

Climate Change and Human Rights: What Follows for Corporate Human Rights Responsibility?

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Abstract

Although climate change and human rights are increasingly important issues of corporate responsibility, the interrelationship between these two topics has hardly been discussed with regard to business activities. This is odd, considering how many activities of transnational corporations and other business entities, such as mining, fossil fuel extraction and deforestation, are directly linked to global environmental damage that in turn can generate human rights violations.

Many international human rights standards and instruments provide important – though implicit – guidance for states and private companies alike regarding the prevention and sanctioning of business activities that may result in climate-change-related human rights impacts. The most prominent of these instruments is the 2011 United Nations (UN) Guiding Principles on Business and Human Rights (GPs). This set of 31 principles is intended to diminish the risk of companies causing or contributing to human rights harm.

The GPs start with the state duty to protect against corporate-related human rights abuse. This obligation may be relevant to climate-change-related human rights protection for several reasons. Among these is that –

- it entails a state duty to regularly assess existing regulations, laws and jurisdictions with the objective of determining if a state has taken all appropriate steps to prevent, investigate, punish and redress human rights abuses by third parties, and
- it can be seen as the basis for a state duty to ensure policy coherence, i.e. to align climate change and human rights policies.

The extraterritorial dimension of the state duty to protect, i.e. the extraterritorial application of human rights obligations, could be helpful in closing existing gaps in regulation concerning the prevention of climate-change-related corporate human rights harm. Unfortunately, the GPs address this

issue inadequately as they do not require states to put in place effective regulatory measures to prevent and punish their companies from abusing the rights of individuals and communities in other countries. As a result, the further development of international human rights law is needed.

The second pillar of the GPs, the corporate responsibility for human rights, is as important for the protection against climate-change-related human rights harm associated with corporate activities as the state duty to protect. The following aspects of the GPs are particularly relevant:

- Their applicability to the whole spectrum of internationally recognised human rights
- The corporate responsibility to carry out human rights due diligence, and
- The use of the concept of impact instead of sphere of influence for defining the scope of corporate responsibility.

From a strictly legal point of view, the GPs are of little help in preventing climate-change-related human rights impacts by corporations as they are, *per se*, not legally binding or enforceable on either states or private business entities. Their effectiveness will, therefore, depend on how seriously states take their human rights obligation to protect, and on whether companies acknowledge that there is a ‘business case’ for complying with the corporate responsibility to protect human rights. The latter, *i.e.* whether such a business case exists, is more apparent when it comes to human rights violations directly attributable to business enterprises and recognisable to the consumer, such as violations in the field of labour rights; it is less apparent in the case of climate-change-related human rights impacts which often become noticeable only many years after the harmful business conduct. Consequently, in the context of climate change, the GPs are of primary relevance for either those companies that already believe there is a business case in conducting human rights due diligence, or the few well-intentioned companies that conduct human rights due diligence even in the absence of a strong business case for it. These two groups of companies will be exposed to lower risk profiles as climate change unfolds and businesses are held more responsible for human rights violations.

A. Introduction

Climate change and its impacts are increasingly being assessed from a human rights point of view.¹ This holds particularly true for its normative appraisal. The human-rights-based approach to climate change² is not surprising, given the existing and potential human costs thereof: the United Nations (UN) estimates that by 2020 almost 50 million more people will be at risk of hunger, and that rising sea levels will threaten the future of many island and coastal communities.³ According to the UN Office of the High Commissioner for Human Rights (OHCHR), –⁴

... it is clear that projected climate change-related effects threaten the effective enjoyment of a range of human rights, such as the right to safe and adequate water and food, [and] the right to health and adequate housing.

With regard to the advantages of a human-rights-based approach, the International Law Association states in its Second Draft Report on Legal Principles Relating to Climate Change that “[v]iewing climate change in human rights terms could help those vulnerable to climate change to garner public attention and influence negotiations.”⁵

Also, the OHCHR, in its 2009 report on the relationship between climate change and human rights, concludes – after having critically looked at the barriers to invoking human rights in the context of climate change⁶ – as follows:⁷

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- 1 The United Nations (UN) has been at the forefront with regard to developing a human-rights-centred approach to climate change. See, for example, the website of the UN Office of the High Commissioner for Human Rights regarding human rights and climate change, available at <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx>, last accessed 5 October 2012. Also see the article by Christian Roschmann in this Volume.
 - 2 That is, an approach “which would place the individual at the centre of inquiry, and draw attention to the impact that climate change could have on the realization of a range of human rights”; International Law Association (2010:35, Footnote 263).
 - 3 See <http://www.asiapacificforum.net/news/the-human-cost-of-climate-change.html>, last accessed 4 October 2012.
 - 4 See <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx>, last accessed 4 October 2012.
 - 5 International Law Association (2012:43).
 - 6 One of the biggest barriers is causality. In reference to this, the 2009 OHCHR Report states that “it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implica-

Irrespective of whether or not climate change effects can be construed as human rights violations, human rights obligations provide important protection to the individuals whose rights are affected by climate change or by measures taken to respond to climate change.

