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Corporate Social Responsibility 2014

Business as usual?

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About the author

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Introduction

There is today a widespread international recognition that the business sector and not only states have responsibilities as regards the respect for social and human rights. Several regulatory initiatives have emerged resulting in numerous guidelines applying to all enterprises[1] ranging from Small and Medium Enterprises (SMEs) to large Multinational Enterprises (MNEs)/ Multinational Corporations (MNCs). An umbrella term for these guidelines, often referred to as soft law, is Corporate Social Responsibility (CSR).

These instruments are today voluntary but a growing number of international actors ranging from the European Parliament, UN experts, Legal Scholars and individual States argue that they should be legally binding.

CSR, and advances to better regulate companies, challenges a core principle of International Law - that is, who is a legal subject under International Law.

This paper argues for a reconsideration of the doctrine of the state as being the only bearer of protecting and ensuring the human rights of its people. In a globalized world, the difference of opinions does not concern whether the state is the only 'threat' to the realization of human rights, it is whether companies can and should be recognized as legal entities under International Human Rights Law. Careful considerations will have to be made in order to decide on how to best realize compliance with CSR.

The most recent CSR development is the adoption of a binding CSR Directive by the European Parliament which is still to be voted upon by the European Council member states.[2] The UN Human Rights Council will also most probably bring up the proposal by a number of States to adopt a similar legally binding Treaty in its 26th session presently taking place, June 2014.[3]

Corporate Social Responsibility- Concepts and Challenges

CSR has been subject to a number of regulatory initiatives over the years resulting in several internationally acclaimed CSR principles, guidelines and recommendations, for example The OECD Guidelines for Multinational Enterprises (The OECD Guidelines), The Ten Principles of the United Nations Global Compact (The UN GC Principles) and the United Nations Guiding Principles on Business and Human Rights (The UN Guiding Principles).

The latter, the UN Guiding Principles is by far the CSR instrument most frequently referred to. The aims are similar in these documents and formulations are frequently identical. The primary responsibilities of companies put forward in these documents are to a large extent of negative nature, that is, avoiding infringing on the provisions under International Human Rights Law (IHRL).

One of the minimum responsibilities is reiterated in these instruments: produce a policy document explaining their commitment to *respect*, *protect* and *fulfil*[4] these commitments under IHRL. Basically, how they will deal with commitments, challenges and opportunities to enhance human rights in the context in which they are operating. In these policy documents, reference should be made to the rights under the UN International Covenant of Social, Economic and Cultural Rights (ICESCR) as well as other fundamental IHRL instruments such as the UN Universal Declaration of Human Rights (UDHR). Furthermore, common in these documents are provisions governing the respect for labour rights, protecting the environment and increasingly the subject of anti-corruption.

Labour rights and environmental responsibilities have traditionally been the principal areas of the CSR concept. It has been high on the agenda of NGOs since the 60s but only became a tangible discussion at the UN level when the former Secretary General Kofi Annan appointed John Ruggie to serve as the UN Secretary-General's Special Representative for Business and Human Rights from 2005-2007. In that capacity, he produced the above mentioned UN Guiding Principles, a "soft-law"[5] instrument which was unanimously endorsed by the UN Human Rights Council (UNHRC). Some of the CSR provisions are also protected under hard law treaties, one example is the protection of labour rights under the International Labour Organization conventions (ILO conventions). Furthermore, there are certain international crimes for which corporate leaders and business entities can be directly held liable under domestic legislations. For more on this topic, please refer to the discussion under the heading "Lessons Learnt".

Changing the Traditional status of Legal entities under International Human Rights Law

There has been a vivid discussion on whether there is a need for "hard law" regulations in the area of human rights responsibilities for businesses going back nearly two decades. The first non-voluntary initiative put forward at the international level was the 'Draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (The Norms) introduced by the UN Economic and Social Council (ECOSOC) in 2003 and was the first non-voluntary initiative put forward at the international level.

