

CURRENT PROGRESS ON FOSTERING BUSINESS RESPECT FOR HUMAN RIGHTS

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Abstract

After the emergence of the United Nations Guiding Principles on Business and Human Rights (UNGP), developed by John Ruggie and adopted by the UN Human Rights Council with its resolution 17/4 of 16 June 2011, as the first international standard for preventing and addressing the potentially adverse impacts that business activity may have on the human rights of individuals, the UNGP quickly became the internationally accepted framework for enhancing the standards and practice regarding business and human rights, being endorsed or employed by individual Governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors.

The article summarizes the current progress on the efforts to move the UNGP from paper to practice, in order to set up a legally binding framework for preventing and addressing the impact of the business activity on the human rights of individuals and also for providing access to justice and effective remedies for the victims of such abuses.

Key Words: *Business, Human Rights, Guiding Principles, framework.*

JEL Classification: [K2, K38]

1. Introduction

In order to reach the “common ideal” to which peoples and nations, all structures of society and all individuals must aspire, as proclaimed by the *Universal Declaration of Human Rights* on 10 December 1948, the United Nations General Assembly, it is necessary to progress towards the development of respect for the rights and freedoms that the fundamental document enshrines, through education and learning, and progressive measures on national and international level to ensure their universal and effective recognition and application, in other words, a common, lasting, ever-renewing effort of States, of all institutions and individuals (Moroiu Zlătescu, 2007, p. 198).

As it is recognized that the large corporations exercise an economic and social influence that rivals that of the states in which they operate, the responsibilities of the states are considered to no longer be limited to positive or negative obligations in their relations with the citizens, but they have to include efforts for protecting human rights in relationships between private individuals (Fodor, 2019, p. 1).

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The *United Nations Guiding Principles on Business and Human Rights* (UNGPR), developed by Prof. John Ruggie¹³⁰, as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and endorsed by the Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011, emerged as the internationally accepted framework for enhancing standards and practice regarding business and human rights, being endorsed or employed by governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors.

As the *United Nations Guiding Principles on Business and Human Rights* have enjoyed widespread uptake and support from both the public and private sectors, there are still gaps and challenges to be overcome to move the UNGPR from paper to practice. Currently, the efforts of governments and the European Union are focused on (1) laying down *National Action Plans* to guide their efforts to protect human rights from business related adverse impacts, on (2) imposing legislation on mandatory *human rights due diligence* and on (3) lowering barriers for access to effective remedy to victims of human rights abuses.

2. National Action Plans on Business and Human Rights

In order to foster business respect for human rights, the *United Nations Guiding Principles on Business and Human Rights* propose that States consider a “smart mix of measures – national and international, mandatory and voluntary”¹³¹. Although numerous countries are discussing, creating or have already adopted *national action plans*, policies or laws to incentivize, pressure or mandate business respect for human rights, there are still unsatisfactory levels of business performance and disclosure which call into question the effectiveness of efforts and measures taken to date (Fiedler, 2019).

The concrete requirements for the implementation of the UNGPR through National Action Plans (NAPs) are detailed in the *Guidance on National Action Plans on Business and Human Rights*, developed by the UN Working Group on Business and Human Rights¹³², which provides recommendations on the development, implementation and update of National Action Plans (NAPs) on Business and Human Rights.

¹³⁰ United Nations Human Rights Council (21 March 2011). Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.

¹³¹ United Nations (2011). *Guiding Principles on Business and Human Rights*. New York and Geneva: HR/PUB/11/04, Commentary on Guiding Principle 3.

¹³² UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, available at: https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf (accessed: 24 April 2021).

A National Action Plan is defined by the UN Working Group on Business and Human Rights as an “evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (UNGPs).” Therein the existing laws and policies which are relevant to business and human rights should be identified, shortcomings and gaps in the existing regulatory framework should be recognized and concrete commitments by the government to address the identified shortcomings and to close regulatory gaps should be stated.

From the beginning, the European Union has been a strong supporter of the implementation of the UNGP. In 2011, the European Commission published its strategy for corporate social responsibility¹³³, calling on its member states to develop National Action Plans on Business and Human Rights and announcing an EU Action Plan on Responsible Business Conduct. Following up on its strategy, the Commission published a staff working document in March 2019, which gives an overview of the Commission's and the European External Action Service's (EEAS) progress regarding business and human rights and implementing corporate social responsibility and responsible business conduct.