In examining whether this conclusion holds true (i.e. whether human rights law can provide effective tools to address the challenge of climate change), special attention needs to be paid to private sector actors – particularly corporate entities – and the role they play with regard to climate change and its human rights impacts: many business activities are directly linked to global environmental damage that, in turn, can generate human rights violations, among them mining, fossil fuel extraction and deforestation, to name just a few.⁸ Climate change and human rights are increasingly important corporate responsibility issues,⁹ but what can be said about the interrelationship between the two?

This paper examines this relationship. It assesses whether existing international human rights standards and instruments are sufficient to manage (i.e. to prevent and sanction) private business activities that may result in climate-change-related human rights impacts, using as a case study the most recent global instrument regarding corporate responsibility for human rights, i.e. the Guiding Principles on Business and Human Rights: Implementing

tions for human rights. ... [G]lobal warming is often one of several contributing factors to climate change-related effects, such as hurricanes, environmental degradation and water stress. Accordingly, it is often impossible to establish the extent to which a concrete climate change-related event with implications for human rights is attributable to global warming”, Report of the Office of the UN High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 January 2009, para. 70, available at <http://www.ohchr.org/Documents/Press/AnalyticalStudy.pdf>, last accessed 4 October 2012 (hereinafter OHCHR Report (2009)). As to causality being a barrier to invoking human rights instruments in the context of climate change, see also International Law Association (2012:39): “International law analyses of the fit between human rights law and climate change have been mixed. Although the UN Human Rights Council and Office of the High Commissioner on [sic] Human Rights (OHCHR) have recognized the applicability of human rights law to climate change, the OHCHR and others have raised concerns about causal links and extraterritoriality”.

7 OHCHR Report (2009:para. 71).

8 See International Council on Human Rights Policy (2008:70).

9 As for the former, see e.g. the UN Global Compact, “Caring for Climate” initiative, available at http://www.unglobalcompact.org/issues/environment/climate_change/, last accessed 8 October 2012.

the United Nations “Protect, Respect and Remedy” Framework (GPs).¹⁰ Section B looks into the state duty to protect against corporate-related human rights abuses, with the emphasis on extraterritoriality (both direct and indirect). Section C discusses the relevance of corporate responsibility to respect human rights in terms of protecting against climate-change-related human rights impacts. The focus here is on human rights due diligence and impact assessment. The concluding Section D assesses the likely effect of the GPs and asks how climate and human rights, as well as private companies, can profit from them.

B. The 2011 UN Guiding Principles on Business and Human Rights

In June 2011, the UN Human Rights Council formally endorsed the GPs. This set of 31 principles seeks “to provide for the first time an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.”¹¹

The GPs are the result of six years of research and intensive multi-stakeholder consultations around the world, led by the Special Representative of the UN Secretary-General on the human rights responsibility of transnational corporations and other business enterprises, Harvard Professor John Ruggie. According to Ruggie, —¹²

[t]he Guiding Principles highlight what steps States should take to foster business respect for human rights; provide a blueprint for companies to know and show that they respect human rights, and reduce the risk of causing or contributing to human rights harm; and constitute a set of benchmarks for stakeholders to assess business respect for human rights.

10 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework, 21 March 2011, UN Doc. A/HRC/17/31, available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>, last accessed 10 October 2012. For a full analysis of the GPs, see Roos (2013).

11 Ruggie (2011).

12 (ibid.).

I. The State Duty to Protect against Corporate-related Human Rights Abuses

The GPs start from the classical state-centric conception of *human rights*, according to which states bear the primary responsibility for the protection and promotion of human rights. Correspondingly, the first chapter of the GPs describes the legal obligations which states have to meet in order to fulfil their duty to protect against corporate-related human rights abuses. These can be summarised as follows: states are required to take appropriate steps to prevent, investigate, punish and redress human rights abuses by third parties through effective policies, legislation, regulations and adjudication (GP, Principle 1 – hereafter GP 1). If a state fails to take such steps, it may breach its international human rights obligations. GP 1 does not state anything new from a legal point of view, as holds true for the entire set of the GPs: they do not create new international law obligations, but elaborate “the implications for existing standards and practices for States and businesses” (see GP 14).

