Input to the collaborative UN project UNGPs 10+ "Business and Human Rights: Towards a Decade of Global Implementation"

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(1) Tacking stock / progress

Where has progress taken place in UNGPs implementation over the course of the last decade? What are the promising developments and practices (by governments, businesses, international organizations, civil society organizations, etc.) that can be built on?

The UNGPs build a crucial normative point of reference for a great variety of stakeholders, including states, international organizations, civil society and business actors. They establish concepts and yardsticks that build a basis for further developments.

Legislative developments and litigation

At the forefront of current developments is the adoption of domestic legislation establishing reporting obligations and/or due diligence requirements, drawing on the UNGPs' three-pillar structure and other concepts put forward in the UNGPs. Laws have been adopted in the UK, France, and the Netherlands and are under debate in Germany, Switzerland, and the European Union. These initiatives try to alleviate harm caused by the operations of transnational companies, hence addressing the second UNGP pillar. They also provide for remedies in case of harm caused, thus addressing the third pillar of the UNGPs.

Furthermore, the last decade has seen a rise in human rights corporate litigation outside US and Anglo-Saxon jurisdictions. Such forms of litigation often render judicial rulings with extraterritorial reach and/or effect (adjudicative extraterritorial jurisdiction). The rise of legislative instruments also strengthens the liability of holding corporations for human rights abuses committed by their subsidiaries and/or suppliers abroad. They may even have extraterritorial reach and/or effects (normative extraterritorial jurisdiction). These mutually beneficial developments have mainly taken place in continental European jurisdictions and at EU level.

Corporate and policy engagement

Corporate engagement with human rights appears to have increased, with many companies now expressing their commitment to the UNGPs, adopting human rights policies, and integrating human rights in their codes of conduct and their social and environmental policies and procedures. Many have adopted operational-level grievance mechanisms which are in line, at least on paper, with the UNGPs' third pillar. More and more companies are establishing human rights due diligence processes and integrating human rights in corporate risk assessments, in line with the UNGPs' second pillar.

The UNGPs have also contributed to greater policy coherence as other international standards for responsible business conduct have also started using the UNGPs as a point of reference, notably the OECD Guidelines for Multinational Enterprises.

Increased societal scrutiny

Awareness of consumers in capital-exporting states has risen significantly, in part thanks to the framing of cases of corporate misconduct as adverse human rights impacts.

On the whole, the issue area of business and human rights has attracted more political and societal attention. We now understand better where and when business self-regulation is not enough and have good reasons for binding legislation as part of a 'smart mix' of measures.

(2) Gaps / Failures

Where do gaps and challenges remain? What has not worked to date?

The main gaps and challenges involve a lack of (binding) regulation, implementation and remedy and the risk that businesses will pay mere lip service to human rights and the UNGPs.

Access to remedy and justice for victims

Whereas the prevention aspect of the UNGPs has been engaged with extensively by states and businesses, their responsibility to provide access to remedies (the UNGPs' third pillar) has been neglected. Victims of corporate human rights abuse continue to experience significant obstacles to achieving access to remedy and access to justice.

With respect to access to a legal remedy, victims face a myriad of hurdles. These include factual and financial barriers, such as high litigation costs and lack of legal aid, as well as the fact that the burden of proof typically lies with the victims. Fact-finding abroad is very expensive. NGOs have so far helped out, as for example in the case of the Peruvian peasant who has filed a suit against RWE, but this might not be a solution for all cases. The barriers also include legal/doctrinal ones, such as the principle of separate legal entities (and the doctrine of limited liability), the statute of limitations, the applicability of 'foreign law' due to conflict of laws/private international law, as well as the lack of legally binding obligations under domestic law in home states. Finally, legal proceedings in host states are often likely to prove ineffective. Even if victims can reach a judgment in their favor, it will typically not be enforceable within the jurisdictions where the corporation at issue is domiciled.

Creating effective remedies or consolidating existing ones, on the one hand, is crucial as a means to help victims obtain redress and to 'empower' in a broader sense. On the other hand, it is key to hold

corporations to account in an effective way and to provide stronger incentives to proactively take action to comply with due diligence/human rights.

