evolving trend in the legislative arena. As outlined earlier, a growing number of predominantly Western European states have enacted or are developing designated BHR legislation. While there is significant variance of such laws between jurisdictions, they tend to render HRDD mandatory for companies at various levels. As such, they tend to transform HRDD from a voluntary commitment into a binding obligation for businesses.

This growing trend of a 'hardening' of the UNGPs in the domestic realm (Choudhury 2017; Scrhrempf-Stirling & Wettstein 2021) does not only show in the legislative, but also in the adjudicative space. BHR litigation is not a new phenomenon in principle. Litigators have brought civil lawsuits for human rights violations against multinational companies to the domestic courts of parent companies' home states since the 1990s (Meeran 2021). However, while most of such cases were dismissed on the grounds of lacking jurisdiction of home state courts in the past, there have been significant advances in this regard in recent years. In a number of jurisdictions such as the UK, the Netherlands and Canada, courts have accepted jurisdiction for a few seminal cases and outlined promising paths for future cases to follow suit (Roorda & Leader 2021). It is to be expected that the above-described trend toward new BHR legislation will create further possibilities for victims of corporate human rights abuse to bring cases to the courts of multinationals' home states.

Accountability challenges at the international level

The lack of binding force of the UNGPs for corporations has been lamented by critics all along (Nolan 2013; Deva & Bilchitz 2013). As a consequence, 10 years after John Ruggie put the UN Draft Norms to rest for good – a move that was later termed 'Normicide' – the UN Human Rights Council passed a resolution at the initiative of Ecuador and South Africa to commence new negotiations on a binding international treaty on BHR in 2015 (Deva & Bilchitz 2017). While Western powers and the private sector keep opposing such binding instruments at the international level, countries of the Global South along with civil society organizations are supporting it. However, history is only partly repeating itself in this regard. The BHR landscape has changed profoundly in the past ten years; the UNGPs have fostered broad acceptance of a corporate responsibility to respect human rights and it is now for the opponents of such a view to provide plausible reasons why such a responsibility should not be binding. Nevertheless, the negotiations so far have made it clear that despite this changed context, the road to a binding instrument will be long and hard-fought. However, we have seen what perhaps few of us thought possible: five years into the negotiations, there still is a road.

Conclusion

Merging business and human rights requires that we overcome two old paradigms. First, we must give up on the state-centrism that has characterized traditional human rights thinking and systematically include non-state actors,

and among them businesses, as bearers of human rights obligations. Second, we must replace the corporate-centric, private outlook that has characterized CSR with an understanding of corporations as political institutions with public responsibilities that include respect for human rights. In a nutshell, we must move from the state-centric outlook on human rights and the corporate-centric view on corporate responsibility, to a rightsholder-centered understanding of business and human rights.

Those old paradigms in our thinking on human rights and corporate responsibility have both obstructed our view on corporate human rights responsibility conceptually and also enabled the creation of structures that have made it difficult to put business and human rights into practice. Recently, the UNGPs have opened the door to breaking down some of those long-standing barriers to corporate human rights accountability and recent developments particularly in domestic legislative and judicative spaces give reason for hope that this door can be pushed open wider. Nevertheless, at the end of the day, the success of the business and human rights movement is measured by tangible improvements of the situation of those whose rights are abused on the ground – and by this measure, the business and human rights journey has only just started.

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About the author:

Florian Wettstein is Professor of Business Ethics and Director of the Institute for Business Ethics at the University of St Gallen, and Editor-in-Chief of the *Business and Human Rights Journal*.