Some commentators on the GPs view the emphasis on the state duty to protect, including the duty to adopt corresponding measures, as one of the Principles’ primary strengths.¹³ This positive assessment also holds true for the role which the state duty to protect can play when it comes to the prevention and remedying of climate-change-related human rights impacts by corporate non-state actors. At first glance, climate policy and regulation is not an area in which a state’s influence and private business activities clash in the same apparent way as they do in areas such as the promotion of foreign trade (in which states grant export, investment, and other credits to private companies).¹⁴ The state obligation to protect may, however, be relevant to climate-change-related human rights protection as it entails, among other things, a state duty to regularly reassess existing regulations, laws and jurisdictions with the objective of finding out whether they meet the ‘duty to protect’ requirements. Examples of “appropriate steps to prevent, investigate, punish and redress human rights abuses by third parties” in the aforementioned sense of GP 1 which can be relevant for the prevention of climate-change-related harm to human rights by corporates are –

13 See e.g. Amnesty International et al. (2011).

14 The promotion of foreign trade, too, can certainly have a climate-relevant component.

- companies' non-financial disclosure obligations in order to increase standards of human rights due diligence and accountability
- emissions caps¹⁵ or fuel-efficiency regulations, and
- the judicial enforcement of human rights.

These are all areas in which states have a special responsibility to protect, and are obliged to exercise their (political) margin of appreciation in conformity with human rights law.

1. The Duty to Ensure Policy Coherence

The duty to protect can also be seen as the basis for a state duty under international public law to align climate change and human rights policies – i.e. to make sure that relevant climate change laws and regulations are in line with a state's human rights obligations, and that any climate change policy-making needs to take human rights into account. The duty to ensure policy coherence is explicitly mentioned in GPs 8–10. Thus, according to GP 8, –

States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

GP 9 reads as follows:

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

GPs 8 and 9 refer explicitly to trade- and investment-related laws and policies that shape business practices (see GP 8, Commentary), and international “economic agreements concluded by States, either with other States or with business enterprises” (see GP 9, Commentary), respectively. The rationale behind these Principles can, however, also be applied to international agreements related to climate change, and to climate change policymaking and implementation, for the following reasons: the Principles acknowledge that “at times, States have to make difficult balancing decisions to reconcile different societal needs”, and that the appropriate balance needs to be struck

15 For a definition of *emissions caps*, see e.g. <http://www.wisegeek.com/what-is-an-emissions-cap.htm>, last accessed 23 July 2012.

between human rights laws on the one hand, and laws and policies that shape business practices on the other (see GP 8, Commentary). Whereas the latter frequently serve economic interests only, the former primarily serve the interests of individuals and groups. As stated in the Commentary to GP 8: “[t]here is no inevitable tension between States’ human rights obligations and the laws and policies they put in place that shape business practices”, but there can be. The same holds true for climate-change-related laws and policies oriented to human rights needs on the one hand, and business-related laws on the other. In summation, the following can be concluded from the GPs regarding policy alignment for protection against climate-change-related corporate activities that may impact on human rights: states – in shaping business-relevant policies – need to make sure that such policies or the terms of international agreements –

- do not constrain them from fully implementing new human rights legislation, including human-rights-relevant climate change policies and agreements, and
- contribute to the fullest extent possible to the protection and realisation of human rights.

2. The Extraterritorial Dimension of the State Duty to Protect

To date, the legal situation of many, if not most, countries of the world is still insufficient when it comes to policies, legislation, regulations and adjudication relevant to the prevention of climate-change-related corporate harm to human rights. The existing regulation gap is closely related to the extraterritorial dimension of the state duty to protect: one of the main challenges regarding state regulation of business activities which might result in climate-change-related harm to human rights is the global or transnational nature of such activities. In this regard, two scenarios can be envisaged:

- Corporate activities take place in one country while the harm is felt in one or more other countries, and
- The harmful conduct is attributable to a company which is a subsidiary to a parent or management company based in a different jurisdiction from the subsidiary.

From a legal point of view, these scenarios are, inter alia, problematic insofar as two or more states with regulatory powers of varying degrees come into

play: the ‘home state’ (i.e. the state in which the parent company¹⁶ is registered), and the ‘host state’ (i.e. the state in which the corporation or its subsidiary operates).

