

THE PROTECTION OF INDIVIDUALS FROM BUSINESS ACTIVITIES AS A CONSTITUTIONAL GUARANTEE OF HUMAN RIGHTS*

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This study aims to examine how the government protects individual human rights in relation to business activities that can harm people's human rights. The findings are based on a normative legal research that uses secondary data in the form of primary, secondary, and tertiary legal materials. The data collection technique includes library research and qualitative analysis. The study indicates that the government and corporations must protect human rights. It means that states must adopt regulations to protect, fulfill, and respect people's human rights from company activities, and corporations must respect human rights regulations in their activities.

Keywords:

human rights, business activities, corporate responsibility

Introduction

Do business actors have human rights duties? Handelsman (2002) argued that this question is based on the fact that the activities of corporations can produce a variety of problems for the state and can violate people's human rights, such as environmental rights – for example, losing access to clean water due to factory activities –, violations of labor law, discrimination against women, et cetera, either directly or through their sphere of influence on state regulation.² The question also raised by Mena et al. (2010) and can be quickly answered because international law sees human rights as the relationship between a state and its citizens (Weissbrodt & Kruger 2003). Van der Ploeg & Vanclay (2017) argued that the state is a duty-bearer, while the citizen is a duty-holder. However, the international community wants to emphasize the obligation to protect human rights of the corporation, although private entities like corporations are typically not directly bound to international human rights agreements (Ratner 2001).

Nevertheless, it is the responsibility of states to pass and enforce legislation at the national level that may compel enterprises to uphold human rights. Thus, a state can protect individual rights through constitutional protection against corporate activities. One emerging instrument in human rights protection relating to business activities is the Guiding Principles on Business and Human Rights, which were formulated to elucidate the distinct roles and obligations that States and enterprises possess in addressing the influence of corporate activities on human rights.

The conflict between preferences on effective business activities and human rights arise from the inherent tension between the corporate drive for profit and the ethical and

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²The corporate sphere of influence in state regulations means that corporations or business actors can interfere in making rules that will benefit the corporations but harm people's human rights.

moral obligation to protect human rights (Griffith et al. 2020). Addressing this conflict requires a nuanced understanding of the roles and responsibility of both business and state in human right. Hence, this paper wants to see how the state protects individual human rights from corporate business activities.

1. State and Corporation's Responsibility for Human Rights

To answer the previous question, do business actors have human rights responsibilities? First, we need to understand what human rights are; the United Nations (UN) says human rights are people's right to be treated with dignity. Human rights are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. Additionally, the International Bill of Human Rights provides the primary human rights directives (United Nations 1948). Meanwhile, the Amnesty International defines human rights as universal, invisible, and interdependent. They are shared values grounded in the inherent dignity of all human beings (Amnesty International 2000). Additionally, Human Rights Watch says that human rights belong to everyone, everywhere, regardless of nationality, ethnicity, or religion (Human Rights Watch 2000). From these three definitions, we can simply say that human rights are for everyone without discrimination.

The 1948 Universal Declaration of Human Rights (UDHR) created the framework for protecting human rights. UDHR is an instrument containing civil, political, economic, social, and cultural rights. UDHR was broken down into two covenants. The First is the International Covenant on Civil and Political Rights (ICCPR), and the second is the International Covenant on Economic, Social, and Cultural Rights (ICESCR). In total, the United Nations have adopted 18 human rights treaties up to this point (UNHRC 2023). All treaties talk about how states protect people's human rights. Meanwhile, corporations' obligations on human rights responsibilities also have long been discussed. History records the imposition of human rights on corporations starting in 1970 with the Draft Code of Conduct on Transnational Corporations, but this code has received almost no attention, and in 2003 the United Nations issued a new provision titled Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, commonly referred to as "the norm" (Ruggie 2007). Nevertheless, this provision could not be implemented because corporations were responsible for human rights like states, while corporations did not have rights and obligations as a state (Weissbrodt & Kruger 2003).

The non-enactment of the norm does not stop the public from imposing human rights obligations on corporations because companies remain among the most visible and important actors – apart from the state – in the governance of global problems and global solutions. Their economic power and pursuit of private interests, maintained primarily via lobbying, has been bolstered by the ability to form, interpret, and implement political and legal norms, rules, standards, and regulations (Koechlin, et. al, 2009). Moreover, under the aegis of the United Nations, a special office responsible for the development of human rights legislation related to corporate involvement in human rights was established. This is the Special Representative on Business and Human Rights, who the Secretary-General appoints under the UN Commission on Human Rights (Ruggi 2011).