As a middle-ground, the OECD contact points serve as a good example of an instrument that may help victims to get a remedy if companies have not complied with their OECD Guidelines' due diligence obligations which are consistent with the UNGPs. In some cases, companies have agreed to compensate victims of human rights abuses for their losses. What makes the national contact points attractive is their mandate to "hear cases" where transnational corporations have allegedly failed to abide by their due diligence obligations. As opposed to courts, the national contact points have a lower admissibility threshold and the procedures are not costly for victims. Although the contact points do not have the competence to make binding statements, they help concretize standards of adequate business conduct. These statements are referred to in national laws which makes them effective on the ground. Furthermore, they might contribute to the development of customary international law. That being said, it seems a viable option to try to improve the visibility and the effectiveness of this already existing instrument.

Transitional justice

Major gaps and challenges continue to exist with respect to the role of private actors in situations of conflict and during political transitions. A specific gap exists with regard to rules and standards for private actors on how to cooperate with states or international organizations in the sensitive contexts of transitions or when transitions are yet to come. This relates not only to corporations which have been involved in human rights violations and are ready to take responsibility, but also to private entities which are actively engaged as donors or assistants to transitional justice, namely in investigations, prosecutions, truth-seeking, and reparations.

The UNGPs overlook scenarios in which a state itself violates rules of international law and therefore is not particularly interested in what businesses are doing on its territory. They also omit the regulation of the behavior of private actors, who, instead of states, decide to stand for human rights and comply with international law even when they are not obliged by a home or host state to do so. Although Ruggie spoke about the possibilities of obliging a corporation to refrain from aiding and abetting any other actor involved in a violation of rights, including governments, these ideas have not found their place in the final draft of the UNGPs so as the standards which would regulate the 'voluntary' private involvement in addressing these human rights violations.

The current trend of the private sector's engagement in transitional justice shows that neither states nor international organizations can do much to scrutinize businesses that are willing to espouse criminal trials, truth commissions, reparation programs, or institutional reforms. This might be disturbing because the private sector takes over the function of a state to repair harm done to victims, find the truth, and sometimes even punish perpetrators (one of the examples are Grievance Mechanisms established by the UNGPs, which are very often operated in violation of procedural rights and fair trial standards). And this 'private decision-making' of where and how to interfere in public functions, especially as sensitive as transitions from violent conflict or authoritarian regimes, is not regulated by international law.

It might sound like a very positive development that a private actor is committed to supporting victims and governments in transition by offering them money, expertise, or technical assistance. Yet, the role

of private actors in the enforcement of international law by administering justice or designing reparation programs is not necessarily positive. Transitional justice laws, soft or hard, were not created for private actors, which means there are no standards or rules to guide a private entity through the process. Standards for private interference should be established at the international level, preferably in the framework of the UNGPs.

For further reading on the interconnections between transitional justice, corporate accountability, and BHR, see Julia Emtseva, *Philanthrocapitalism, transitional justice and the need for accountability* (2020), https://www.justiceinfo.net/en/oxford-partnership/45639-philanthrocapitalism-transitional-justice-need-accountability.html; UN Working Group on Business and Human Rights consultation with States, Project on business in conflict and post-conflict contexts https://www.ohchr.org/Documents/Issues/Business/Session22/CN_22sessionConflict_project.pdf; Irene Pietropaoli *Business, Human Rights and Transitional Justice* (Routledge 2020), Sabine Michalowski *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013), Leigh Payne et al. *Transitional Justice and Corporate Accountability from Below* (CUP 2020).

Gap between policy commitments and corporate practice

With respect to the uptake of the UNGPs by business, a principal implementation gap is that too often, businesses which seek to engage with the UNGPs and integrate human rights due diligence in their processes continue to view human rights due diligence through the lens of corporate risk management. Human rights due diligence should focus on the rights of others, not risks to business operations and reputation. Businesses typically engage with the language and practices of the UNGPs, and human rights more generally, in a way that is in line with 'business as usual', rather than reflecting a substantive transformation in business approach or ethos 'beyond the bottom line'. This raises the question to what extent it will be possible to achieve improvements in business conduct with respect to human rights when there is no clear 'business case' for doing so, or where respecting human rights may clash with profit maximization.