With regard to the effective prevention of and protection against climate-change-related harm, the situation described can be difficult to solve when the state with the ‘stronger’ regulatory and/or jurisdictional case does not or cannot exercise its power satisfactorily, leaving regulation up to the ‘weaker’ state. The International Council on Human Rights Policy (ICHRP) published a Rough Guide on Climate Change and Human Rights, in which it describes this dilemma vividly, taking the prospects of national-level litigation with regard to harm caused by greenhouse gas (GHG) production by multinational corporations as an example, the basis of which is fundamentally transnational:¹⁷

Many of the biggest emitters do not operate in one State: they act globally. The biggest American and European emitters (oil and gas and logging companies) generate many of their emissions abroad, in countries that do not have emissions caps or robust regulation or judicial enforcement. US and European car producers sell cars globally: even if fuel-efficiency regulations are introduced in their home countries, they can still be avoided elsewhere. Many LDCs [least developed countries] rely for transport on discarded fuel-inefficient vehicles from the West. Airlines and shipping companies escape global emissions accounting altogether, although this is likely to change. Furthermore, if emission levels are evaluated across entire production and supply chains, it is quickly apparent that many of the emissions attributed to developing countries in fact serve to improve the lifestyles of the wealthy. In manufacturing too, companies can source or outsource the most polluting phases of production to other countries. For all these reasons, the most polluting private actors have many means to escape a state-centric emissions accounting regime. Indeed, a perverse effect of CBDR [common but differentiated responsibilities] is that firms may seek ways to ‘dump’ emissions in countries that do not have caps.

The dilemma described here raises the question of whether or not the principle of extraterritoriality can serve as a means to tackle these governance gaps. The answer is not clear-cut: the category of extraterritorial jurisdiction,

16 “A parent company is a company that owns enough voting stock in another firm to control management and operations by influencing or electing its board of directors; the second company being deemed as a subsidiary of the parent company. The definition of a parent company differs by jurisdiction, with the definition normally being defined by way of laws dealing with companies in that jurisdiction”, available at http://en.wikipedia.org/wiki/Parent_company, last accessed 17 July 2012.

17 ICHRP (2008:69).

i.e. a state's ability to exercise legislative, judicial and/or executive power beyond its territorial limits,¹⁸ is highly controversial and politicised. This is particularly the case when it comes to policy domains in which states have not yet agreed to certain uses of extraterritoriality, such as human rights and climate change,¹⁹ and business policies and human rights,²⁰ respectively. With regard to the latter in particular, "[l]egitimate issues are at stake and they are unlikely to be resolved fully anytime soon".²¹

The International Law Association's Committee on Legal Principles Relating to Climate Change regards the question of whether human rights obligations can be applied extraterritorially as one of two barriers to efforts to invoke human rights instruments in the context of climate change. In its Second Draft Conference Report of 2012, the Committee describes the current legal situation as follows:²²

Although the failure by developed States to regulate or control GHG emissions could amount to an interference with individual rights domestically, obligations to protect human rights from environmental harm may not apply extraterritorially. The case law on extraterritoriality of human rights mainly involves occupation or control of territory, and is not helpful to the very different settings of climate change. That is one of the reasons why developing States have not so far sought to bring human rights cases against major GHG-emitting States.

18 See e.g. http://en.wikipedia.org/wiki/Extraterritorial_jurisdiction, last accessed 16 July 2012.

19 See International Law Association (2012:39): "International law analyses of the fit between human rights law and climate change have been mixed. Although the UN Human Rights Council (HRC) and Office of the High Commissioner on [sic] Human Rights (OHCHR) have recognized the applicability of human rights law to climate change, the OHCHR and others have raised concerns about causal links and *extraterritoriality*" [emphasis added].

20 See Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Ruggie, John, UN Doc. A/HRC/14/27, 9 April 2010, para. 46, available at <http://198.170.85.29/Ruggie-report-2010.pdf>, last accessed 16 July 2012 (hereinafter Report 14/27): "All States have the duty to protect against corporate-related human rights abuses within their territory and/or jurisdiction. In several policy domains, including anti-corruption, anti-trust, securities regulation, environmental protection and general civil and criminal jurisdiction, States have agreed to certain uses of extraterritorial jurisdiction. However, this is typically not the case in business and human rights".

21 (*ibid.*:para. 47).

22 International Law Association (2012:40).

The Committee does, however, concede that evolving international legal approaches may help to address this barrier,²³ which raises the next question: is the new international corporate human rights regime in general, and are the GPs in particular, of any help? Do they identify necessary legal approaches to this issue?

Unfortunately, the GPs contribute only so much to a solution of the extraterritoriality problem, as the UN Special Representative took quite a conservative approach to this issue. He missed the opportunity to interpret public international law progressively by declaring that the extraterritoriality dimension of the state duty to protect remains unsettled in international law.²⁴

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.