In 2008, the session of the UN General Assembly presented the results of the work of the Special Representative under the name of the UN Protect, Respect and Remedy Framework on Business and Human Rights. These are usually called the three pillars of business and human rights. The first pillar entails the state's duty to protect, while the second pillar involves the corporation's responsibility to uphold. The third pillar encompasses the joint responsibility of both the state and the corporation in addressing human rights violations, specifically by providing avenues for redress through both judicial and non-judicial means. The three pillars were delineated throughout 31 principles outlined in *The United Nations Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy (UNGPs)." The principles are established by nations and enterprises to explicitly define their obligations and commitments in maintaining and upholding human rights in business operations. Furthermore, it guarantees the availability of a proficient recourse for both individuals and collectives impacted by aspirating.*

- a. The first pillar is the duty to protect: the state's responsibility to protect against human rights abuses by third parties, including businesses.
- b. The second pillar is a responsibility to respect: the corporate responsibility to respect human rights.
- c. The third pillar is access to remedies for victims of human rights abuses by corporations.

The first pillar of the state duty to protect includes protecting human rights from abuses by third parties, including business enterprises, through policies and regulations and providing access to remedies, whether through litigation or a non-litigation mechanism (Lagoutte 2014).

The second pillar of the United Nations Guiding Principles delineates the obligation of corporations to uphold and protect human rights (Ramasastry 2015). Corporations must ensure they do not violate the rights of persons and take action to address any negative impact on human rights that may arise. A company's operations must be conducted to respect and safeguard the human rights of all individuals, including employees, community members, consumers, and other stakeholders, without causing any interference or injury. Responsibility entails that firms must evaluate the consequences of their actions, refrain from violating human rights, and tackle any prospective or existing repercussions. Companies are required to engage in efficient redress procedures if they discover that they are responsible for or have had a role in causing harm.

The Report of the Special Representative emphasizes the role of states to uphold international law to prevent human rights violations committed by individuals, including legal entities, against other individuals. It also highlights international law as a normative framework for companies to exercise due diligence and fulfill their corporate responsibilities to respect human rights (Ruggie 2008). The third pillar is the availability of remedies (Skinner et al. 2013). This pillar highlights that it is the responsibility of both a state and a corporation to provide access to redress if it demonstrates that a corporation's activities violate the human rights of individuals. The process can be either

judicial (in the form of a court) or non-judicial (in the form of negotiation, mediation, and another mechanism).

2. Results: State protections of individuals regarding business activities

The opposition between business and human rights peaked in early 2011 when the United Nations Commission on Human Rights unanimously endorsed the Guidance Principles for Business and Human Rights: Implementing the United Nations Framework "Protection, Respect, and Remedy" (UNGPs). This endorsement took place after United Nations Special Representative John Ruggie finalized and produced global standards for business and human rights with the overwhelming support of all United Nations member states. These guiding principles are the fruit of nearly six years of hard work by the Special Representative, who was appointed by the United Nations Secretary-General in 2005. These principles are the result of in-depth consultations with various interest groups, corporations, and other stakeholders, including civil society, governments, and investors, to support the development of UNGPs.

UNGPs set norms based on international legal principles and social expectations, providing a foundation for the future of state rulemaking at national and global levels and an authoritative framework for business actors to be assessed from this point forward, thus, the adoption of UNGPs has also contributed to the discourse on human rights protection, although it still causes controversy. The significant influence that business can exert on human rights has been acknowledged for a considerable period. This impact can have a positive effect, exemplified by providing innovative solutions and services that enhance the quality of life for individuals worldwide. It can also have detrimental effects, such as when corporate activities undermine people's means of making a living, exploit employees, or displace communities. Companies can also be implicated in human rights violations perpetrated by external entities, such as states, if they engage in collusion with security forces, for example to forcefully crush protests.³

As stated above, UNGPs have the full support of the 28 countries that are members of the Human Rights Council and 12 cross-regional sponsors and are carried out without voting. So, UNGPs have universal support. This universal support is essential to enact and implement the United Nations framework of "protection, respect and remedy". This acceptance is also a fact in the history of the United Nations, which states unanimously that each Member State supports having a set of human rights principles concerning business. However, the implementation is not always in line with the agreement. One of the ways states implemented UNGPs is by creating a National Action Plan (NAP) for Business and Human Rights (Labowitz & Dorothée 2014). According to the table below, out of the 193 countries that were members of the UN as of October 21, 2021, only 26 countries had a NAP, which amounts to only 13,47%. It really is a small number; what makes this interesting is that the acceptance of UNGPs was unanimous,

³ Please refer to the Office of the United Nations High Commissioner for Human Rights website for additional information about human rights, the evolution of the global human rights movement, and human rights concerns and mechanisms: www.ohchr.org. To obtain additional information regarding labor rights and international labor standards, including the eight fundamental ILO conventions, please visit the website: www.ilo.org/global/standards/lang--en/index.htm.

so every country agreed with this guideline, but the implementation of the UNGPs, as the table and picture below also show, is not always in line with the agreement.

