

НОРМОТВОРЧЕСКАЯ И ПРАВОПРИМЕНИТЕЛЬНАЯ ДЕЯТЕЛЬНОСТЬ МЕЖДУНАРОДНЫХ ОРГАНИЗАЦИЙ

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DUE DILIGENCE OF HUMAN RIGHTS AS A NEW WAY OF HUMAN RIGHTS PROTECTION

Аннотация. *This article aims to analyze a new phenomenon, taking place in the sphere of human rights protection. Companies have a responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others. This is the message the UN Human Rights Council sent to all actors in 2008 as part of adopting unanimously the Protect, Respect and Remedy policy framework for business and human rights put forward by John Ruggie, the UN Special Representative for Business and Human Rights. The protection of human rights, including where it relates to business, is the primary obligation of the state. However, in many parts of the world, and in specific contexts, governments continue to be unable or unwilling to live up to all their duties. Companies have the responsibility to respect human rights, but there have been several instances where companies have failed to live up to international standards or expectations. In cases of state inability and failure, the onus increasingly falls on companies to be more proactive in the field of human rights.¹ It is against this background that the UN Human Rights Council sought to clarify the obligations for states and the responsibilities of business by adopting the Special Representative's framework.*
Ключевые слова: *Международное право, policy framework, UN Human Rights Council, corporate responsibility, human rights abuses, Guiding Principles, international standards, human rights due diligence, assessment, actual practice*

But what does the corporate responsibility to respect or act with due diligence of human rights mean in practice?

The process of globalization and other global developments over the past decades have seen non-state actors such as transnational corporations and other business play an increasingly important role both internationally, but also at the national and local levels. The growing reach and impact of business enterprises have given rise to a debate about the roles and responsibilities of such actors with regard to human rights.

International human rights standards have traditionally been the responsibility of governments,

aimed at regulating relations between the State and individuals and groups. But with the increased role of corporate actors, nationally and internationally, the issue of business' impact on the enjoyment of human rights has been placed on the agenda of the United Nations. Over the past decade, the United Nations human rights machinery has been considering the scope of business' human rights responsibilities and exploring ways for corporate actors to be accountable for the impact of their activities on human rights.²

The concept of human rights due diligence has been advanced by the United Nations Special Representative of the Secretary General on Business and Human Rights, Professor John Ruggie. It was first set out in 2008 by the Special Representative as the

¹ "The State of Play of Human Rights Due Diligence, Anticipating the next five years", Volume one: General Overview – Institute for Human Rights and Business, 2011.

² <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx>

central requirement of the ‘Corporate Responsibility to Respect’ human rights – part of the UN endorsed ‘Protect, Respect and Remedy’ Framework on business and human rights.

The *‘Protect, Respect and Remedy’ Framework* rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.³

Beyond the Human Rights Council, the Framework has been endorsed or employed by individual Governments, business enterprises and associations, civil society and workers’ organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization and the Organization for Economic Cooperation and Development in developing their own initiatives in the business and human rights domain. Other United Nations special procedures have invoked it extensively.

During the interactive dialogue at the Council’s June 2010 session, delegations agreed that the Framework should provide with concrete and practical recommendations for its implementation and take the form of “Guiding Principles” subject to extensive consultations. In October 2010, an an-

notated outline was discussed in separate day-long sessions with Human Rights Council delegations, business enterprises and associations, and civil society groups.

The document was also presented at the annual meeting of the International Coordinating Committee of National Human Rights Institutions. Taking into account the diverse views expressed, the Special Representative then produced a full draft of the Guiding Principles and Commentary, which was sent to all Member States on 22 November 2010 and posted online for public comment until 31 January 2011.

Thus, the Guiding Principles are informed by extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that the Guiding Principles touch upon.

The Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. Each Principle is accompanied by a commentary, further clarifying its meaning and implications.

Some of the Guiding Principles have been road-tested as well. For example, those elaborating effectiveness criteria for non-judicial grievance mechanisms involving business enterprises and communities in which they operate were piloted in five different sectors, each in a different country. The workability of the Guiding Principles’ human rights due-diligence provisions was tested internally by 10 companies, and was the subject of detailed discussions with corporate law professionals from more than 20 countries with expertise in over 40 jurisdictions. The Guiding Principles addressing how Governments should help companies avoid getting drawn into the kinds of human rights abuses that all too often occur in conflict-affected areas emerged from off-the-record, scenario-based workshops with officials from a cross-section of States that had practical experience in dealing with these challenges. In short, the Guiding Principles aim not

³ Human Rights Council, Seventeenth session, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprise, John Ruggie – “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, A/HRC/17/31, March 21, 2011.

only to provide guidance that is practical, but also guidance informed by actual practice.⁴

What do these Guiding Principles do? And how should they be read?

Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.

In 1952, CEO of General Motors, Charlie Wilson, famously proclaimed: «What’s good for GM is good for the country». His words now apply in the context of human rights protection. Endorsement by the United Nations Human rights Council of a new set of Guiding Principles for Business and Human Rights has been welcomed as the “authoritative global standard” for corporations to respect human rights. The Guiding Principles conclude that the companies should carry out “human rights due diligence to identify, prevent, mitigate and account for how they address their adverse human rights impact.”⁵

The Guiding Principles ask that companies, especially those with operations in conflict zones, be audited to prevent and deter such violations. This idea should come as a little surprise considering that some corporations are more powerful than states.