At least Ruggie concedes that ‘home states’ are not generally prohibited from doing so – provided there is a recognised jurisdictional basis.²⁵

The GPs have been criticised for not having adequately addressed the extraterritoriality issue. Ruggie’s interpretation of the extraterritoriality dimension is correctly viewed as a “lukewarm endorsement of extraterritoriality”.²⁶ Amnesty International regards the GPs’ weak point as being that they “do not require States to put in place effective regulatory measures to prevent and punish their companies from abusing the rights of individuals and communities in other countries.”²⁷

Amnesty International asked the Working Group on Business and Human Rights, which the UN Human Rights Council formed following the endorsement of the GPs, to focus on extraterritoriality in their future work in order “to adequately advance the rights of those affected by business-related human rights abuses.”²⁸

23 (ibid.).

24 GP 2, Commentary.

25 See GP 2, Commentary.

26 Backer (2011:146).

27 Amnesty International (2011).

28 (ibid.).

It is to be hoped that the Working Group takes this appeal seriously, but it has not picked up the issue to date.²⁹

Despite the legitimate criticism that may be levelled against the GPs' treatment of extraterritoriality, one has to give credit to the Principles for the following reasons:

- They ask states to “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations” (GP 2), and
- They point out some of the policy reasons for home states to encourage companies domiciled in their territory and/or jurisdiction to respect human rights abroad, and list exemplary domestic measures with extraterritorial implications that states have adopted in the past.

Among those policy reasons are an increased predictability for business enterprises, and reputation protection for states seeking to avoid being associated with possible overseas corporate abuse. Domestic measures with extraterritorial implications, mentioned in the Commentary to GP 2, include –

- requirements for ‘parent’ companies to report on the global operations of the entire enterprise
- multilateral soft-law instruments, such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development
- performance standards required by institutions that support overseas investment, and
- direct extraterritorial legislation and enforcement, including criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs.

Each of these measures could be instrumental in preventing and/or prosecuting climate-change-related human rights violations linked to corporate activities. This article will now examine two of them more closely: indirect extraterritorial jurisdiction (IETJ), and direct extraterritorial jurisdiction.

29 The Working Group aims at disseminating and discussing the GPs. Its agenda, reports and ongoing work are available at <http://www.business-humanrights.org/Documents/UNWorkingGrouponbusinesshumanrights>, last accessed 16 July 2012.

a) Indirect Extraterritorial Jurisdiction

IETJ by the home state “consists in imposing on the parent company domiciled in the home State a due diligence obligation to control its subsidiaries or business partners”.³⁰ IETJ is primarily being exercised through reporting requirements, which are one of the domestic measures with extraterritorial implications explicitly mentioned in the GP’s chapter on extraterritoriality.³¹ Requiring parent companies to report on the global operations of the entire enterprise – in particular the company’s overall human rights policy and impacts, and especially those of its overseas subsidiaries – is an important means to foster a corporate culture respectful of human rights at home and abroad.³² Such a state policy measure relies on territory as the jurisdictional basis, even though it may have extraterritorial implications.³³ States should, therefore, be less reluctant to adopt such reporting policies; and extraterritoriality – at least if it is only ‘indirect’ – should be a surmountable barrier to efforts to invoke human rights instruments in the context of climate change.

The 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights³⁴ argue in the same direction. They explicitly recognise the ‘home state principle’ as a basis for state measures to protect human rights. The relevant part of Principle 25, Bases for Protection, reads as follows:

States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means ... in each of the following circumstances: ... c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned.

From a strictly legal point of view, the relevance of the Maastricht Principles for establishing a legal argument in favour of extraterritorial human rights obligations is limited: the Maastricht Principles have only been adopted by

30 De Schutter (2010:249).

31 See Commentary to GP 2.

32 How a company can and should embed human rights into its core business practices is elaborated in this article in Section B, *II. The Corporate Responsibility to Respect Human Rights*.

33 See Report 14/27, para. 48.

34 The Maastricht Principles are available at <http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf>, last accessed 17 July 2012.

a group of experts in international law and human rights. The Principles express expert opinions, but are not legally binding on states. The Principles do, however, provide important guidelines for states on the scope of their human rights obligations beyond their own borders, and stress the importance of IETJ.

b) Direct Extraterritorial Jurisdiction

Compared with IETJ, direct extraterritorial jurisdiction – both legislation and enforcement – over private actors or activities abroad is an even more controversial concept than its counterpart, and has not yet received widespread acceptance. Also, the barriers which need to be overcome concerning direct extraterritorial jurisdiction are quite high. Similar challenges exist in the international environmental law regime. Although environmental protection is one of the policy domains in which states have already agreed to certain uses of extraterritorial jurisdiction (ETJ),³⁵ the issue of ETJ has not been finally settled in this area either.³⁶ Here, parallels are apparent between the international corporate human rights regime (which is still evolving) and the international environmental law regime. As far as evolving international legal approaches to extraterritoriality are concerned, these regimes should be linked to one another. This is crucial when it comes to developing solutions for the problem of climate-change-related harm to human rights.

