

DO HUMAN RIGHTS MATTER TO BUSINESS IN UZBEKISTAN: ANALYSIS OF INTERNATIONAL AND NATIONAL MECHANISMS

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ABSTRACT

This article examines international soft law instruments (UNGPs and OECD Guidelines) in the field of business and human rights. It also includes a scrutiny on whether there is a potential to harden these soft law mechanisms. The author further analyses the way some national legislations (France, Germany, Switzerland) and judiciary (the British and Dutch courts) deal with human rights impacts of business activity. Then, finally, the author reflects on the need for a socially responsible business in Uzbekistan that respects human rights and pursues a meaningful due diligence policy.

KEYWORDS:- Business, Human Rights, UNGPs, Corporate Responsibility, Soft Law, Parent Company, Subsidiary, Due Diligence, Duty Of Care.

INTRODUCTION

Businesses can have a profound impact on the human rights of workers, consumers, and communities wherever they operate.[1] Increased access to employment, improved public services and better infrastructure facilities are among the key positive effects of business on society.[2] Each business niche is a platform for generating innovations and new technologies. [3] Nevertheless, one should not lose sight of the harm (polluting the

environment, underpaying workers, forced eviction of communities) that can be inflicted in the course of entrepreneurial activity.[4] Prioritization of commercial targets may pose a risk of neglecting social responsibilities of business.[5] In no case should the maximization of business profits be carried out to the detriment of human rights and public interests. [6] Internationally, some soft law instruments call for businesses to respect human rights. [7] At the national level, a number of countries (France, Germany,

Norway) have introduced mandatory corporate due diligence, which includes respect for human rights as an element.[8] In this regard, in the light of the stable inflow of investments and the acceleration of the business environment, the legislation of Uzbekistan should be revised in terms of respect for human rights by business as part of its due diligence policy.

This paper first examines some of the instruments of international and domestic law establishing corporate human rights responsibility before comparing the relevant experience of two selected countries (UK - *Okpabi v Shell* [9] and Netherlands - *Akpan v Shell* [10], based on two landmark cases. Finally, it explains the growing need in Uzbekistan to regulate corporate conduct in relation to human rights.

Currently, the impacts of business activity on human rights is primarily regulated by soft law instruments of international law.[11] To ensure that business activities comply with international human rights norms and standards, in 2011 the United Nations Human

Rights Council approved the United Nations Guidelines on Business and Human Rights (UNGPs).[12] The document consists of three pillars (the state duty to protect human rights; the corporate responsibility to respect human rights; access to remedy), including 31 principles and is aimed at implementing the 'respect, protect, fulfil' framework in business operations at national and international levels.[13] The author of the idea and developer of the UNGPs is John Ruggie, UN Special Rapporteur on Business and Human Rights.[14] Despite being a soft law instrument, the UNGPs are a pragmatic and progressive document, as they reinforced state duty to protect against any human rights abuse including by business.[15] It has been a worldwide call for businesses to prevent and mitigate the "adverse human rights impacts" of their activity. Most importantly, this document laid the foundation for the development of a legally binding treaty on business and human rights. [16]

In the same year, the Organisation for Economic Co-operation and Development introduced Guidelines for Multinational

Enterprises (the OECD Guidelines). The document has a special chapter of recommendations for human rights due diligence of multinational enterprises. Although the OECD Guidelines are mainly focused on companies or other organizations established in more than one country, they are applicable to the corporate behavior of all enterprises with respect to human rights. [17] Both documents urge business enterprises to put operational-level grievance mechanisms in place so that those whose rights are adversely affected by business activity can seek remedy. Such mechanisms should meet several criteria: legitimacy, accessibility, predictability, equitability, transparency. Availability of non-judicial grievance mechanisms allow to reach an agreed solution and lessen the burden of domestic courts. [18]

Since soft law mechanisms are nonbinding, States and enterprises choose their own behavior in relation to UNGPS and the OECD Guidelines. [19] Still, this choice must comply with human rights norms and standards. [20] There is an ongoing global debate over the adoption of an international treaty

establishing rules binding on States for the protection of victims of human rights abuses by businesses. Many scholars, some state actors, business structures, NGOs and other stakeholders are actively involved in this debate. [21] The draft of the legally binding international instrument has been elaborated by the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights established in 2014 by the Resolution of the UN Human Rights Council. Currently, a third revised draft of the document is publicly available. [22] Many consider the adoption of this document as a historic opportunity to put human rights above the business interests. [23] According to some authors, tightening the framework of soft law is a promising way to form a more socially responsible attitude of business to human rights. [24]

The aforementioned soft law instruments in the field of business and human rights have prompted many States to include provisions on corporate conduct in national legislation. For instance, following the Rana Plaza disaster

and the Erica oil spill case, in 2017 the French Parliament passed the Corporate Duty of Vigilance Law. [25] The law obliges the largest French companies to assess and eliminate the negative impact of their activities on human rights and the environment by publishing annual public vigilance plans. This includes impacts related to their own activities, the activities of companies under their control, as well as the activities of suppliers and subcontractors with whom they have established commercial relationships. [26] Although opinions on its meaningful application vary, the French law on due diligence has become an important signal throughout Europe or perhaps around the world that businesses should be held accountable for potential harm to their activities. [27]

Quite recently, in response to the 'Citizens' Responsible Business Initiative' the Swiss parliament suggested a counter proposal aimed at strengthening business' respect for human rights and environmental standards. With regard to enforcement mechanisms, the counter-proposal provides for criminal

sanctions and, in particular, fines in case of non-compliance with reporting obligations or for giving false testimony. However, it does not contain any provision on civil liability for the affected persons.

