

Business and Human Rights: Implementing the UN Guiding Principles

15-16 September 2011

Conference Summary

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On 15-16 September 2011, the British Institute of International and Comparative Law, together with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and the International Bar Association, and generously sponsored by Clifford Chance LLP and The Söderberg Foundation, held a conference on “Business and Human Rights: Implementing the UN Guiding Principles”. This conference considered the implementation of the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy”’, drafted by UN Special Representative John Ruggie and adopted by the United Nations Human Rights Council in June 2011.

The Guiding Principles follow the Ruggie Framework by dealing with three pillars: the state duty to protect human rights; the corporate responsibility to respect human rights; and access to remedies. Over the course of the two days, six panels explored the critical aspects of these three pillars in an attempt to flesh out the implications of the UN Guiding Principles for business, governments, and civil society. From the robust panel discussions emerged certain themes that will be critical to determining how the Guiding Principles are taken forward.

The State Roles v. The Business Roles

The tension between the scope of state and business roles in upholding human rights were found in two key ways: what is a reasonable use of extraterritoriality to hold companies accountable for abuses abroad, and what tools should be legally mandated and what tools should be voluntary? With regard to extraterritoriality, it was noted that this principle is used in a number of areas, such as bribery and corruption, and therefore would not necessarily be a large step if applied to human rights. There seemed to be some agreement about the fact that there must be a “smart mix” of tools, some legal and some voluntary. However, the balance in that mix remains for debate. Some participants favoured a voluntary-driven approach, while others believe legal regulation is a critical driver to level the playing field for victims of human rights abuse. There is also concern about a lack of access to resources by victims of abuse, both with regard to necessary information about rights and the degree of evidence required, and with regard to access to legal processes.

Furthermore, there is not always a clear line between voluntary and mandatory tools, as evidenced by litigation around the failure of some companies to uphold their codes of conduct; once adopted, does the law require that they be applied? Laws also provide the opportunity for companies to engage in “legal engineering,” or finding loopholes to avoid the intended consequences of the regulation. In a related concern, certain situations seem to require a clarification of the relationship between the Guiding Principles and international law. For instance, should state-owned enterprises fall under Pillar I or Pillar II of the Ruggie framework, and how do “conflict-affected zones” correspond with international humanitarian law categories?

The role of lawyers also figured into this “voluntary/mandatory” debate, with some speakers finding lawyers indispensable and others finding them obstructive in seeking solutions to human rights-related problems. This discussion highlighted a structural and conceptual problem of the Guiding Principles, which are a voluntary tool and have purposely avoided legal language and theories.

Embedding Due Diligence

The consensus that an exclusively legal approach to upholding human rights is insufficient gives rise to the question of what businesses can do to facilitate human rights protection. Part of the corporate responsibility to respect human rights under the Guiding Principles is the concept of human rights due diligence. There were two principal strains of concern in this regard: of what should this due diligence consist?; and what should a due diligence process look like? A number of speakers broached the idea of human rights risk but it remained unclear how this risk can and should be defined. The Guiding Principles recommend components of this process but participants stated that there was a fundamental concern over the disconnect between human rights policies and human rights practice. For instance, while many companies have laudable human rights policies, it was felt that there is a dearth of appropriate human rights impact assessments, as well as experts to implement them.

It was felt that the Guiding Principles, although general in their scope, will require sector-specific application. For example, the legal sector will not be able to apply them the same way as the financial sector might. This lack of clarity around appropriate goals and objectives for a due diligence outcomes raised concerns when considered in conjunction with the fact that participants expressed a need for a business case as a means of creating incentives to protect human rights. To this end, participants did agree that all parts of a business must engage with the due diligence process, and one panellist suggested that the process be embedded in corporate compliance sections. Conference participants were advised not to under-estimate the business interest in human rights.

Language and Communication

A third theme that emerged consistently was the need for appropriate multi-stakeholder communication. Concern about communication and the use of language arose largely in the context of the policy/practice divide. For instance, one panellist noted that even where laws require stakeholder engagement, that engagement can be superficial and insufficient. This criticism relates to the need for appropriate tools and processes, considered above, but also how best to make stakeholders aware of these tools.

Lack of awareness of grievance mechanisms, for instance, was noted as one of the key problems to ensuring effective dispute resolution. Part of improving awareness involves transparency and disclosure of processes and outcomes to stakeholders. However, a tension between disclosure and confidentiality was voiced as well, and was deemed a necessary consideration in developing an effective communication strategy. One positive development in the area of communication has been the use of cell phone technology. A number of participants pointed to the use of cell phones as a means of collecting information for grievance mechanisms and facilitating communication between activists and lawyers spread across the world.

The conference covered a great deal of ground in discussing the role of the Guiding Principles in the business and human rights movement, both with regard to the range of topics discussed and the range of participants involved. Special thanks to Jonathan Bonnitcha and Robert McCorquodale for the organisation of the conference, as well as to the co-organisers and the sponsors, and to the rapporteurs – Anna Blachura, Lara Blecher, Daniel Levien and Camilla Wee.

Link to the Guiding Principles: <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>