

Challenges in International Human Rights Law

Introduction

As Legal Counsel for a Crown Corporation (State-Owned Enterprise) for the Government of Canada, my role involves compliance with international human rights law and the applicability of international human rights law to commercial transactions. Due diligence is conducted to ensure that we identify and seek to mitigate human rights risks in our transactions through applying international human rights law and other international standards. The Corporation works in the space of international trade assisting Canadian exporters sell products and services abroad. The dichotomy of this role underscores the need to ensure respect for human rights whilst also complying with the Government of Canada trade agenda.

Against this backdrop, I consider the most pressing concern in International Human Rights Law to be accountability and the effectiveness of the mechanisms and regulatory environment to address alleged human rights violations, including how international human rights law has influence in the corporate world. Some have alluded to a 'governance gap' between corporate influence and accountability with regard to business respect for human rights, despite the range of standards and norms in place.¹

Business vs human rights or business and human rights

Human rights are universally recognized in international law and this universalisation is widely accepted by all States as a basis to act and oppose human rights violations. However, the effectiveness of the implementation mechanisms for these norms over the past seventy years remains a contentious issue.²

The corporate world, especially in the field of international trade, grapples with the question of doing business or respecting human rights, sustaining jobs or selling goods or technology to parties where there may be a risk that they would be used to commit or facilitate a human rights violation. The *United Nations Guiding Principles on Business and Human Rights* (UNGPs) provide the sounding board for States and businesses to ensure respect for human rights, which is grounded in international law. The UNGPs themselves are not legally binding and some businesses lack awareness, capacity and incentive to ensure that they adhere to these principles.

¹https://www.chathamhouse.org/sites/default/files/field/field_document/20150922BusinessHumanRightsFordV2.pdf pg 2

² <http://theconversation.com/the-universal-declaration-of-human-rights-at-70-the-challenges-that-await-the-un-115032>

It has been recognized that the rise of authoritarian and nationalist politics fuelled by economic, cultural and security concerns, are contributing to an increasingly difficult environment for human rights globally. Alongside this, the international human rights system is grappling with shifting geopolitical power, new actors in the governance space and emerging global threats.³ All of this combined undoubtedly affects how ensuring accountability in international human rights law is becoming increasingly challenging, including in the space of business and human rights.

Accountability – enforcement and grievance mechanisms

In light of the above, the existence of enforcement mechanisms or mechanisms with power raise questions when ensuring accountability in international human rights law.

The United Nations system plays an important role in the protection of human rights but its effectiveness in practice is something that has been long debated and will continue to be.⁴ The International Criminal Court has further been the subject of similar discussions in the context of war crimes, genocide and crimes against humanity.⁵

Similarly, in the business and human rights context, accountability for human rights violations is something that remains to be seen clearly. Human rights due diligence for businesses is becoming less alien a concept and is sometimes marketed as giving companies a competitive edge in a market where corporate social responsibility and being a good ‘corporate citizen’ is increasingly being held in high regard. Mandatory human rights due diligence in some European countries is now putting the pressure on businesses and governments alike to close this ‘governance gap’ referred to above.

In the Canadian context, in recent months, the *Tahoe Resources Inc. v. Adolfo Agustin Garcia, et al.* case confirmed that Canadian courts are the appropriate forum for human rights claims arising from the activities of Canadian companies abroad.⁶ Litigation at national level to achieve accountability for alleged human rights violations may become more prevalent. A Canadian Ombudsperson for Responsible Enterprise was also announced to independently investigate, report and recommend remedies on alleged human rights abuses linked to Canadian corporate activity abroad.⁷ This, however, has

³ <https://www.chathamhouse.org/about/structure/international-law-programme/rights-accountability-justice>

⁴ <https://www.nytimes.com/2016/09/19/world/what-is-united-nations-un-explained.html>

⁵ <https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose>

⁶ <https://www.miningweekly.com/article/court-case-sets-precedent-for-claims-arising-from-overseas-activities-of-canadian-miners-2019-07-30>

⁷ <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse-ombudsperson.aspx?lang=eng>

faced set back due to the supposed lack of oversight power initially stated when it was announced.⁸

It is clear that the drive for accountability for human rights violations will continue to gain momentum and the struggle to provide comprehensive, just and effective mechanisms to implement the legal regulatory framework surrounding international human rights will continue to present challenges. As the current political and social landscape continues to shift, the chances of a pragmatic approach to address these issues remains to be seen.

The views expressed herein are solely my own and do not express the views or opinions of my employer or the Government of Canada.

⁸ <https://ipolitics.ca/2019/07/11/civil-society-labour-groups-resign-in-protest-from-federal-panel-on-corporate-responsibility-abroad/>