Furthermore, as the concepts the UNGPs introduce become increasingly accepted and mainstreamed among business, the risk that corporate expressions of commitment to the UNGPs will form mere cosmetic endorsements increases. In line with this, as the establishing of human rights due diligence processes becomes a more common 'good practice' among business actors, there is a risk that such processes will be created as an end in themselves, rather than in order to change and improve business practices. The corporate action that should follow from policy commitments and the establishment of ethical processes should not be an afterthought.

Normative clarity

Another remaining challenge is the normative clarity of the UNGPs. This particularly concerns the notion of "due diligence". This notion is central in the general structure of the UNGPs, and has been key to reach consensus and involve major economic actors around them. This is particularly true for Anglo-Saxon business actors, which are used to the application of the concept by US courts, generally favorable to business entities. It is indeed a flexible notion and, despite the attempts to clarify UNGP nos. 18 and 19, its contours remain uncertain. Unsurprisingly, some authors (e.g. K. Martin-Chenut, Droits de l'homme et responsabilité des entreprises: les 'Principes Directeurs des Nations Unies, in G. Giudicelli-S. Manacorda (a cura di), Responsabilité pénale des personnes morales: perspectives européennes et internationales, LGDJ, 2013, p. 229, spec. pp. 243-244) have criticized the adoption of

the due diligence standard, suggesting that it must be integrated with the concept of "sphere of influence" (sphère d'influence), used in the Global Compact, in the OECD Guidelines and in the ISO 26000, which defines it as the "range/extent of political, contractual, economic or other relationships through which an organisation [...] has the ability to affect the decisions or activities of individuals or organisations".

Regarding the national laws that seek to impose due diligence obligations on transnational corporations, some deficits remain. Particularly, it has become apparent that a core problem are the uncertainties that remain with respect to the obligations that are imposed on companies. For, the protection of human rights standards is considered to be too broad and also conflating obligations by businesses and by states. It is considered to be important that businesses know exactly which obligations they have, for otherwise laws would fail to comply with core rule of law standards.

States do not want to develop these standards themselves, as they fear that this would interfere with other countries' sovereign rights. Hence, it would be helpful if specific protective standards were developed at the international level. National laws could then refer to these standards when imposing the obligation on corporations to avert adverse human rights impacts in their supply chains. The ILO core labor standards are one example of such more specific standard-setting on the international plane. Furthermore, such regulations seem to be critical under international trade law, as they possibly disturb the non-discriminatory free market among states, particularly to the detriment of states in the Global South. Accordingly, an imperialist critique could be levelled against such regulations. Hence, it would be important to identify strategies that could alleviate negative economic effects.

BHR and the internet

Concerning the first pillar, states have troubles getting a grip on big internet companies. In Germany, the Network Enforcement Act has been implemented to oblige social media companies to erase hate speech. This has led to many deletions of content and to ensuing lawsuits in practice. This reveals that there is a need for regulation. However, this law only regulates a small part of possible human rights abuses that can take place in social media domains. It does not regulate, e.g., what happens if internet companies interfere with freedom of expression when deleting comments. Moreover, no laws have yet been enacted, that regulate the use of data by social media/internet companies. One stumbling block here is that it is unclear when and in how far a state has jurisdiction to regulate these issues. This calls for solution finding on the international plane.

Tax

Gaps remain with respect to transnational or harmonized business taxation and combating illegitimate tax havens. Some domestic tax policies lead to losses of income needed by governments to pursue proper human rights and environmental policies.

(3) Obstacles

What are key obstacles (both visible and hidden), drivers, and priorities that need to be addressed to achieve fuller realization of the UNGPs?