Currently, the following states have adopted National Action Plans on Business and Human Rights¹³⁴:

- a. National Action Plans on business and human rights:
 - 2013: UK, Netherlands;
 - 2014: Denmark, Finland;
 - 2015: Lithuania, Sweden, Norway, Colombia;
 - 2016: Switzerland, Italy, USA, Germany;
 - 2017: France, Poland, Spain, Belgium, Chile, Czech Republic, Ireland;
 - 2018: Slovenia;
 - 2019: Kenya, Thailand;
 - 2020: Luxembourg, Japan.
- b. Human Rights National Action Plans with chapter on business and human rights:
 - Georgia, South Korea, Mexico.
- c. States that are in the process of developing a National Action Plan:

¹³³ European Commission, *Corporate social responsibility & Responsible business conduct*, available at: <https://ec.europa.eu/growth/industry/sustainability/corporate-social-responsibility> (accessed: 24 April 2021).

¹³⁴ United Nations, Office of the High Commissioner on Human Rights, *State national action plans on Business and Human Rights*, available at: <https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx> (accessed: 24 April 2021).

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| - Argentina | - Indonesia | - Myanmar |
| - Australia | - Jordan | - Nicaragua |
| - Azerbaijan | - Latvia | - Pakistan |
| - Brazil | - Malaysia | - Peru |
| - Ecuador | - Mauritius | - Portugal |
| - Guatemala | - Mexico | - Uganda |
| - Greece | - Mongolia | - Ukraine |
| - Honduras | - Morocco | - Zambia |
| - India | - Mozambique | |

d. States that have begun steps in the development of a National Action Plan:

- Ghana, Kazakhstan, Nigeria, South Africa, Tanzania, Philippines.

Existing National Action Plans have also been criticized for shortcomings¹, both regarding the elaboration process (“ongoing NAP processes in some Member States are neither participatory nor transparent, with stakeholders involved weakly or not at all, and civil society organisations in particular frequently lacking even basic information or opportunities to engage in dialogue with government representatives”), as well as the content (“published NAPs to date mostly describe historical actions, and lack specific commitments capable of demonstrably improving UNGP implementation at the national level”). Also, most National Action Plans lack commitments to improve access to remedies and to remove legal and practical barriers encountered by victims of business-related human rights abuses seeking redress (“access to effective remedies for victims of business-related human rights abuses is of crucial importance and should be addressed in National Action Plans. [...] further progress on this third pillar of the Guiding Principles is necessary”²).

Sadly, Romania has, until now, not published a National Action Plan on Business and Human Rights, and the *National Strategy for Sustainable Development of Romania 2030*, adopted by the Government’s Decision (HG) 877/2018, does not contain any commitments regarding Business and Human Rights.

3. Human Rights Due Diligence

¹ European Network of National Human Rights Institutions, *Recommendations for the Next EU Strategy On CSR, April 2015*, available at: https://media.business-humanrights.org/media/documents/files/documents/EU_CSR_Communication_ENNHRI_Final_Apr_2015_2.pdf (accessed: 24 April 2021).

² Council of the European Union, *Council Conclusions on Business and Human Rights*, 10254/16, available at: https://ec.europa.eu/anti-trafficking/sites/default/files/council_conclusions_on_business_and_human_rights_foreign_affairs_council.pdf (accessed: 24 April 2021).

The *United Nations Guiding Principles on Business and Human Rights* clarify that all business enterprises have an independent responsibility to respect human rights, and that in order to do so they are required to exercise human rights due diligence to identify, prevent, mitigate and account for how they address impacts on human rights³.

The concept of Human Rights Due Diligence comes from the UNGP:

- “In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights”⁴.
- “In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”⁵.

According to the UNGP, a Human Rights Due Diligence should:

- a. *evaluate the impact*: “Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;”
- b. *adapt to the concrete circumstances*: “Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;”
- c. *be ongoing*: “Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”

Enterprises are expected by the UNGP to identify and assess risks by geographic context, sector and business relationships throughout own activities (both HQ and subsidiaries) and the value chain, considers the UN Working Group on Human Rights. The prevention of adverse impacts on people is considered to be the main purpose of human rights due diligence. It concerns risks to people, not risks to business. It is expected to be ongoing, as the risks to human rights may

³ United Nations, Office of the High Commissioner on Human Rights (2018). Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163), available at: <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2019ForumBHR.aspx> (accessed: 24 April 2021).

⁴ United Nations (2011). *Guiding Principles on Business and Human Rights*. New York and Geneva: HR/PUB/11/04, Guiding Principle 15.

