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Freedom of Expression and Corporate Social Responsibility

By: Amanda Sivin



The international governance of freedom of speech involves a few moving parts: The UN Guiding Principles on Corporate Responsibility (UNGPs), the International Covenant on Civil and Political Rights (ICCPR), governments who legislate on restricting speech, and companies who are tasked with reconciling the conflicting directions of the three sources. [1] The UNGPs direct companies to adhere to international human rights standards governing freedom of speech, and the ICCPR provides that international human rights standard.[2] Though the ICCPR is directed to ratifying governments who implement laws to restrict speech rather than companies, as stated by many scholars, the ICCPR is most prominent standard and is the international human rights standard that companies should abide by per the UNGPs direction.[3] Additionally, it is this standard companies should have in mind when a government enacts a misinformation law that heavily restricts freedom of expression.[4] However, the UNGPs are not a legally binding framework and the U.S. government has only encouraged, not mandated, their implementation.[5] The lack of influential enforcement is one of the framework's major pitfalls, which may call for change.

The U.S. government continuously encourages American companies to implement the corporate responsibility standards set forth in the United Nations (UN) Guiding Principles on Business & Human Rights (UNGPs).[6] In fact, they urge companies to treat the UNGPs as a floor rather than a ceiling in their operations.[7] This is because many companies have human-rights impacts on at least half of the world's population.[8] Furthermore, for example, because social media

companies impact what people can write, say, and read, the companies possess a “transnational power and influence that sets the companies apart from any other private enterprise.”[9] The UNGPs state that companies have a “responsibility to respect human rights,” in which companies should (1) avoid “infringing the human rights of others” and (2) address “adverse human rights impacts with which they are involved.”[10]

Under the UNGPs’ corporate responsibility framework, companies are called on to proactively engage in various measures to ensure their activities protect human rights.[11] To begin, companies are expected to adopt human rights policies that implement the UNGPs, hire qualified staff to implement the policies, and engage with community stakeholders to learn about potential human rights impacts.[12] Furthermore, companies are urged to conduct due diligence to determine the human rights risks of their operations, deploy strategies to avoid undermining human rights, and communicate publicly when addressing a potential harm or human rights infringement.[13] However, when companies are in a situation where national law is inconsistent with international human rights law standards, companies are not supposed to violate local law.[14] Rather, they are expected to actively seek paths to avoid infringing on human rights.[15] As the UNGPs emphasize, companies are held accountable to “know and show,” meaning companies must know their potential human rights impacts and show what they are doing about it.[16]

Some say that we can trust companies to abide by the international human rights scheme absent legal enforcement.[17] The trajectory of the business and human rights movement has been positive as companies are increasingly undertaking measures to align their operations with international human rights standards on a voluntary basis.[18] However, companies are revenue focused machines. Unless enforcing the human rights regime will drive up profits in the most efficient way, companies will not do it while not legally bound. I call upon thinkers and researchers to inquire as to what enforcement regime is appropriate. Should the ICCPR be somehow written into law along with the UNGPs?[19] Should the UN be able to fine certain companies that don’t know and show”[20] their cooperation with the international human rights scheme for free speech? The system in place is a strong one with clear responsibilities, so the only thing left to brainstorm is a proper legally binding enforcement scheme.

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[1] Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 *duke l. tech. rev.* 26, 39-40 (2018).

[2] *Id.*

[3] GLOBAL NETWORK INITIATIVE, <https://globalnetworkinitiative.org/> (last visited October 22, 2021).

[4] *Id.*

[5] Aswad, *supra* note 1.

[6] *See, e.g.*, U.S. DEPT OF STATE, *RESPONSIBLE BUSINESS CONDUCT: FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA* 17 (2016), <https://2009-2017.state.gov/documents/organization/265918.pdf> [<https://perma.cc/AWL5-8EVB>]

[7] U.S. DEPT OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, *U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS* 4 (2013), https://photos.state.gov/libraries/korea/49271/july_2013/dwoa_USG-Approach-on-Business-and-Human-Rights-updatedJune2013.pdf [<https://perma.cc/9QEX-X4YT>]

[8] Simon Kemp, *Digital 2020: 3.8 Billion People Use Social Media*, WE ARE SOCIAL (Jan. 30, 2020), <https://wearesocial.com/blog/2020/01/digital-2020-3-8-billion-people-use-social-media> [<https://perma.cc/42YE-HBLQ>].

[9] Susan Benesch, *But Facebook’s Not a County: How to Interpret Human Rights Law for Social Media Companies*, *yale l.j. on reg.*2020.

[10] Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011); John Ruggie (Special Representative of

the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs]

[11] *Id.*

[12] *Id.* at princs. 16, 18, 19.

[13] *Id.* at princs. 17, 19-20.

[14] *Id.* at princ. 23(a), (b).

[15] *Id.*

[16] *Aswad*, supra note 1 at 60.

[17] *Id.*

[18] James Wood, *The New Risk Front for GCS--Nearly Half of Contracts Have Human Rights Clauses, LB Research Finds*, LEGAL BUS.: BLOG (Dec 8, 2021, 8:46 PM), <https://www.legalbusiness.co.uk/blogs/the-new-risk-front-for-gcs-nearly-half-of-contracts-have-human-rights-clauses-lb-research-finds/>.

[19] UNGPs, supra note 10.

[20] UNGPs, supra note 10.