Motivations for human rights performance

The human rights performance of states, business actors and other actors should build an important yardstick for their power and legitimacy. This would establish a stronger incentive to push for human rights regulation as a component of self-interest. Yet, this would require reformation and steps beyond the human rights regime, including major UN organs.

New legal requirements will often be met with refusal by companies and will likely result in an inefficient box-ticking-approach fueled by (big) consulting firms. Such an approach is not likely to change a company's overall attitude to business and human rights. It is necessary to have board members with human rights (or CSR) expertise who will ensure a thorough treatment of these issues (including the company's Human Rights Policy) and a critical reading of CSR reports and who can counterbalance shareholders' short term financial expectations. This can be facilitated by nudging companies to establish sustainability committees on their boards or to appoint Chief Sustainability Officers. Principle 16 should include this aspect. If the relevant expertise is not present on boards, companies will perceive 'human rights' as being part of the corporate reputation management.

Conflict of laws

One major obstacle to the effective implementation of the UNGPs lies in the multi-jurisdictional nature of the economic processes they aim to govern. From a legal point of view, this obstacle relates to issues of international private law (conflict-of-laws), and has clearly emerged in the context of direct civil liability litigation before European courts. Indeed, Reg. 44/2001/EC and today Reg. 1215/2012/EU ("Bruxelles I") give civil courts of EU Member States jurisdiction to hear tort claims against corporate defendants incorporated or otherwise located in the EU (see arts. 4(1), 7, and 63), but according to arts. 4 ff. of Reg. 2007/864/EC the substantive law to be applied in tort lawsuits is normally the *lex loci delicti*, with ensuing effects of normative dumping. Major examples are *Akpan and others v. Royal Dutch Shell*, District Court of The Hague, C/09/337050 / HA ZA 09-1580, 20 January 2013; and more recently *Jabir and others v. KiK Textilien und Non-Food GmbH*, Landgericht Dortmund, 7 O 95/15, 10 January 2019. This combination of international private law norms undermines the effectiveness of human rights in business activities based on vast and transnational value chains (see in the literature L. Enneking, The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case, 1 Utrecht L. Rev. 1 (2014), 44; N. Bueno, Corporate Liability for Violations of the Human Right to Just Conditions of Work in Extraterritorial Operations, 5 Int'l J. Hum Rts., (2017), 565, spec. 576-577).

(4) Systemic challenges

What systemic or structural challenges need to be tackled to realize sustainable development based on respect for human rights?

Externalization of harm

International business is often able to externalize the harm it causes with respect to the human rights of workers and other affected people, as well as its environmental harm. The line between the legitimate use of a competitive advantage and the issue of unfair externalization of harm is sometimes fine, and needs to be better defined. The so-far vague concepts of 'human rights dumping' and 'environmental dumping' may be useful in this regard, but they need to be sharpened in order to add to the debate. Addressing corporate harm externalization will ultimately require binding, worldwide, harmonized standards, either directly enshrined in international instruments or through the adaptation of domestic laws. Such standards would need to be more fine-tuned than human rights, and more adapted to the corporate activity.

The role of political and law-making elites

Members of the political and law-making elites in capital-receiving countries who disregard public welfare in their country need to be persuaded that more social policies and laws, more environmental regulation, more adequate and transparent taxation is warranted and also in their own long-term interest. In line with this, international anti-corruption instruments need to be strengthened. Law-making actors in capital-exporting states need to be persuaded to push the regulatory agenda, which in turn requires pressure from citizens and civil society.

The public-private dichotomy

Another crucial challenge lies in the question to which extent *private* companies can be responsible for human rights in the *public* international human rights system, without simply equalizing the two realms - and without confounding state duties with business duties. One solution is to situate business enterprises between and beyond the dual constellation of public (state) and private (non-state). An extensive scholarship in political science, philosophy, law and economics is dedicated to carving out this hybrid role. As early as 1953, renowned economist Howard R. Bowen fuels the discussion about business responsibility, emphasizing their role for the public interest and the public well-being. He stipulates: "We can support freedom and private control of enterprise only if it is conducive to the general welfare." (https://www.uipress.uiowa.edu/books/9781609381967/the-social-responsibilities-of-the-businessman).

