Book Review: The UN Guiding Principles on Business & Human Rights

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Barnali Choudbury, *The UN Guiding Principles on Business & Human Rights- A Commentary*, Edward Elgar Publishing, 2023

The endorsement of the United Nations Guiding Principles (UNGPs) in 2011 represents a milestone for business and human rights as the principles successfully achieved to put the duties of different actors involved in (possible) human rights abuses on the international agenda. The UNGPs provide a non-binding yet authoritative framework for a three-pillared scheme to identify and contextualize the responsibilities with regard to business and human rights: the State's responsibility to protect, businesses' responsibility to respect, and facilitating access to remedy. However, although the impact of the principles can be described as ground-breaking, they have also been criticized for their vague and generic language which provides for a leeway for certain actors to circumvent their responsibilities (see Andreas Rasche & Sandra Waddock, Surya Deva, Florian Wettstein).Therefore, it is important to determine and clarify the content of the principles to increase their efficiency and effectiveness. In this light, this commentary on the UNGPs which examines all the principles one-by-one through the inputs of various prominent scholars, academics, experts and practitioners is indeed a reference guide to when working on corporate social responsibility.

The UNGPs and private international law are inherently linked. UNGPs aim to address issues regarding human rights abuses and environmental degradation which are ultimately transnational. Therefore, every time we talk about the extraterritorial obligations of the States, or the private remedies attached to cross-border human rights violations, we have to talk within the framework of private international law. For instance, in a case where a multinational company

headquartered in the Global North causes damage through its subsidiaries or suppliers located in the Global North, the contractual clauses regarding their respective obligations or the private remedies in their contracts brings the questions of which law is applicable or how to enforce such mechanisms. Furthermore, in cases where the violations are brought before a court, it is inevitable that the court will have to decide on which law to be applied to the conflict at hand. In this regard, although the commentary does not go into detail about conflict of laws/ private international law issues, we know that the implementation of the UNGPs requires the consideration of private international law rules.

The commentary consists of two parts; the first part is dedicated to the UNGPs, and the second part focuses on the Principles for Responsible Contracts (PRCs) which is an integral addition to the UNGPs.

The first part starts with the UNGPs' first pillar, the State's duty to protect in context. The authors Larry Cata Backer and Humberto Cantu Rivera (UNGPs 4&5) emphasize the centrality of the State as an actor in many interactions when it engages in various commercial transactions and the privatization of essential services. Such instances pose a unique opportunity for the State to exercise its influence over businesses, service providers, or investors to facilitate respect for human rights and to fulfill its duty to protect human rights. Furthermore, as Olga Martin-Ortega and Fatimazahra Dehbi highlights (UNGP 7) when a company is operating in a conflict zone, the States that are involved must engage effectively with the situation to protect human rights considering the heightened vulnerability. Overall, actions of privatization or other commercial transactions do not exempt the State from its own duties. On the contrary, the State has heightened duties to ensure and support respect for human rights through various means such as its legislation, policies, agencies or through (effective) membership of multilateral institutions or its contracts.

Moving onto the second pillar, the business' responsibility to respect, Sara L. Seck
emphasizes

that this responsibility is not framed as a duty—like the State duty to protect but rather is a more flexible term—and is independent of the State. However, more regard could have been given to common situations such as where the lines between the States and the businesses are blurred. I do not mean here the situations where the business enterprises are fully or partially owned by the State but rather – *de facto*—the businesses have more power (both in economic and political terms) on the ground. More examples could have been given such as how the revenues of Shell exceed the GDP's of Malaysia, Nigeria, South Africa and Mexico. In the increasingly globalized and competitive world of today, the (possible) role of businesses changes rapidly. Conversely, the disconnect between the policies, statements, and pledges businesses make with respect to human rights and their actual performance has been identified and highlighted quite accurately. The analysis of the lack of incentives for businesses to respect and engage with human rights by Kishanthi Parella (UNGP 13) provides an excellent mirror to the situation on the ground. It is rightfully identified that although the pressure from the consumers, investors, and/or other stakeholders can incentivize companies to do better, it may be insufficient. For instance, although Shell has been criticized by civil society, affected stakeholders, and the public for over a decade, and has faced several high-profile cases, the change beyond its corporate policies and documents remains highly contested.