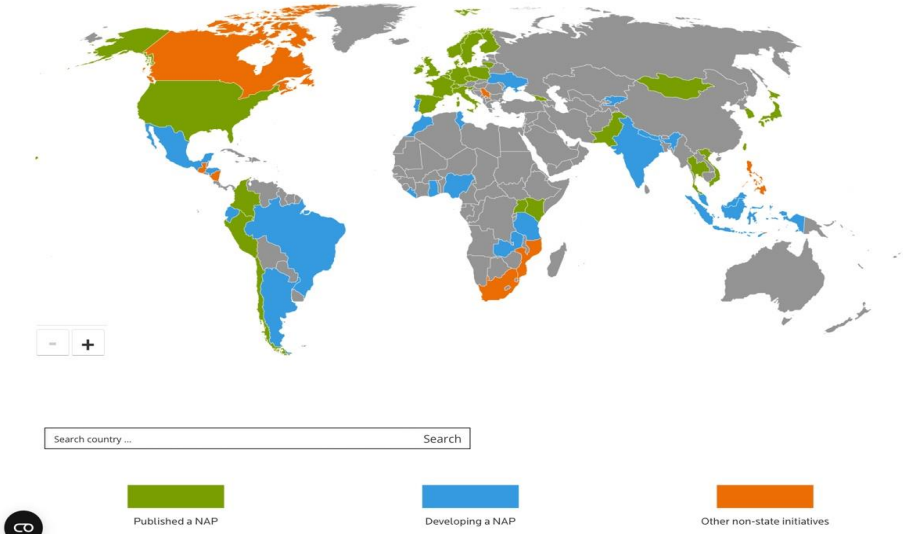
Table 1. List of the states that have a NAP

No.	State	Launched
1.	United Kingdom	September 2013, Updated 2016
2.	The Netherlands	December 2013
3.	Denmark	April 2014
4.	Finland	October 2014
5.	Lithuania	February 2015
6.	Sweden	August 2015
7.	Norway	October 2015
8.	Colombia	December 2015
9.	Switzerland	December 2016, Revised 2020-2023
10.	Italy	December 2016
11.	USA	December 2016
12.	Germany	December 2016
13.	France	April 2017
14.	Poland	May 2017; Second edition 2021-2024
15.	Spain	July 2017
16.	Belgium	July 2017
17.	Chile	July 2017
18.	Czech Republic	October 2017
19.	Ireland	November 2017
20.	Luxembourg	NAP 2020-2022
21.	Republic of Slovenia	November 2018
22.	Kenya	June 2019
23.	Thailand	October 2019
24.	Japan	October 2020
25.	Uganda	August 2021
26.	Pakistan	October 2021

Source: UNHRC (2023)

Even though, as Figure 1 shows, there are also 21 countries currently developing a NAP, and 7 are involved in other non-state initiatives, the total still does not exceed 40% of Member States.

Figure 1. National Actions Plans on Business and Human Rights



Source: National Actions Plans on Business and Human Rights (2024)

In 2014, The UNHRC passed two resolutions to respond to how to protect human rights from business actors; one reaffirmed the UNGPs and called, amongst other things, for states to develop NAPs on business and human rights (Working Group on Business and Human Rights 2023). Second, it resolved to establish an intergovernmental process on the human rights obligations and an intergovernmental process on the human rights obligations of transnational corporations. This may lead to an international treaty providing legally enforceable rights to remedy business-related human rights abuses (O’Brien et al. 2016). Furthermore, to comply with and implement these guiding principles, corporations must do several things to integrate human rights into their business operations. Among others, according to Principle 4 UNGPS corporations must practice due diligence in the context of human rights in the following ways:

- a. In developing a commitment to respect human rights, corporations must disclose their commitment to respect human rights through available public policies. The governing body must approve the policy of the organization and must state the expectations of employees, business partners, and other parties related to this policy. This policy should then be reflected in operational procedures throughout the corporate organization.
- b. Assess the potential and actual impact of human rights. The guiding principles call on corporations to assess the potential and actual human rights impacts because of corporate operation. This process should be done in consultation with potentially affected groups and other stakeholders and draw on the work of human rights experts. Ideally, this human rights assessment should first be carried out before the corporation starts operating, and then periodically during its operation. This assessment can be integrated into other impact assessments, such as environmental or social impacts.