Initiatives to establish the right balance between human rights and business interests are supported by a number of other European countries, including Norway and Germany. In 2016, Germany approved a national action plan that provides for the introduction of due diligence of human rights in the corporate processes of 50% of German companies with more than 500 employees by 2020. The Norwegian government developed a draft law which imposes an obligation on companies "to know of salient risks that may have an adverse impact on fundamental human rights and decent work, both within the enterprise itself and in its supply chains. [28]

Progress in the field of business and human rights is observed not only in legislative acts or government initiatives, but also in the judicial practice of a number of countries. There have been several landmark decisions where the

judiciary has established the liability of the parent company for harm caused by its subsidiaries. The following paragraphs analyse some of these progressive cases.

Okpabi and others v Royal Dutch Shell has been a second case following *Vedanta Resources PLC and Anor v. Lungowe*, in which the Supreme Court allowed applicants from the country of the subsidiary to challenge the parent company in British jurisdiction. Joint claims were brought by more than 42,000 citizens of two affected areas in the Niger Delta in the English courts against Royal Dutch Shell and one of its Nigerian subsidiaries, Shell Petroleum Development Company of Nigeria Ltd. The Claimants alleged that oil spills and pollution from pipelines operated by the subsidiary caused substantial environmental damage, with the result that natural water sources cannot safely be used for drinking, fishing, agricultural, washing or recreational purposes. [29] After unsuccessful attempts before the High Court and Court of Appeal, the claimants received the approval of the UK Supreme Court to proceed with the appeal. The judgment of the Supreme Court from 12

February 2021 established that it is reasonably arguable that the parent company owed a duty of care to the claimants. [30]

Earlier on 29 January 2021, the Hague Court of Appeal reached final solution concerning the claims of four Nigerian farmers and fisherfolks including Elder Friday Alfred Akpan against the same parent company (Royal Dutch Shell) and its subsidiary (Shell Petroleum Development Company of Nigeria). The lawsuits were instituted 13 years ago by four Nigerian farmers and fisherfolks with the support of Milleudedefensie. The claimants put forward three demands from Shell. First, to stop and prevent future oil spills from its pipelines. Second, to clean up the wide-spread environmental pollution resulting from the oil spills. Third, to take responsibility for the actions of its subsidiary in Nigeria and pay damages as appropriate. The Court of Appeal held Shell liable for the spills according to Nigerian laws. In the meantime, the Court ordered Shell and Shell Nigeria to install adequate leak detection systems in its pipelines at Oruma village. [31]

The two cases cited above demonstrate that parent companies can be held liable for the damage inflicted by their subsidiaries to the human rights and environment in the case of direct control or policy management in the activities of the latter. In this case, the action (inaction)s of the subsidiary are considered to belong to the parent company, regardless of their separate corporate structure. Since the parent company could or should have control to prevent or mitigate the harm of such actions (inactions). [32] In EU competition law, there is a similar doctrine of a single economic entity, which means that companies that hold a dominant position in the market bear the risk of liability for violation of competition rules by their subsidiaries. [33]

Civil Code of Uzbekistan establishes mainly financial liability of parent company in case of insolvency of its subsidiary. [34] There is no provision on whether a parent company is responsible when its subsidiary fails to respect or violates human rights norms and standards. The legislation as a whole is silent about the impact of entrepreneurial activity on human rights. There have been no or very few (non-

academic, and mostly by independent experts on forced evictions and environmental issues) [35] studies conducted in Uzbekistan on the impact of business on human rights.

Corporate due diligence is an absolutely new concept for most business entities and very rarely manifests in one form or another. [36] Business entities in Uzbekistan do not develop due diligence plans and, accordingly, no self-monitoring exists over the impact of their activity on human rights. Some businesses in the form of a joint-stock company develop a corporate governance code applicable within their corporate structure. [37] But this document prioritizes the rights of shareholders, not the rights of those affected by the corporate practice.

In recent years, there have been numerous cases of illegal forced evictions under the pretext of implementing investment projects. No human rights analysis has been conducted on this issue, with the exception of those conducted by civil society and individual experts. Persons whose rights have been affected by forced evictions have filed lawsuits

in national courts, but have not been able to access effective remedies. In most cases, they ended up receiving no or disproportionate compensation. [38] National courts have not yet developed a practice of applying international human rights norms to cases, in which business interests conflict with human rights, or on issues that are poorly regulated by law.

CONCLUSION

Business and human rights have already become a topic of both global and national discussions. The laws and regulations emerged in the course of these discussions indicate some progress in this area. Yet, this should not be the end of the road. The governments should put more effort to build a sound mechanism to enforce human rights in business context. The courts are main resort to seek a remedy and should be equipped with clear mandates to weigh human rights against business interests. Quite often, due to the lack of national regulations and underdeveloped judicial practice, victims fail to access to effective remedy. While the majority norms of

International human rights law are mandatory for states, not all national courts (particularly, in Uzbekistan) feel comfortable with applying these norms in their decision-making. In this regard, the Government of Uzbekistan should take legislative, judiciary and policy measures to ensure that businesses do not pursue their commercial targets at the expense of human rights abuses.

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