

Annual Conference of the African Bar Association

Port Harcourt, Nigeria

7 August 2017

The intersections of human rights and business*

Brief overview of human rights

The concept and practice of international human rights law is as interesting as it is controversial. Its global appeal demonstrates, to a large extent, its acceptability. Generally speaking, the term “human rights” refers to those inalienable rights that are attached to human beings, without which there will be a deficit in human dignity. Over the centuries, legal scholars have grappled with the precise definition of human rights. Almost 400 years ago, Hugo Grotius thought that one aspect of the universal laws of nature was the right of all individuals and groups to self-preservation. He affirmed that this right existed in all countries regardless of their municipal laws. In the same vein, Professor Osita Eze opined that human rights represents demands or claims which individuals or groups make on society, some of which are protected by law and have become part of *Lex lata*, while others remain aspirations to be attained in the future.

However, the atrocities of the two world wars and the holocaust motivated States to draw up the United Nations Charter in 1945, with its main purpose being to promote and encourage respect for human rights and for fundamental freedoms as a panacea for international peace and security. In a 1948 resolution, the United Nations General Assembly affirmed the Universal Declaration of Human Rights (UDHR), which reinforced modern international human rights law and which has influenced most international human rights instruments and Constitutions in the world.

The UDHR consists of a preamble and 30 articles, setting forth the human rights and fundamental freedoms to which all men and women everywhere in the world are entitled to, without any discrimination. Article 1 of UDHR clearly states, “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*”.

Essentially, the UDHR instigated the two foremost international human rights treaties, namely: the international covenant on civil and political rights (ICCPR) and its two optional protocols and the international covenant on economic, social and cultural rights (ICESCR). The UDHR and the two international human rights treaties constitute the international bill of rights.

Business and human rights

Perhaps the statement “business and human rights” could not have been a valid expression fifty years ago. Traditionally, International human rights law and standards have been the responsibility of States, aimed at regulating relations between the State, individuals and groups. However, times have changed and the process of globalization has contributed to the increased role and influence of corporate actors nationally, regionally and internationally; and regular business activities naturally raise human rights questions in areas of employment, security and the environment etc. Today, some transnational corporations have grown so large and diverse as to generate more financial resources than small States. Hence, the issue of business activity impact on the enjoyment of human rights has become so critical that it has earned a place in the United Nations agenda.

Over the past decade, the UN human rights machinery has been considering the scope of business’ human rights responsibilities and exploring ways for businesses to be accountable for the impact of their activities on human rights. On 16 June 2011, the UN Human Rights Council¹ endorsed the UN Guiding Principles on Business and Human Rights (Guiding Principles) for implementing the UN “Protect, Respect and Remedy” Framework, providing - for the first time - a global standard and normative framework for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

The UN Guiding Principles are a “soft law,” but they provide an authoritative framework designed to prevent and address adverse human rights risks and the impacts of business activities, and to ensure that victims have access to effective remedy. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises (whether big or small) wherever they operate². It exists independently of States’ abilities and/or willingness to fulfil

¹ HRC resolution 17/4.

² Commentary on the UN Guiding Principles on Business and Human Rights.

their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

Notably, the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national laws in relevant jurisdictions. Most human rights violations do not exist in a vacuum, but within a nexus of corruption, poverty, poor public services and infrastructure, weak national institutions and other factors that make it difficult for businesses to operate efficiently.

Also, States are required to set out clearly the expectation that all business enterprises within their territory must respect human rights throughout their operations. It includes their supply chains and other sub-contractors. We have seen the value of this expectation in Europe and the United States, where human rights victims successfully sue parent companies for human rights abuses committed in other countries.

Effective judicial and non-judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses largely depends on their impartiality, integrity and ability to accord due process. In other words, it is one thing to have a good framework or the best of laws, but it is yet another to harness the best outcomes through implementation or enforcement.

Under the regime of business accountability for human rights, local businesses, companies and transnational corporations are to be held to the same standard of scrutiny for infraction of human rights regardless of their size, sector, location, ownership and structure. It is the duty of States to protect against human rights abuse within their territory by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

However, the Guiding Principles also put boundaries on the responsibility of companies with respect to human rights. Companies are not expected to address the human rights of anyone and everyone. Their baseline responsibility relates specifically to the people whose human rights are affected in connection with their own operations, products and services. It extends to human rights impacts that occur through their business relationships. This includes the actions of joint

venture partners, business customers or clients, suppliers, suppliers' suppliers and so forth. It includes the companies providing cleaners that clean their offices, the kitchen staff that work in their canteens, the security guards who keep their assets secure: in sum, all entities that play a role in how a company's business gets done.

Good practice - Regulatory Developments Addressing Human Rights Due Diligence

As of January 2017, a new European Union directive on non-financial reporting will require large companies to disclose information on their human rights policies and outcomes, risks and risk management "to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity."³

The UK Modern Slavery Act and the US Federal Acquisition Regulations Anti-trafficking Provisions both require companies to disclose information about the due diligence that they conduct on their supply chains in relation to forced labour and human trafficking⁴.

The California Transparency in Supply Chains Act of 2010 requires retailers and manufacturers doing business in California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for goods offered for sale.

Since 2012, US-listed companies for which tin, tungsten, tantalum or gold are necessary to the functionality or production of a product they manufacture, must disclose annually whether any of those minerals originated in the Democratic Republic of Congo (DRC) or an adjoining country, and if so, must describe their due diligence measures⁵.

The Securities and Exchange Board of India requires that the 500 largest listed companies submit business responsibility reports describing their implementation of the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, which include respect for human rights in line with the UN Guiding Principles⁶.

³ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014.

⁴ Section 54(9) of the Modern Slavery Act 2015.

⁵ US Securities and Exchange Commission 17 CFR Parts 240 and 249b.