The Guiding Principles astutely recognize that corporations too can be brought to book for human rights abuses. The Guiding Principles require corporations to respect human rights, as regulators, investors and consumers increasingly insist upon them. Corporation are no longer solely judged on their balance sheets. The way in which a corporation treats its employees and the environment, manages its supply chain and engages with the community now matter a great deal.

In June 2010, the Institute for Human Rights and Business published its State of Play report on human rights due diligence, which examined how 23 com-

panies had interpreted the concept and described the efforts made to apply it in practice.

One of the main areas of both human rights and business risk lies in the contractual relationships businesses have with each other, and with States and State entities. These relationships range from Joint Venture agreements, to Mergers and Acquisitions, Public Private Partnerships, Host Government Agreements, Strategic Supplier arrangements, End-User and Licensing agreements.⁶

Due-diligence of human rights. How should it be?

Economic players, especially companies that operate across national boundaries (trans-national companies), have gained unprecedented power and influence across the world economy. This has not always benefited the societies in which they operate.

The aim of linking business operations with Human Rights and Social Compliance is to enable corporations to ensure the protection and promotion of Human Rights in sustainable economic development and highlight the fact that compliance will have a direct effect on the company’s bottom line and profitability.

One of the foundational principles proclaims that business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.

Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of

⁴ Human Rights Council, Seventeenth session, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprise, John Ruggie – “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, A/HRC/17/31, March 21, 2011.

⁵ James Kallman, Mahdev Mohan “Reality check”, FORBES Indonesia, August 2011.

⁶ “The State of Play “of Human Rights Due Diligence, Anticipating the next five years”, Volume one: General Overview – Institute for Human Rights and Business, 2011.

structuring contracts or other agreements, and may be inherited through mergers or acquisitions.

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

The *initial step in conducting human rights due diligence* is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men.⁷

While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social

impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.

Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

The assessment of human rights impacts informs subsequent steps in the human rights due diligence process.

Good example to follow

The inaugural International Accounting Bulletin Awards, which were held on March 8th, 2012, recognised and rewarded the leading accounting firms, networks and alliances across the world, judged by an independent panel of high level accounting experts.

The IAB awards recognize and reward the leading accounting firms, networks and alliances across the world, and are judged by an independent panel of high level accounting experts. Thus, MAZARS – one of the leading international audit firms won the International Accounting Bulletin (IAB) “Audit innovation of the Year” award for its “Human Rights Audit” practice.⁸

The jury commented on the reasons why they rewarded Mazars on the innovation of the Year Category: “Mazars has taken a lead role in assessing audit clients against the Mazars indicators for Human rights Compliance. These indicators measure how well a company is complying with basic human rights. They are assessed against local laws and consolidated at an international level. Judges felt the Mazars Human rights audit was pertinent, innovative and could set a benchmark for global best practice.”

The current Global financial crisis has shown that sustainability, along with good and meaningful

⁷ Human Rights Council, Seventeenth session, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprise, John Ruggie – “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, A/HRC/17/31, March 21, 2011.

⁸ Mazars is an international, integrated and independent organisation, specialising in audit, accounting, tax and advisory services. Mazars can rely on the skills of more than 13,000 professionals in the 68 countries which make up its integrated partnership. Find the complete report on <http://annualreport.mazars.com/>

financial reporting, is important information when reporting on a company's performance. Mazars recognizes the profound changes taking place in the world and seeks to be out in front with relevant reporting for the clients and meaningful information for their various stakeholders and Regulators.

Mazars has set out a bold initiative to drive companies and business leaders across the world to manage and address Human Rights issues in business.

James Kallman, Managing Partner of Mazars in Indonesia and Global Head of the Human Rights practice, said: *"In recent years, we have seen a growing understanding among companies that recognizing human rights risks in their local operating environments is one of the most important steps in ensuring company compliance, good practices and, as a result, doing business sustainably. This has a direct effect on corporate bottom lines and profitability. Our clients care about Human Rights and Social Compliance and so does Mazars, deeply."*

Mazars has begun to assess the compliance of its clients' businesses against Mazars Indicators for Human Rights Compliance which were developed based upon the Best Practices in Human Rights as set out in The Human Rights Compliance Assessment. All indicators have been assessed against prevailing local laws as a baseline for compliance and allow for consolidation at an international level.

On the consulting side, Mazars assists companies in assessing Human Rights impacts and risks and then recommends best policy and procedures for managing, monitoring and reporting Human Rights issues in a company's day to day operations.

Through this latest development in Mazars' sustainability practice, its clients can now meet stakeholders' expectations and by becoming more sustainable and responsible, they can in the long run mitigate reputational risks and financial losses.

Philippe Castagnac, CEO of the Mazars Group, commented on the IAB reward: *"For Mazars, Human Rights compliance is central to business and is a powerful strategy in current business environment. Business is now playing a more pronounced and visible role in the human rights debate following an increasing pressure to act with due diligence to avoid infringing on the rights of others as laid out in the UN Human Rights' policy framework. Many international companies have started embarking on this issue but need to be assisted by truly recognised experts. It's why we decided to launch this "Human Rights" practice. Today, we are really proud of the recognition by the IAB Awards jury of this innovative initiative in which we truly believe"*.

Until now most companies' engagement with human rights responsibilities has been through voluntary codes and initiatives. While some voluntary initiatives have a role to play, such voluntarism can never be a substitute for global standards on businesses' mandatory compliance with human rights.

These global standards should address the human rights responsibilities and obligations of both states and companies. As a minimum requirement, all companies should respect all human rights, regardless of the sector, country or context in which they operate.⁹

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