In short, the Norms proposed binding obligations for all companies within their respective spheres of activity to; "promote, secure the fulfilment of, respect, ensure respect of and protect human rights under international law…". (UN 2003)

The binding character of the Norms was largely resisted by States, not least by the UK who submitted a statement to the Office of the High Commissioner of Human Rights (OHCHR) asserting that they should not use "legally-binding treaty language because companies should not be placed in the same position as states when it comes to human rights responsibilities.".

The Norms were abandoned in 2005 failing to win approval by the UNCHR.

The underlying reasoning behind the failure of the Norms remains unclear. It is however clear that a majority of the actors affected were not willing to accept an explicit recognition of companies to acquire binding rights and duties under IHRL. If the Norms had been accepted and implemented, despite their supposedly hard law nature given that they were not joined by a sanction system, accountability and remedies would hardly have been an option.

At the core of the complexity pertaining to the links between business and human rights lays the status of enterprises under international law. Traditionally, economic entities have not fallen under the recognized categories of international law. Consequently, there is little agreement among legal scholars, practitioners and individual states on whether companies can acquire rights and duties under IHRL. The disinclination was reflected in the failure of the Norms but current developments seem to reflect a new wave of push for binding regulations.

Business as usual or "Hardening" Soft law - the current debate

NGOs and civil society actors have for a long time pushed for legally binding instruments to ensure corporations' compliance with human rights standards. The tendency of recent growing support among states to establish such instruments is on the other hand noteworthy and the topic is currently widely discussed at EU and UN level.

United Nations Human Rights Council

At the 24th session of the UNHRC[6] general debate on "Transnational Corporations and Human Rights" in Geneva September 2013 Ecuador wrote a statement to the President of the UNHRC in an attempt to pave the way for a legally binding instrument. "An international legally binding instrument, concluded within the UN system, would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States (…)." (Government of Ecuador, 2013) The statement was supported by 85 states.[7]

The present 26th UNHRC session, June 2014[8] will most probably treat the above mentioned proposal by Ecuador and a number of governments to draft a treaty.

Is there a north versus south division in approach? The countries behind the letter to the President of the UNHRC were all states from the Global south, however the below mentioned development at the EU level speaks against such assumption.

The European Parliament Directive

The European Parliament (the EU Parliament) adopted a Directive by the EU Commission on disclosure of non-financial and diversity information by large companies and groups on the 15th of April 2014. (European Commission, 2014) The proposal is now subject to joint adoption by the Parliament and the Member States of the European Council (EU Council) in order to become binding legislation.

In short, the proposed legislation aims at making companies with more than 500 employees[9] responsible of disclosing information which is more encompassing than only financial, that is environmental matters, social and employee- related aspects, respect for human rights, anti-corruption and bribery issues and diversity on boards of directors. The reason why there is a need for binding regulations at this point in time is according to the EU Parliament that there are limits to a voluntary approach. Fewer than 10% of the largest European companies disclose information about non-financial issues regularly.

The proposed legislation has been embraced by the broader human rights community of the world and many states but the outcome of the vote will most likely be far from unanimous. Sweden is one of the states which have reacted with hesitation to the adoption by the European Parliament. The first statement by representatives of Swedish Business (Svenskt Näringsliv, 2014) was blunt and not hidden behind diplomatic terminology, they stated that legally binding regulations will be a burden for companies. Very much like the statements by the UK in relation to the Norms mentioned above but referring less to the argument based on that companies are not legal entities under traditional IHRL.

Reflections regarding Practical Implications of drafting Hard Law CSR regulations

Intuitively it may seem as if legally binding regulations would be key in ensuring that companies actually live up to the existent recommendations and guidelines on human rights responsibilities. However, being aware of the lengthy processes which have led to the today existing IHRL treaties, the existing challenges in enforcing many of the provisions of these treaties and lack of accountability are some of the reasons why it would be a mistake to rush the launch of a process of drafting a Human Rights and Business treaty.

The arguments by advocates do at times come across as if the perception is that the adoption of a treaty would be a quick fix to the compliance problem. It can however not be stressed enough how detailed and explicit such a treaty would have to be in what it entails and how or if it would be joined by a sanction system where companies would actually be held responsible for failing on living up to these IHRL standards. If the Treaty would not be joined by a sanction system, would it present any difference to the existent UN Guiding Principles, The UN GC Principles and similar documents?

