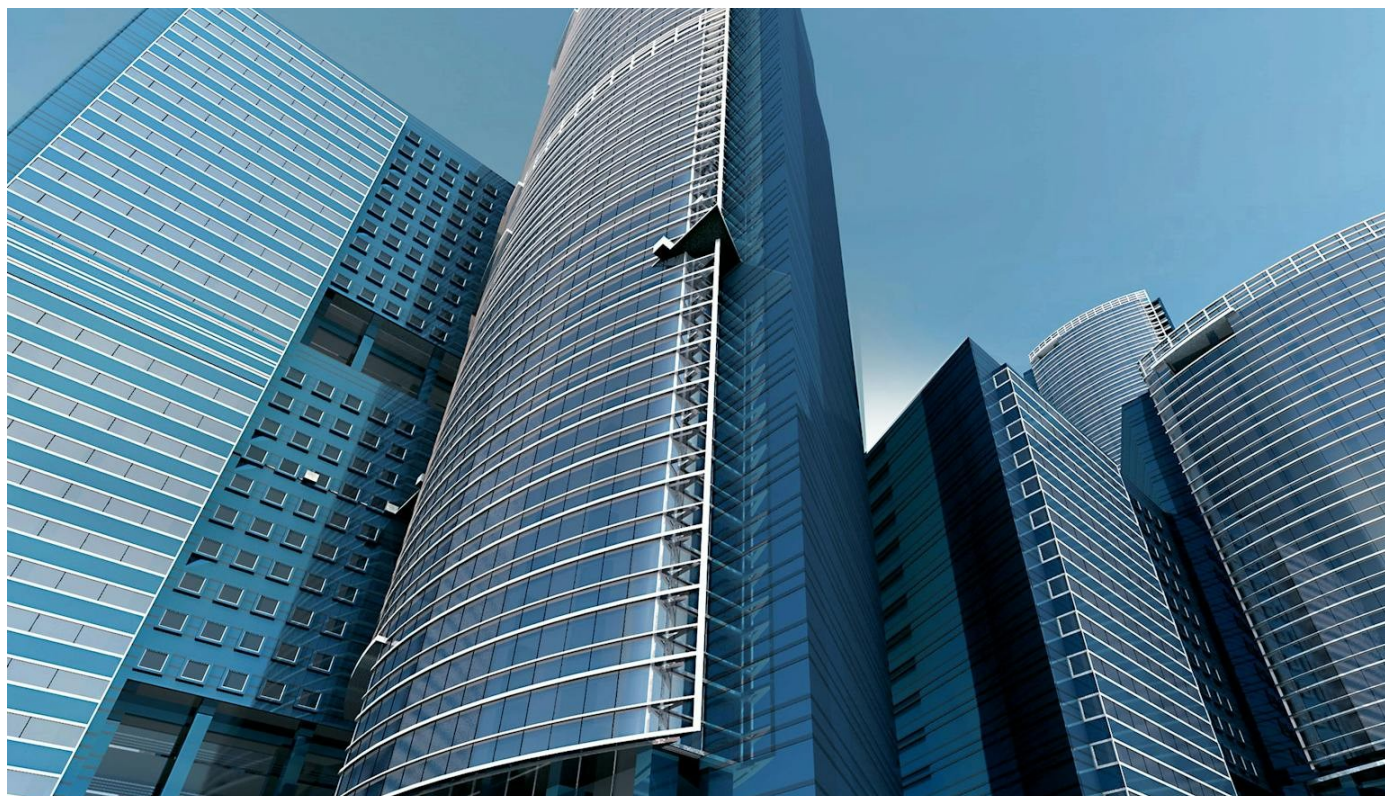


Home / Human Rights / “Beyond Voluntarism”: International Instruments in Addressing State Responsibility for Corporate Harms



“Beyond Voluntarism”: International Instruments in Addressing State Responsibility for Corporate Harms

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The socio-legal concept of state-corporate crimes discusses the state-corporate symbiotic nature in causing environmental harm and human rights violations through the activities of enterprises. This paper briefly presents the concept of state-corporate crimes and the scope of one international instrument (United Nations Guiding Principles – UNGPs) that has been promulgated to address this issue. The framework of the

UNGPs shows their voluntarism and non-binding nature. Irrespective of the UNGPs, such corporate harm is inevitable. The UN is in the process of promulgating a Legally Binding Instrument (LBI, latest draft) to address this issue through the Open-ended Intergovernmental Working Group (OEIGWG). I conclude by highlighting the dire necessity of transforming ineffective international instruments into effective tools to avoid corporate harm in order to achieve the desired protection goals.

State-Corporate Crimes

State-corporate crime is defined as actions that result from the intersection of the interests of the state and the interests of the corporate sector, leading to outcomes that violate laws or cause significant harm (Tombs, S., & Whyte, D., 2003). State-corporate crimes have been discussed in two primary types: “state-initiated corporate crime” and “state-facilitated corporate crime”. “State-initiated corporate crime” involves active participation by state agencies in committing specific criminal acts, while “state-facilitated corporate crime” occurs when state agencies fail to regulate corporate misconduct. When a corporate crime is carried out “at the behest of, or with the implicit consent of, the government,” it falls under “state-initiated” corporate crime, which can be seen as a form of criminal conspiracy (R Kramer, R Michalowski, and D Kauzlarich, 2002).