35 See Report 14/27, paras. 46–50.

36 On the issue of EJT, the International Law Association elaborated in its first report, *Legal Principles Relating to Climate Change*, as follows: “Corporations operating in foreign countries could be subject to the environmental laws of their home state through the ‘nationality’ principle of jurisdiction. This is problematic, however, if such corporations are also subject to the host state jurisdiction [–] leading to jurisdictional disputes. Yet if damage originating from corporate activity in the host state resulted in environmental damage in the home state or the global commons – for instance, the climate system – then the home state would have a stronger case. In such a case the ‘objective’ applications of the territoriality principle – the ‘effects’ principle – could also be applied, giving the home state a stronger case for applying jurisdictional extraterritoriality, though this has not generally been accepted” International Law Association (2010:29).

II. The Corporate Responsibility to Respect Human Rights

So far, this article has focused on the GPs' implications for the state duty to protect against climate-change-related harm to human rights associated with corporate activities. The state duty to protect is, however, only one – albeit a central one – of the three pillars which the GPs promote.³⁷ The second pillar, the corporate responsibility for human rights, is of equal importance and of great relevance for the issues discussed in this article. The principles and the commentaries thereto³⁸ provide guidance and answer several crucial questions to this effect. One of them concerns the relationship between the state duty to protect and the corporate responsibility to respect, on the one hand, and between national and international human rights obligations on the other:³⁹

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

With regard to climate-change-related human rights impacts and/or violations, the subsequent aspects of the GPs' elaborations on “corporate responsibility to respect human rights” are particularly relevant –

- applicability to all human rights
- the human rights due diligence concept
- human rights impact assessment, and
- impact versus sphere of influence.

These will be discussed in more detail in the following paragraphs.

37 The GPs implement the tripartite framework on business and human rights – “Protect, Respect, and Remedy” – developed by the UN Special Representative and passed by the UN Human Rights Council in 2008. The Framework comprises three core principles which complement and support each other. The first pillar is the state duty to protect against human rights abuses by third parties, including businesses. The second entails the corporate responsibility to respect human rights, while the third focuses on the need for more effective access to remedies.

38 See Chapter II of the GPs.

39 GP 11, Commentary.

1. *Applicability to all Human Rights*

The GPs neither prioritise particular human rights to which a company should pay special attention nor define specific areas about which corporations should be most concerned. Rather, they are based on the premise that all human rights are or can be relevant for business activities:⁴⁰

Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.

Hence, the GPs apply to the whole spectrum of internationally recognised human rights, which encompass at a minimum those that are expressed in the so-called International Bill of Human Rights (made up of the Universal Declaration of Human Rights and the two main instruments through which the Declaration has been codified – the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), as well as the principles concerning fundamental rights as set out by the International Labour Organization’s 1998 Declaration on Fundamental Principles and Rights at Work.⁴¹ This broad scope of the GPs is one of the reasons why they are of particular relevance for the prevention, investigation, punishment and redress of climate-change-related human rights abuses by corporations: climate-change-related effects can threaten the effective enjoyment of a broad spectrum of human rights, not just a subset of them. Though certain human rights are more likely to be affected (such as the right to life, the right to food, the right to safe and adequate water, the right to health, and the right to adequate housing), other human rights may be at risk as well. The openness of the GPs with regard to subject matter applicability allows for the largest degree of flexibility possible when it comes to applying human rights law to climate change.

40 GP 12, Commentary.

41 See GP 12.

2. The Human Rights Due Diligence Concept

According to GP 15, in order to meet their responsibility to respect human rights, business enterprises should maintain statements of policy, human rights due diligence, and remediation processes. Human rights due diligence constitutes the core element of corporate human rights responsibility. It is to be welcomed that the GPs resort to the *due diligence* concept as the basis of corporate responsibility to actually address adverse human rights impacts with which enterprises are involved.⁴² This concept is familiar to business, and what is more, it plays a particularly important role when it comes to preventing climate-change-related harm to human rights, for the following reasons: the purpose of human rights due diligence is “to identify, prevent, mitigate and account for how ... [businesses] address their adverse human rights impacts.”⁴³

The *due diligence* concept has long been recognised in environmental protection law. Its concretisation through the GPs, with regard to human rights, is of great relevance for the prevention of climate-change-related human rights impacts, given their close link to environmental degradation measures. The introduction of the *due diligence* concept to corporate human rights responsibility thereby establishes an important tie between climate change and human rights, both of which have been recognised as important corporate responsibility issues by themselves,⁴⁴ but, thus far, have hardly ever been linked to each other.