- c. Integrate and act on the findings of the assessment. Integrating human rights assessment findings is an essential step in risk mitigation. The guiding principles recommend that corporations be responsible for addressing impacts and ensuring that decision-makers are appropriate, as well as appropriate oversight. Based on the guiding principles, corporate measures to address an impact depend on whether the corporation is the cause of the impact or is involved through its business relationship. It also depends on the corporation's effort to overcome the impact. When a corporation does not have the influence to prevent or mitigate adverse effects caused by its business partners, it should consider terminating its relationship with its business partners.
- d. Conducting audits of impacts, the guiding principles note that human rights issues can be integrated into existing tracking mechanisms such as audits, work assessments, and grievance mechanisms. The guiding principles state that traction should use both qualitative and quantitative indicators, and corporations must demonstrate to investors, civil society, and governments that they have managed human rights risks under the guiding principles.
- e. Communicate how the impact is occurring. The guiding principle states that the responsibility to respect human rights requires that business enterprises have policies and processes that can be used to recognize and demonstrate that they respect human rights in their business operation. Demonstrate involving communication, providing transparency and accountability to individuals or groups that may be affected and to other relevant parties, including investors. Communication can be diverse, including in-person meetings online, consultations with affected parties, and formal reports to the public. Formal reporting continues evolving from traditional annual and corporate sustainability responsibility reports to including integrated and updated non-financial and financial reports online. These guiding principles do not define "severe human rights impacts." However, they may include the risk of corporate complicity in crimes against humanity, war crimes, genocide, forced labor, and possible violations of the integrity of persons, such as torture or the promotion of the right to life.

The UNGPs make the following recommendations on the content of National Action Plans in order to contribute to the first pillar of the UN Protect, Respect and Remedy Framework:

- a. Harmonize, both horizontally and vertically, all laws and regulations at the central and local government levels that are not based on the guiding principles of business and human rights.
- b. Transform international human rights law norms governing business and human rights into part of legal norms regulated through laws and regulations to strengthen corporate responsibility to respect human rights.
- c. Develop specific policy instruments to implement affirmative action to protect vulnerable groups, such as children's rights, women's rights, persons with disabilities, indigenous peoples, the elderly, LGBT groups, the rights of religious minorities, and other vulnerable groups, against negative operational impacts.

- d. Encourage SOEs to implement the guiding principles of business and human rights, including developing human rights due diligence instruments to avoid the involvement of SOEs in human rights violations.
- e. Provide facilities for MSMEs to meet compliance standards with business and human rights guiding principles.
- f. Develop sectoral policies/regulations governing corporations to respect human rights following the guiding principles of business and human rights.
- g. Standardize compliance on human rights with corporate activities realized through human rights due diligence instruments and human rights certification.
- h. Simplify licensing and provide incentives to every company that has conducted human rights due diligence.
- i. Conduct periodic supervision of corporate operational activities.
- j. Encourage law enforcement against corporations whose operations harm human rights.
- k. Develop a policy framework for bilateral investment treaties concerning standards of respect for human rights, environment, and labor.
- l. Increase the effectiveness of corporate social responsibility as part of the company's policy in respecting human rights and implementing sustainable development.
- m. Conduct periodic reviews of national action plans on business and human rights to adjust to the development of business dynamics.

In Indonesia, for example, human rights protection, written in Article 28A of the 1945 Constitution, confirms that everyone has the right to life and to defend his life and livelihood. Further, Article 28I details the rights of the individual:

- a. The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.
- b. Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment.
- c. The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilizations.
- d. The protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government.
- e. For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated and set forth in laws and regulations.

Conclusion

The *UN Protect, Respect, and Remedy Framework* states that corporations must respect human rights, whether the state regulates them or not. This is per the provisions of Article 2, paragraph 1 of the ICCPR, which requires states to protect a person's human rights from violations committed by others. Thus, the state must protect through the

laws and regulations it issued. The corporation has an obligation to comply not only with the laws and regulations issued by the state, but also with the minimum human rights provisions required by international human rights law and with the obligation of remedy or compensation both by the state and by the corporation through the means of litigation and non-litigation. Each country that must protect its citizens' human rights must provide human rights protection to its citizens from the consequences of business activities through the UN Protect Respect and Remedy Framework and the UN Guiding Principles on Business and Human Rights (2011) through their National Action Plan.

Furthermore, corporations must incorporate these guiding principles in their business operations in accordance with the UN Framework. This is because these guiding principles have provided a global standard for corporations on respecting and protecting human rights in the countries in which they operate. These principles also suggest avoiding or mitigating human rights impacts, which reduces risks to corporations and, ultimately, fulfills people's constitutional right to the protection of their human rights.

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