UN Working Group Business & Human Rights Consultation towards a Decade of Implementation (2020)

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(1) 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?

First pillar: 'State duty to protect'
The UNGPs (2011) were successful in putting issues on the legislative table and giving 'norm entrepreneurs' a tool to strengthen their (minority) position in national debates. Laws have been adopted with specific reference to the UNGPs around the world. Australia and the United Kingdom (UK) adopted transparency regulation, while France and the Netherlands adopted further-reaching 'due diligence' regulation.

In addition, the European Commission adopted a new definition of 'Corporate Social Responsibility' (CSR) consistent with the UNGPs. CSR is currently understood to be 'the responsibility of enterprises for their impacts on society' in the European Union (EU). 'A smart mix of voluntary policy measures and, where necessary, complementary regulation' would be required to implement CSR, including business and human rights measures. Three regulatory frameworks have been taken in the EU to implement the UNGPs: the Non-Financial Reporting Directive, the country-by-country reporting (CBCR) rules for payments (in the extractive industry and logging sector) and the Conflict Minerals Regulation. The latter two frameworks have also been inspired by section 1502 and 1504 of the United States (US) Dodd-Frank Act (2010).

Second pillar: 'Corporate responsibility to respect'
In my studies of all the debates of legislation and regulation in the EU and its Member States, there were two instances in which some corporations agreed that the benefits of regulation should prevail over concerns about immediate business risks in the EU. First, some social corporations and Dutch branches of big transnational corporations supported the Dutch law on child labour. It concerns highly visible corporations that heavily invest in consumer branding. Second, some EU-based extractive industry corporations displayed a relatively constructive attitude in the adoption process of the CBCR rules. In an industry that is characterised by long project cycles, these transparency rules were perceived to create some certainty regarding resource prices, investments and project outputs in unstable and insecure regions.

Third pillar: 'Access to remedies'
Various countries have taken steps to strengthen access to remedies. For example, there are currently court proceedings ongoing against the South Korean corporation Samsung Electronics at home and in France. Both extraterritorial litigation and support local access to justice capacity development in third countries are valuable. This has also been emphasised by the Committee of Ministers of the Council of Europe in its Recommendation on Business and Human Rights (2016).

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

The answers to this question are limited to challenges that are related to progress reported above.

First pillar: 'State duty to protect'
The legal frameworks reported above have many deficiencies. For example, the EU Non-Financial Reporting Directive and the laws in Australia and the UK do not require corporations to exercise 'due diligence'. They can show that they have done nothing and still comply. Similarly, the impact of sections 1502 and 1504 US Dodd-Frank Act has been minimised in the Donald Trump era.

Furthermore, the new 'due diligence' regulations require us to think about new issues. These regulations make large amounts of information available that is not always presented in user-friendly ways. Such unstructured information can create a 'poverty of attention' and new accessibility issues for people and organisations.

Second pillar: 'Corporate responsibility to respect'
While it has often been asserted that more regulation can enable corporations to reap various immediate and long-term benefits (including employee morale and cost savings), business organisational behaviour remains resistant to change. Particularly worrisome is the lack of respect for core labour rights and the right to health and safety at work.

Third pillar: 'Access to remedies'
This is a good opportunity to report three major challenges. First, stakeholders (including policymakers) have been arguing that extraterritorial remediation and (support for) local judicial remediation are mutually exclusive. For example, this was a major discussion point during the discussion day of General Comment 16 on Business and Human Rights of the UN Committee on Economic Social and Cultural Rights in 2017.

Second, stakeholders (including policymakers) over and over again return to presenting (support for) non-binding remedies as an equivalent alternative for binding remedies. While it is correct that justice does not need to be defined formally, the commentary to UNGP 26 explains that civil judicial remedies should form the backbone of a wider package of remedies that include non-judicial remedies at the country, industry and company level. Judges represent the 'last bastion against corruption' for many victims in many countries.

Third, UNGP 26 provides that countries should take appropriate steps to ensure the effectiveness of judicial mechanisms when addressing business-related human rights abuses, including the consideration of ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy. Various barriers to justice remain, especially for vulnerable people. But, there is a lack of awareness and research about power dynamics that serve as barriers to justice in the countries where violations occur. Knowledge about the impact of trauma on survivors of corporate human rights abuses can, for example, be useful to inform judicial processes.

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

The first issue relates to the limited attention that corporations from developing and emerging countries have gained. Such corporations have been studied almost exclusively in supply chain relations, as subsidiaries of corporations from economically developed countries There has been much attention for issues relating to power diffusion, i.e. the growing influence of corporate non-state actors, but not for issues relating to power transfusion, i.e. the rising influence of new corporate non-state actors on the global stage. In my monograph manuscript, I study such corporations in their own right and as competitors of EU-based corporations (See attached summaries of relevant publications.)

Second, various remedying mechanisms overlook barriers that women encounter. The Gender Guidance (2019) of the United Nations (UN) Working Group on Business and Human Rights is a major step forward. But, various UN bodies fail to refer to any of the relevant legal frameworks on gender when they deal with complaints. For example, they have largely ignored the gender-dimension in the South Korean electronics industry, an industry in which female workers are generally hired over men as they are perceived to be 'better suited' to performing repetitive irregular labour and to be easier to control. My postdoc research on gendered barriers to remedies is currently ongoing.

(4) 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?

<u>The answers to this question are limited to issues reported above.</u>

<u>First pillar: 'State duty to protect'</u>
<u>Second pillar: 'Corporate responsibility to respect'</u>

- US Supreme Court Justice Louis Brandeis famously said 'If we desire respect for the law, we must first make the law respectable'. Various countries around the world have laws that harm victims of corporate human rights abuse. Article 8 of the South Korean Assembly and Demonstration Act (2007) and Section 14(1)(d)(i), 40 and 48 of the Kenyan Labour Relations Act (2007) are useful examples. These articles need to be amended.

- Countries need to make the costs of not respecting 'transparency' legislation higher. While it is not perfect, the new Australian Transparency Register seems to be a step in the right direction. The Register seems to make it easier for 'users' to identify the business entities that have reported.

- There is a need to fund initiatives to empower citizens in their consumption of corporate human rights information in the contemporary age of 'information disorder'.

<u>Third pillar: 'Access to remedies'</u>

- Support for local capacity building in developing and emerging countries is often promised by economically developed countries, but not often implemented. Practical local remedies facilitate legal certainty, predictability and the participation of everyone involved. By design, such remedies would be beneficial for victims of all corporations, regardless of the nationality of the owner. They can, furthermore, increase awareness about the behaviour of corporations in the places where abuse occurs and might have a regulatory effect on all operating there.

- Training, legal aid and various other transformative measures to alleviate gendered barriers to remediate need to be studied and operationalised.

(5) Additional information about your submission (e.g. collection of inputs from members; or inputs from consultation):

I have good knowledge of all progress that has been made worldwide, but have the most expertise in researching the international perspective and the perspectives in the EU, France, the Netherlands, Kenya and South-Korea. I am from Belgium and have conducted 25 expert interviews in Kenya and South Korea in 2017-2018. I will send summaries of my relevant publications to wg-business@ohchr.org later today.