One could make a brief comparison to the legally binding UN treaty adopted already in 1966, The UN International Covenant on Economic Social and Cultural Rights (ICESCR) which is today ratified by most states in the world. The provisions in ICESCR have sometimes been considered somewhat "weaker" in comparison to its "sister" treaty, the UN International Covenant on Civil and Political Rights (ICCPR) much due to one specific wording in the treaty, namely that the realization of the rights are of "progressive" nature whereas the ICCPR provides for immediate realization of all its rights. The ICESCR is joined by a reporting

system whereby the state parties have signed up to regularly report on their progress in relation to all the human rights which are protected by the treaty to the UN Commission on Economic Social and Cultural Rights. However, the reality is that the reporting mechanism has failed. Far from all state parties live up to their commitment to comply with the legal requirement of regularly reporting and there is no sanction system. The reality hence; a legally binding treaty which plays an important role in guiding States, nonetheless the basic requirements are not complied with and there is no mechanism for legal accountability for those who fail to live up to their duties.

Drafting a treaty in the 21st century in a completely new area, considerations would have to be made regarding lessons learned when it concerns the difference between the compliance level of parties to a treaty versus guidelines. Especially as this proposed treaty would mean the introduction of an entirely new legal entity under IHRL, namely corporations. The UN Guiding Principles presents a number of recommendations for possible judicial and non-judicial grievance mechanisms. However, realistically, how far would the UNHRC be willing to go in introducing such accountability mechanisms or sanction systems? Would such a treaty have provisions of progressive nature?

The Importance of Positive Duties under International Human Rights Law

As the debate and arguments by hard law CSR advocates commonly concern negative obligations, which means refraining from interfering or curtailing with human rights, it should not be forgotten that being a party of a treaty under IHRL means more than being bound to respect human rights. By becoming parties to IHRL treaties, entities assume obligations and duties under international law to *respect*, to *protect* and to *fulfil* human rights. In short, if the traditional treatment of legal entities adopting an IHRL treaty would apply to companies, it would in addition to binding companies to refrain from interfering or curtailing with human rights, also bind them to protect individuals and groups from human rights abuses as well as fulfilling, that is take positive action to facilitate the enjoyment of basic human rights. The latter, fulfilling human rights, taking positive action may be worth reflecting upon. How would the suggested treaty bind companies to promoting and facilitate enjoyment of human rights in a broader sense in the state where they operate?

The wording in the UN GC Principles speaks loud and clear on the topic of positive obligations when explaining what companies should do to raise human rights issues in the wider community where they operate. Principle 1 of the guidelines stipulates that on the note of Rule of Law, "(…) businesses may have the opportunity to promote and help raise standards in countries where protection of human rights issues is insufficient." A concrete example of what companies should do to benefit the community, where they operate, is "by contributing to the public debate. Companies interact with all levels of government in the countries where they operate". With the risk of sounding pessimistic, as mentioned above, it is hard to believe that the mother states of the MNCs in the UNHRC will sign up to be legally

bound to engage in the public debate and raise human rights issues not only at the community level but also at government level, even those human rights which are not directly connected to the business in question. Especially, when establishing their businesses in new markets, early stages of entering a new country when good relations with the Government in question often are crucial.

The general approach of the UN Guiding Principles to companies operating in different industries is commendable. The advantage of guidelines may be that there is an element of greater flexibility, which is needed considering differences between companies depending on the business within which they operate as well as their size and capacity.

Apart from questions concerning respecting, protecting and fulfilling human rights obligations for individuals, hard law CSR advocates would plausibly like to, to a large extent in such a treaty, include the widely discussed and traditionally core CSR matter, namely environmental/sustainability aspects.

Is it possible to cover all these areas in one treaty? Ruggie was successful in compiling guidelines of an impressive scope, however, you do not need more than to glance at the existing IHRL treaties to find that another character, language, detail and essentially hours spent is needed, when moving from guidelines to a treaty.