3. Human Rights Impact Assessment

In order to discharge their responsibility to respect human rights, business enterprises should carry out an essential component of human rights due diligence: a human rights impact assessment. According to the GPs, this assessment is to be effected in four steps:

42 The International Trade Union Federation has also argued in this direction. See Letter of International Trade Union Federation to John G. Ruggie, 27 May 2011, available at http://www.ituc-csi.org/IMG/pdf/Letter_to_Mr_John_G_Ruggie_.pdf, last accessed 20 July 2012.

43 GP 17.

44 As for climate change, see e.g. the UN's Global Compact “Caring for Climate” initiative, available at http://www.unglobalcompact.org/issues/environment/climate_change/, last accessed 8 October 2012.

1. Identification and assessment of actual and potential human rights impacts with the goal of understanding “the specific impacts on specific people, given a specific context of operations” (GP 18)
2. Effective integration across relevant international functions and processes, and taking appropriate action based on the findings of the impact assessment (GP 19)
3. Tracking responses in order to determine whether human rights policies have been implemented optimally, to ensure that there has been an effective response to the identified human rights impacts, and to drive continuous improvement (GP 20), and
4. External communication and reporting of how a business addresses its human rights impacts, “providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors” (GP 21, Commentary).

A human rights impact assessment typically includes –⁴⁵

... assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.

The GPs leave up to each corporation how it incorporates processes for assessing human rights impacts, recognising that the latter can be included in other processes such as risk assessment or environmental and social impact assessments.⁴⁶ This is an important consideration for the prevention of climate-change-related human rights effects because it gives corporations the greatest possible flexibility, and recognises the interrelationship between environmental, social and human rights impact assessments. At the same time, however, the GPs stress that, in any case, the impact assessment should include “all internationally recognized human rights as a reference point”.⁴⁷ From all of this it clearly follows that managers – or anyone responsible for their company’s climate change impacts – also need to consider human rights. Schuchard and Weston, the former a manager of environmental research and innovation and the latter an associate of human rights research and innovation at Business for Social Responsibility, explain why

45 See GP 18, and Commentary thereto.

46 See Commentary to GP 18.

47 (ibid.).

managers' involvement is so important for the prevention of climate-change-related human rights impacts.⁴⁸

These individuals, often finance and energy managers, are generally charged with making direct investments that can impact the human rights of communities in areas where these investments take place, such as buying or selling of carbon market instruments, recommending sites for new facilities, procuring energy and water, carrying out remediation activities, and engaging suppliers. For instance, if a project involves establishing a new plant that will stress the local community's water resources, over time this may impact the community's right to food, safe water, and health – especially if the community's water resources are already suffering from climate change-related drought. Finally, managers should beware of adaptation's pitfalls – namely, growing instability in communities where people feel they are disenfranchised – while prioritizing the development of strong foundations for a world of climate instability.

The focus on affected communities is in line with the GPs repeated emphasis on paying special consideration to particularly vulnerable and/or marginalised groups at any stage of the implementation of a company's human rights responsibility, especially in all due diligence activities.⁴⁹

Business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.

Schuchard and Weston suggest how these challenges can be addressed:⁵⁰

[C]limate change managers can use quantitative analysis to represent the longer-term trends of climate change while doing qualitative research via community engagement to determine potential human rights issues.

They further advocate for treating the nexus of climate change and human rights as a strategy issue, and illustrate why a company might profit from this:⁵¹

Senior-level executives have an opportunity to help their company address climate change and human rights by promoting quantitative data analysis with qualitative, holistic thinking. At the same time, they should promote aligned, consistent actions throughout the company, particularly among their marketing, public relations, and government affairs teams. Companies that do this will be ahead of the game – and ultimately more efficient, with lower risk profiles as

48 Schuchard & Weston (2009).

49 Commentary to GP 20.

50 Schuchard & Weston (2009).

51 (ibid.).

climate change unfolds and companies are held to higher account for human rights.

4. *Impact v Sphere of Influence*

Closely related to the requirement of a human rights impact assessment is yet another of the strengths of the GPs: they use the concept of *impact* for defining the scope of corporate responsibility, instead of the vaguer concept of *sphere of influence*.⁵² Ruggie explains this as follows: “[T]he concept of impact is a more objective basis for attributing responsibility than influence.”⁵³

What is important in the case under consideration is that *impact* refers not only to actual but also to potential effects which corporate conduct or operations can have on human rights, whether the adverse impact is caused through, or contributed to by, a company’s own activities, or whether the impact is directly linked to a company’s operations, products or services by its business relationship, even if the enterprise has not directly contributed to those impacts.⁵⁴ In this context, *business relationships* are understood “to include relationships [of a business] with its business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations or services.”⁵⁵

According to the GPs, the corporate responsibility to respect human rights requires that business enterprises “avoid causing or contributing to adverse human rights impacts” in the former case, and that they seek to prevent or mitigate such impacts in the latter case (GP 13). In any event, they have to address adverse human rights impacts with which they are involved (GP 11).