⁶ Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2015.

In March 2016, the French National Assembly adopted a bill that would require the largest French companies to conduct human rights and environmental due diligence as part of a “duty of care.” The bill is currently before the Senate.

Human rights risks are business risks

Human rights risks have today arguably become a leading indicator of business risks, be they operational, financial, reputational or legal. Research illustrates, for example, the increasing likelihood and scale of conflicts with local communities when natural resource, agricultural or construction projects impact their health and livelihoods. Such conflicts destroy value for companies in a variety of ways. Reputational damage or risk is one of the harder costs for companies to measure, as is the prevalence of news stories and campaigns related to human rights impacts on a company’s operations and supply chains. This is a relevant factor for any brand or company. From deaths of garment workers in building collapses and fires in Bangladesh and Pakistan, to forced labour in the fishing industry from Thailand to New Zealand, to governmental abuse of the free expression and privacy of the users of telecom services, to the eviction of poor communities to make way for stadia for major sports events, company reputations are increasingly on the line.

The implication is that more and more companies are now scrutinizing their suppliers and business-to-business relationships at all points along value chains. Government procurement agents and export credit agencies have also started to strengthen requirements for human rights due diligence in their own assessment processes. Also, many companies, financiers and investors use service providers to screen businesses and projects for negative incidents, criticisms and controversies about human rights abuses, using such information as part of their own due diligence.

According to the International Corporate Governance Network (ICGN), “Human rights are attracting increasing attention from a corporate governance perspective as a dimension of both business ethics and enterprise risk management for companies. Indeed, the ethical and risk dimensions are in many ways intertwined, insofar as ethical lapses or inattention to human rights practices by companies may

not only breach the human rights of those affected by corporate behaviour, but may also have material commercial consequences for the company itself.”⁷

Risks of Lawsuits and Administrative Complaints

The absence of human rights due diligence by companies may result in expensive litigation and settlement. The Royal Dutch Shell company was the subject of a lawsuit in the UK High Court by members of Nigeria’s Bodo community, seeking compensation for harms related to their health, livelihoods and land due to oil spills by Shell’s Nigerian subsidiary in 2008. In 2015, following a ruling that Shell could be held responsible for spills if it failed to take reasonable measures to protect the pipelines from malfunction or oil theft, Shell agreed to a 55 million GBP out of court settlement.⁸

In 2013, Adidas agreed to pay severance to the Indonesian workers of an independent supplier whose factory had shut down, after the University of Wisconsin sued the company in US federal court, alleging that it had breached labour provisions in its contract to supply garments with the university logo. The claim sought up to US\$2 million for the workers, though the settlement was confidential⁹.

The case of Africa

Africa is the second largest continent in the world with a population of approximately 1.3 billion, and forms about 16.36% of the entire world population. It is also home to major natural resources that are in high demand in other parts of the globe. The population of Africa and its abundant natural resources largely account for its attraction to businesses, especially the transnational corporations that are ever searching for new market outlets.

However, most African countries are, at the moment, bedevilled with myriad developmental challenges, more especially in the areas of economic development, good governance, law enforcement, institutional capacity, corruption etc. Poor political and economic leadership in many African countries has fuelled a vicious cycle of poverty, high unemployment rates, cheap labour and high-levels of corruption. This state of affairs accounts for weak state institutions and does not

⁷ www.icgn.org/policy/viewpoints/human-rights.

⁸ www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria.

⁹ www.business-humanrights.org/en/adidas-lawsuit-re-university-of-wisconsin.

engender confidence in the minds of potential foreign investors with the financial muscle to make a difference in these economies.

Obviously, for the Guiding Principles to be maximally beneficial and achieve the goal of ensuring a sustainable business climate and enthroning an objective paradigm in business-related human rights protection in Africa, an independent judicial and non-judicial mechanism is a sine-qua non. Also, the strengthening of national human rights institutions (NHRIs) as well as civil society groups should be paramount, as these undertake critical watchdog roles in the society. Considering the human rights awareness levels in Africa, the Bar Associations should be at the forefront in sensitizing, capacity building and creating general awareness of international, regional and national human rights frameworks in general and the Guiding Principles in particular.

Essentially, there is a presumption here that judicial and non-judicial mechanisms for redress should be up and running effectively and demonstrating the values of fairness, non-discrimination and integrity. The climate of rule of law and independent institutions, particularly the judiciary, is generally favourable to commercial transactions and direct foreign investment

The way forward

At this point of our discourse, some recommendations may be appropriate for a better future, as follows:

(a) National Bar Associations

- National Bar Associations as well as other civil society groups should step up a concerted campaign to advance respect for human rights in line with the UN Guiding Principles, highlighting the contribution this will make to uplifting millions of people out of poverty and abuse, and enabling them to enjoy the fruits of development.
- Lobby governments to introduce human rights due diligence into their own procurement policies and practices, and, where applicable, into their development, finance and export credit practices, as an essential means to incentivise and reward companies that act with respect for human rights and meet their own state duty to protect human rights.

(b) Investors, financiers and other stakeholders

- Support and promote better human rights disclosure by companies in line with UN Guiding Principles - such as by using the UNGP Reporting Framework as a means to motivate improved human rights performance, and as a vehicle for meaningful dialogue with investors and other stakeholders.

Conclusion

As illustrated above, if a company is contributing to human rights harms, it should cease doing so and help provide remedy to anyone harmed. Conversely, If it is not contributing to harm, but the harm is still connected to its operations, products or services, it should use its influence or leverage to try to stop it recurring. Where companies are involved with severe impacts on human rights, there is a strong chance that there will be risks to their business as well. Companies in this situation are at a minimum missing a critical opportunity to contribute to sustainable development.

Thank you for your kind attention.

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