Lessons Learnt

One should also bear in mind, that some of the areas, which are treated in the CSR debate are already legally protected, an example is labor rights, where there are already regulations in ILO conventions, which companies are bound by. Once again highlighting lessons learnt, when following the developments IHRL from the mid 20th Century, one lesson is, that the utmost attempt should be made not to duplicate work, have numerous treaties and bodies treating the same issues. Hence, if attempting to create a treaty for human rights and social responsibilities for companies, perhaps not all traditional CSR areas should be covered? Perhaps the focus should solely be on the areas, which are not today covered by a number of other treaties. To reach common ground on these issues will be problematic.

For there to be a viable case made for "replacing" the UN Guiding Principles with a new instrument, it needs to be very explicit, what difference it attempts to make and why it is not enough to ensure enforcement of the existing soft law instruments. The EU Parliament stipulated the core argument in the debate; the simple reason, why the existence of those instruments is not enough, is that the lack of compliance is not acceptable. But this far in the process no explanation as for how companies will be held accountable for failing to respect, protect and fulfilling their potential legal obligations in practice has been accounted for neither by the EU Parliament nor the group led by Ecuador at the UNHRC.

In sum - creating a treaty regarding human rights responsibilities for companies is far from a "quick" fix, literally, theoretically nor practically. As for now, the discussion is based on speculations as nothing tangible has been presented regarding the above mentioned challenges, which only present a fraction of considerations and hurdles.

Whatever the outcome of the vote by the EU Council and of the UNHRC discussions, everyone is talking about CSR in the human rights world and the concept is brought up at corporate board meetings regardless of whether it is embraced by business leaders and states or not.

The Future - many questions and few answers

This paper has argued for a reconsideration of the doctrine of the state as being the only bearer of protecting and ensuring the human rights of its people under international law.

The originally somewhat resonating and contested soft law concept of CSR has become a compliance issue. Company law is changing; non-financial matters like human rights are becoming mainstream.

Whether the answer is to introduce hard law regulations or to ensure compliance with existing soft law regulations is not given. At this point, the outcome of the discussions at the EU and UN level will hopefully answer some of the questions posed in this article, not least regarding how hard law advocates will put forward the practical implications of a compliance mechanism; will these hard law regulations be joined by a sanctions system?

John Ruggie in 2008 characterized the adoption of the UN Guiding Principles as the "end of beginning". 2014 may be the year when companies will have no choice but facing this beginning.

Endnotes

1 The terminology in the debate regarding the Business sector and CSR varies although they refer to the same entities. Therefore in this article, these entities are also interchangeably described as Businesses, Enterprises, Companies and Corporations.

2 This article was finalized in June 2014. The European Council did on the 29th of September adopt the directive.

3 As expected, The UN Human Rights Council did on the 26th of June vote on the legally binding instrument. The vote turned out positive, it was however deeply divided with 20 votes for, 14 against and 13 abstensions, the no voters were many the home states of most of the world's largest TNC's, full negotiations will commence in 2015. On this note, on the 27th of June, the UN Human Rights Council by concensus adopted a second resolution introduced by Argentina, Ghana, Norway and Russia. This second resolution did not propose a legally binding instrument at this point in time but focused on furthering the implementation of The UN Guiding Principles, extending the present working group and clarifying legal issues over the coming years.

4 By becoming parties to international treaties, entities assume obligations and duties under international law to respect, to protect and to fulfil human rights. Refer to the discussion under the heading " The importance of positive duties under International Human Rights Law".

5 In short, soft law means voluntary internationally recognized principles, guidelines and recommendations whereas hard law is legally binding. In the area of IHRL and of particular importance for this article, hard law often refers to UN treaties.

6 The UNCHR was replaced by UNHRC in 2006. The UN Human Rights Council (UNHRC) replaced the UN Commission of Human Rights (UNCHR) in 2006. Hence it is the same forum where the "Norms" failed to win approval in 2006.

7 Ecuador and 85 states from the African Group, The Arab Group as well as Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru.

8 When this article was finalized.

9 Small and Medium Enterprises (SMEs) will not be bound by the proposed law due to considerations regarding the supposedly lack of human resources and the disproportionately information handling costs.

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