⁵ United Nations (2011). *Guiding Principles on Business and Human Rights*. New York and Geneva: HR/PUB/11/04, Guiding Principle 17.

change over time; and to be informed by meaningful stakeholder engagement, in particular with affected stakeholders, human rights defenders, trade unions and grassroots organizations. Risks to human rights defenders and other critical voices are required to be considered⁶.

In the report of the UN Working Group on Business and Human Rights from 2018, it is shown that since 2011, corporate human rights due diligence has become a norm of expected conduct, being integrated in other policy frameworks for responsible business, that a growing number of investors are starting to ask enterprises how they manage their risks to human rights, and that among business enterprises, a small but growing number of large corporations in different sectors have issued policy statements expressing their commitment to respect human rights in line with the Guiding Principles, several such enterprises having developed practices that involve ongoing learning and innovation around the various components of human rights due diligence to prevent and address impacts across operations and relationships, including in supply chains⁷.

Recent discussions on fostering business respect for human rights shifted towards the need for *mandatory due diligence legislation*. In order to become mandatory, the legal duty would need to be accompanied by some consequence for a failure to meet the standard, which, in turn, provides an opportunity for enforcement through civil remedies for those affected.

A first step towards mandatory due diligence legislation was the EU Non-Financial Reporting Directive (Directive 2014/95/EU), which provides that “Large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters”. This directive is transposed, at national level in Romania, by the Order of the Finance Minister no. 1938/2016.

However, these reporting requirements are not sufficient, because they do not require substantive Human Rights Due Diligence to be undertaken, and the company may state that there are no risks because either there was no reporting on any issues stemming from its activity, or because of lacking internal processes to determine or identify the possible risks. Reporting requirements allow the companies to only report on the steps they have taken and do not require them to provide details on any actual human rights abuses they have identified. Lastly, any

⁶ United Nations, Office of the High Commissioner on Human Rights (2018). Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163).

⁷ United Nations, Office of the High Commissioner on Human Rights (2018). Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163).

lack of legal consequence for the failure of a company to actually do a Human Rights Due Diligence, to the extent prescribed by the UNGP, shows that there are further steps necessary to move the *United Nations Guiding Principles on Business and Human Rights* from paper to practice regarding the responsibilities of businesses to identify, prevent, mitigate and account for how they address their adverse human rights impacts.

In this context, individual states already moved to adopt mandatory Human Rights Due Diligence legislation, e.g., France (“Duty of Vigilance Law”) and the Netherlands (child labor due diligence legislation), and the civil society presses for similar legislation in other countries, such as Germany and Switzerland, increasing pressure on the European Commission to introduce EU-wide mandatory human rights due diligence legislation. On 29 April 2020, the European Commissioner for Justice, Didier Reynders, announced that the Commission commits to introducing rules for mandatory corporate environmental and human rights due diligence, as part of a Sustainable Corporate Governance initiative⁸.

According to a draft report published by the European Parliament Committee on Legal Affairs⁹, the proposed EU legislation would:

- a. apply to all EU companies and any non-EU company selling goods or providing services in the EU;
- b. require companies to implement Human Rights Due Diligence in line with the processes provided in the UNGP;
- c. contain sanctions for non-compliance.

Very recently, 50 companies call for the German draft due diligence law (“Lieferkettengesetz” – Law on Supply Chains) to be strengthened in Parliament¹⁰, in order to bring about tangible improvements for people and planet along global value chains and ensure the law is more in line with UN and OECD standards, asking mainly for the following:

- The German law on supply chains should apply the risk-based approach of the UN Guiding Principles and OECD Guidelines consistently, and in particular ensure proactive due diligence obligations cover the full value chain.
- The law should emphasize the rights of affected people in remediation; in addition to strong administrative enforcement,

⁸ Business and Human Rights Resource Centre, *EU Commissioner for Justice commits to legislation on mandatory due diligence for companies*, available at: <https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies/> (accessed at: 24.04.2021).

⁹ European Parliament, *Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL))*, 11.9.2020, available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf (accessed: 24.04.2021).

¹⁰ Business and Human Rights Resource Centre, *50 companies call for German draft due diligence law to be strengthened in Parliament*, available at: <https://www.business-humanrights.org/en/latest-news/statement-sorgfaltspflichtengesetz/> (accessed: 24.04.2021).

legal mechanisms are needed that strengthen and protect victims' rights to remedy, and welcomes the draft's inclusion of third-party standing in lawsuits.

- The scope of a stronger law should not be limited to companies of a minimum size and should also apply to companies established outside but active on the German market.