Building on this scholarship, business enterprises can be said to assume a hybrid role beyond the public and the private. Business actors exhibit public *as well as* private dimensions, for example when contributing to the public well-being while pursuing their self-interest. What is more, they boast characteristics that transcend this duality at the outset. A case in point is their participation in global governance, in self-governance, and their legitimacy to do so. This legitimacy and authority exceeds that of private actors by far: it is not private. At the same time, due to lacking mechanisms of democratic accountability (among other reasons), it does not simply mirror state legitimacy and authority: it is not public. Rather, it is hybrid, transcending the dual relation between public and private. See: Janne Mende (2020) : Business authority in global governance: Beyond public and private, WZB Discussion Paper, No. SP IV 2020-103, Wissenschaftszentrum Berlin für Sozialforschung (WZB) (https://www.econstor.eu/handle/10419/218731).

(5) Concrete targets

In concrete terms, what will be needed in order to achieve meaningful progress with regard to those obstacles and priority areas? What are actionable and measurable targets for key actors in terms of meeting the UNGPs' expectations over the coming years?

Given the multi-jurisdictional nature of their activities, defining and regulating the human rights responsibilities of business actors requires a regulatory approach which integrates domestic law, international public law and international private law instruments. From this perspective, initiatives such as the "Binding Treaty" promoted by the UN Human Rights Council starting from 2014 should not be seen as alternatives to the UNGPs, but rather as complementary to their effective implementation.

Mechanisms of effective accountability will for the foreseeable future rely on domestic legal systems. Both the UNGP and the current draft of the UN's Binding Instrument foresee a central role for the domestic level. Yet, considering the many obstacles to effective remedies, domestic legal systems need to adopt more effective, concise, and concerted measures to address this accountability gap. For home states, that chiefly means establishing when and to what extent corporations have binding 'human rights' duties under domestic law when acting on a transnational level and to create corresponding remedial mechanisms for victims of abuses of both non-judicial and judicial nature. Adopting legislation such as the French *loi de vigilance* can be a first step in this direction.

The hybrid role of business companies between and beyond the public and the private provides a starting point for the development of a hybrid responsibility for human rights. Of course, this comes with challenges and questions. It needs to define which companies shall resume which responsibility, and to what extent. It has to address the broad spectrum between transnational companies and small or medium-sized companies, as well as the relation between international law and state jurisdiction. Then again, these questions are to be dealt with in any form of business responsibility for human rights. The hybrid model offers the major advantage of keeping up the difference between companies and states, while at the same time acknowledging the magnitude of business power and legitimacy. It takes into account business agency, power and legitimacy beyond the private sphere, without indiscriminately integrating those roles into the public. This includes the necessity of developing binding instruments for business enterprises.

(6) Other Info

Is there other information relevant to the UNGPs 10+ project that you'd like to share?

The business and human rights agenda should be more closely interlinked with environmental issues, including the role of business in climate change, land use and deforestation, and animal welfare (as part of a One Health approach, see UN Environment Programme and International Livestock Research Institute (lead author Delia Grace Randolph), *Preventing the Next Pandemic: Zoonotic diseases and how to break the chain of transmission* (Nairobi, Kenya 2020)).

The project should also monitor the effects of the COVID-19 pandemic on BHR - both in general (see inter alia UNDP: Covid 19 Rapid Self-Assessment for businesses, https://www.undp.org/content/undp/en/home/librarypage/democratic-governance/human-rights-due-diligence-and-covid-19-rapid-self-assessment-for-business.html) and in particular with regard to supply chains. Here, the pandemic reaffirmed the urgency to make supply chains more sustainable. In the textile industry, for instance, corporations canceled orders (that had already been produced) on short notice. As a result, contractors in host states laid off big parts of their work force or stopped to pay them (see Mark Anner, "Abandoned? The Impact of COVID-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains", 27.3.2020; and https://www.workersrights.org/issues/covid-19/tracker).