Throughout history, under the framework of “regimes of permission,” states have systematically established structures that effectively authorize corporations to engage in criminal activities. Rather than simply neglecting to prevent corporate crimes, these state policies and regulatory frameworks actively enable and facilitate such illicit actions (David Whyte, 2014). Despite the existence of the debate over corporate crimes and responsibility for several decades, transnational companies are gradually required to operate in a context not just determined by the norms of marketing but by a set of inter-governmental arrangements precisely designed for them (Tombs, S., & Whyte, D., 2003). A crucial aspect of these regimes of permission is the corporate veil, which protects owners from civil liability and shields both owners and managers from criminal liability (David Whyte, 2014). Moreover, because of state-corporate symbiosis, governments often act in ways that protect and promote corporate interests, sometimes to the disadvantage of their citizens (Steve Tombs, 2012).

According to Whyte (Whyte 2013) and Bradshaw (Bradshaw 2015), neoliberalism increases the interdependence between the public and the private sector, resulting in

close collaboration between the government and corporations. A visible appearance of this process is the *revolving door* (Pons, 2022). The state-corporate misconduct has been seen through the lens of a criminological approach in some instances. Public officials may regulate in favor of corporate interests because they hope to secure employment in the private sector after leaving government office, or, conversely, because individuals entering public office from the private sector bring with them the perspectives they gained from industry (Dal Bo, 2006; Cortese, 2011).

Either way, these dynamics impact decision-making processes in ways that are detrimental to the public interest (Cortese, 2011). If corruption captures sets of relationships and practices that harm the public interest (Beetham, 2015), then regulatory decisions could largely be interpreted as corrupt practices (Poynting and Whyte, 2017). This paper is not focused on defining regulatory decisions as corruption, but on presenting their recognition as a form of state-corporate crime, which highlights the necessity of expanding the understanding of the original concept.

Therefore, it has become increasingly pertinent to address the complex and systemic nature of state-corporate criminality in an effective manner, since the issue is systemic and ingrained within governance structures, such that superficial policy adjustments may not suffice to tackle the fundamental origins of state-corporate crime.

International Instruments to Address this Issue

Throughout the past few decades, several international instruments have been promulgated to address various aspects of this issue, and this paper focuses on the UNGPs, which were introduced in 2011 as the first corporate human rights responsibility initiative approved by the UN. They encompass three principles: the state duty to protect human rights (Chapter I), the corporate responsibility to respect human rights (Chapter II), and access to remedies (Chapter III). The UNGPs aim to achieve a wide range of protections, and the primary role of states in protecting individuals from human rights abuses extends not only within their territorial boundaries but also across their jurisdictions, requiring active measures to prevent abuses by third parties, including business enterprises (Arts. 2–4).

This responsibility, grounded in international human rights law, requires not only the establishment of regulatory frameworks but also the active enforcement of standards to prevent violations. This obligation intensifies in situations where business enterprises are owned or controlled by the state, demanding heightened oversight and

accountability mechanisms to ensure compliance with human rights standards. Beyond their territorial obligations, home states bear a responsibility to extend protective measures extraterritorially to support host states in preventing human rights abuses, particularly in conflict-affected areas where risks of human rights abuses are heightened (Art. 7).

The UNGPs further highlight the obligation of states to preserve adequate policy space when pursuing business-related policy objectives such as economic or investment-related agreements, to discharge their human rights obligations effectively (Art. 9). Jointly, these provisions highlight the pivotal role of states in establishing a comprehensive framework that could balance economic policy goals with the imperative of protecting human rights against corporate misconduct.

Effectiveness of UNGPs

Even though the UNGPs cover a wide spectrum in regulatory and policy aspects, their effectiveness remains insufficient because of varying levels of domestic implementation among states due to their lack of influence in national legislation and jurisdictional application (Białostockie Studia Prawnicze, 2019). Despite the UNGPs encouraging TNCs to adhere to voluntary guidelines on human rights due diligence (HRDD), the lack of binding enforceability has resulted in compliance remaining largely optional, reducing the incentive for corporations to rigorously implement human rights standards. (Shulman, S., 2024).

This non-obligatory nature of the UNGPs has resulted in limited remedies in cases of human rights abuses, allowing responsible parties to evade liability, particularly in host states with weak enforcement of existing laws (Tjipto et al., 2022). The effectiveness of the UNGPs is further compromised by the prioritization of harm mitigation over proactive human rights enhancement, which often reflects avoidance of liability rather than preventive measures against human rights abuses. (Kemp & Vanclay, 2013).

Even though the UNGPs advocate for continuous assessment of human rights impacts, empirical studies indicate that many corporations often treat them as administrative formalities rather than substantive commitments. (An, Y., 2022). Accordingly, it can be said that the inherent voluntary scheme of the UNGPs has reduced their effectiveness, rendering them more of a display tool than an effective instrument.

Necessity of Binding Instruments

The above studies demonstrate that, despite the normative clarity of the UNGPs, their practical implementation is hindered by challenges, as home states prioritize political and economic interests over human rights concerns abroad. This tension highlights a persistent disparity between the aspirational scope of international standards and the limited willingness of states to regulate their corporations' conduct.

The preceding analysis of the intertwining nature of state-corporate misconduct and the multifaceted nature of the state-corporate crimes concept has emphasized the pressing need for binding international legal mechanisms to ensure state-corporate accountability. This further highlights the inadequacy of voluntary frameworks and the pressing need for binding instruments that go beyond voluntariness.

Conclusion

The existence of transnational corporate harm, facilitated by weak regulation and insufficient accountability mechanisms, demands robust measures to define state responsibility in preventing corporate harms. The UNGPs have played a pivotal role in shaping state responsibility in regulating corporate conduct. However, their voluntariness has demonstrated inadequacy in compelling states to regulate and prevent corporate harm effectively. The LBI is still in draft form, and its effectiveness cannot yet be ascertained. However, it is apparent that international instruments need stronger binding force to encourage states to regulate corporate conduct to establish a robust legal regime.

About the Author



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#Corporate Accountability

#human rights

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