52 As for the difference between the two, see e.g. Henriques (2009) and http://www.unglobalcompact.org/issues/human_rights/The_UN_SRSR_and_the_UN_Global_Compact.html, last accessed 25 July 2012 (with further references).

53 See <http://globalcompactcritics.blogspot.de/2010/05/global-compacts-principle-on-e-subject.html>, last accessed 25 July 2012.

54 See GP 13.

55 GP 13, Commentary.

C. Assessment: A Paper Tiger?

From a strictly legal point of view, the GPs may be considered unsatisfactory and of little help in preventing climate-change-related human rights impacts by corporations because they are, per se, not legally binding or enforceable on either states or private business entities. At present, the GPs can be characterised as ‘soft regulation’ or ‘soft law’, i.e. permissive, not compulsory regulation in the form of recommendations, opinions or statements, which may eventually lead to ‘hard regulation’ or ‘hard law’, i.e. compulsory law which articulates penalties for failure to comply. There is, however, little likelihood that they will be adopted or recognised as a legally binding instrument at the international level soon, given the long series of unsuccessful attempts, particularly by the UN, to promote legally binding norms on corporate human rights responsibilities.⁵⁶

Due to their non-binding nature, the GPs’ practical significance has been called into question. Some critics of the Principles ask, not without reason, what a company’s incentive would be to discharge its human rights responsibility, given that the GPs are premised on volunteerism, and that there are, so far, no legal consequences or sanctions if a company ignores them. One possible answer, given by a discussant in a professional social network on business and human rights, is the following:⁵⁷

A company's main aim is to make profit and I pretty much doubt that they would willingly want to conduct all the HR [human rights] impact assessments[,] etc.

56 The first such initiative dates back to the 1970s, when the UN drafted the United Nations Code of Conduct for Transnational Corporations. The Code was never adopted due to contentious negotiations. It was not until the late 1990s that the UN started another attempt to clarify and institutionalise corporate responsibilities for human rights: in July 2000, the UN Global Compact was launched, which is a call to companies worldwide to align internal operations with the Compact’s ten universal principles in the areas of human rights, labour, environment and anti-corruption. The Compact, like the GPs, is voluntary in nature, and has, therefore, been criticised in the past (as to the criticism, see e.g. Knox 2011). Finally, the attempt by the UN Sub-Commission on the Promotion and Protection of Human Rights in the late 1990s and early 2000s to draft legally binding norms on the responsibilities of transnational corporations and other businesses with regard to human rights also failed. Both governments and business enterprises strongly opposed the draft norms because of the legal responsibility which they assigned to corporations.

57 Voice of a discussant in a social network on business and human rights (LinkedIn); document with the author.

and multiply their costs for a soft social responsibility with no legal enforcement mechanism to ensure compliance.

This scepticism is all the more appropriate with regard to efforts to invoke human rights instruments in the context of climate change, given, *inter alia*, the barriers thereto, such as the challenge of establishing causality: the causal nexus between corporate activities which may contribute to climate change and related human rights violations is often difficult to establish.⁵⁸

From all of this, one could argue that the GPs' effectiveness will, first and foremost, depend on how seriously states take their human rights obligation to protect – an obligation which is recognised in international public law – and only secondly on whether companies acknowledge that there is a 'business case' for complying with their corporate responsibility to respect human rights. The latter, in turn, will depend to a large degree on the cost–benefit analysis of a corporate enterprise: the more the benefits of avoiding operational, legal and reputational risks outweigh the costs of conducting human rights due diligence, such as a human rights impact assessment, the more compelling is the business case for complying with the corporate social responsibility to respect human rights. At present, the social pressure on corporations (particularly from consumers) is already quite strong when it comes to human rights violations directly attributable to business enterprises and recognisable to the consumer, such as violations in the field of labour rights. In these cases, the business case for companies to comply with their corporate human rights responsibility is already plausible. By contrast, climate-change-related human rights impacts often become noticeable only many years after the harmful business conduct. Consequently, in the context of climate change, the GPs are of primary relevance for either those companies that already believe there is a business case for conducting human rights due diligence, or the few well-intended companies that conduct human rights due diligence even in the absence of a strong business case for it. For them, the GPs offer some helpful guidance on how to conduct responsible business, and to avoid activities which may contribute to climate-change-related harm to human rights. In the end, the GPs will be successful as an instrument to prevent, *inter alia*, climate-change-related human rights violations when companies accept that consideration of human rights is not a burden, but something from which they can actually profit.

58 See Footnote 6 above.

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