Finally, the 50 companies call for a more effective German legislation in order to prepare for a more ambitious EU legislation.

Outside the European context, it is to be noted that the majority of enterprises around the world remain either unaware of their responsibility, or unable or unwilling to implement Human Rights Due Diligence as required of them in order to meet their responsibility to respect human rights. Evidence of what constitute some of the strongest drivers for changing business practice suggests that governments and investors have a key role to play, and for Governments, in particular, addressing and closing market and governance failures is an inherent part of their duties¹¹.

Conclusions. Lowering barriers for access to effective remedy to victims of human rights abuses

While the importance of an appropriate domestic legal framework in line with international standards and appropriate procedures and practices is undeniable, it is no less true that when it comes to the judiciary, we are faced with a failure to respect human rights. One area in which the role of the legislature, the executive and the courts is limited, par excellence, or even non-existent in the case of the courts, for example, is the lack of good knowledge and awareness of human rights to public authorities, as well as by the general public, subjects of rights and beneficiaries of their protection (Moroianu Zlătescu, 2007, p. 3).

Even where institutions operate optimally, adverse human rights impacts may still result from a company's activities and victims must be able to seek redress. Effective grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect¹².

Also, there is need for specific legislative strategies, to be adopted not only by the States parties of the treaties, and for optimization of the control mechanisms and procedures; also, there's need for the support of professionals in the police and the administration of justice in general so that such behavior codes be promoted that cultivate respect for human dignity, equality, and non-discrimination (Moroianu Zlătescu, 2011, p. 72).

¹¹ United Nations, Office of the High Commissioner on Human Rights (2018). Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163).

¹² United Nations (September 2010). The UN "Protect, Respect and Remedy" Framework for Business and Human Rights, p. 3.

As the Guiding Principles clarify¹³, ensuring access to effective remedy is also a part of the State duty to protect against business-related human rights abuse, and discussions on government action need to address the full spectrum of measures from prevention to remediation.

In its Opinion on “Improving access to remedy in the area of business and human rights at the EU level”¹⁴, the European Union Agency for Fundamental Rights (FRA) opined on “possible avenues to lower barriers for access to remedy at the EU level” and identified a number of steps that could be taken regarding legal aid, burden of proof, matters of private international law, non-judicial mechanisms and criminal justice. The Fundamental Rights Agency concluded and recommended that the European Union and its Member States should provide for effective collective redress in business and human rights cases and include it in the standards for non-judicial mechanisms regarding business and human rights, as well as in the National Action Plans of the EU Member States.

The follow-up report¹⁵ published by the European Union Agency for Fundamental Rights (FRA) on 5 October 2020 analyzes the realities that victims face when seeking compensation for human rights violations due to business activity. The report presents the findings of field research on the views of professionals on the various ways in which people can make complaints and concludes that victims face various systemic or procedural obstacles, which may include cases arising from serious violations of the right to life, health or dignity to low-value cases affecting individual consumers, and that, in most cases, inequality of arms and power imbalance between opponents are evident. This imbalance of power, derived either from financial and legal resources or from political influence, manifests itself in various stages of relevant incidents and procedures – from intimidation of victims and their defenders, through access to evidence and experts, to non-compliance with final agreements.

The report also concludes that existing remedies often do not take this imbalance into account and that procedural rules are not adapted to the nature of the cases and the reality of corporate structures. Moreover, in cases where the remedy becomes more accessible, it often lacks the effectiveness and ability to provide a meaningful remedy for victims.

¹³ United Nations (2011). Guiding Principles on Business and Human Rights. New York and Geneva: HR/PUB/11/04, Guiding Principle 25.

¹⁴ European Union Agency for Fundamental Rights, *Improving access to remedy in the area of business and human rights at the EU level. Opinion of the European Union Agency for Fundamental Rights*, FRA Opinion 1/2017, 10 April 2017 (FRA Opinion 1/2017), available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf (accessed: 24.04.2021).

¹⁵ European Union Agency for Fundamental Rights. *Business-related human rights abuse reported in the EU and available remedies* (2019), available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-business-and-human-rights-focus_en.pdf (accessed: 24.04.2021), p. 5.

Because of these practical and legal barriers to access to remedy, even in the European context, it is essential to find ways of alleviating the burden on individual claimants and facilitating redress of their grievances. This is expected to be achieved by new legislation currently being drafted by the European Union and its Member States. Hopefully, the rest of the world will follow the European example, to foster business respect for human rights.

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