Naturally, this brings to the fore the importance of having legally binding, national, regional, and international, rules putting concrete obligations with strong enforcement mechanisms to force companies to do better and create a level playing field for the ones who already are genuinely engaged in human rights issues. Maddelena Neglia discusses the different mandatory legislations initiatives from different countries regarding the implementation of the UNGPs,

and Claire Bright and Celine Graca da Pires examine the same initiatives through the lens of Human Rights Due Diligence processes.

However, as the analysis of the current transparency frameworks within the framework of UNGP 13, considering that there are already legally binding rules on non-financial information disclosure, foreshadows the possible outcomes of future legally binding rules, such as the Corporate Sustainability Due Diligence Directive (See also the last documents, the Council position and the Parliament position.) The commentary does not discuss the positions adopted by the Council and the Parliament as they were not yet adopted at the time the commentary was written). The current transparency laws show that unless such rules have teeth, they are bound to be ineffective.

Of course, the efforts of the States and businesses must be accompanied by strong and effective both State-based and non-State based and judicial and non-judicial remedies for the victims of corporate harm. On this matter, the commentary highlights the mechanisms that we are more prone to forgetting, such as the national human rights institutions (NHRIs) or multistakeholder initiatives (MSIs). It is usually the case that when thinking about remedies, the first thing that comes to mind are State-based judicial remedies. However, as Jennifer A. Zerk and Martijn Scheltema remind us there are several different types of remedies which can even be more effective depending on the context. Furthermore, on an academic level, we tend to focus more on Platon's 'theory on forms/ideas' rather than how things work in practice. As a result of this disconnection between the academics and the victims, we also tend to forget to discuss whether the 'form/idea' complies with the reality on the ground. Therefore, the emphasis in the commentary on the (obvious) link between the remedies and the persons for whom these remedies are intended reminds us that remedies must be stakeholder centric.

Overall, the commentary points out several important issues about the UNGPs:

- The uncertainty surrounding the UNGPs is real—although this was an intentional choice by Professor Ruggie, considering the current frameworks and how far we have come in the business & human rights world, we should not religiously hold onto the UNGPs but rather search for ways to improve and build upon them. UNGPs indeed were a marvelous achievement at the time, in 2011, when it was even

unthinkable for most people that businesses could have any kind of responsibility regarding human rights; yet a worldwide consensus was reached. However, now, there is an enormous momentum to genuinely address corporate disasters through better regulation and enforcement.

- Another important prong in this process still is the international treaty. The commentary does not go into much detail about the Legally Binding Instrument on Business and Human Rights (Penelope Simmons discusses the international treaty within the framework of UNGP 26 as a way to strengthen access to remedy and Barnali Choudhury proposes the international treaty as a way to tackle the remaining problems with the implementation of the UNGPS and the PRCs), however I do believe that the international treaty must also be discussed as an option to better implement the UNGPs. The drafting process of the treaty is evidence of one of many problems with the implementation of the UNGPs. As Daniel Augenstein (UNGP 1), Gamze Erdem Turkelli (UNGP 10) and Dalia Palombo (UNGP 25) point out, international cooperation is very important to effectively address the multi-faceted and transnational problem of respecting and protecting human rights and facilitating remedy when human rights abuses occur within the context of corporate harm. They show that no sole State can fix such a problem, and cooperation between States is essential. This cooperation can be done through could be done by engaging with other States in cases of corporate harm and exchanging information (or making it easy to exchange information) between authorities and courts, or information, as we increasingly see in private international law instruments. However, when we look at the process of drafting such a treaty which would provide common frameworks and rules to do so, it is clear that there is reluctance of the Global North countries whereas the recipient countries of damage are naturally much more enthusiastic.
- The second part of the commentary concerns the Principles for Responsible Contracts which provide guidance for the preparation, management and monitoring of Investor-State (investment) contracts, together with options for access to remedy for the (possible) victims. The PRCs reflect the same principles as the UNGPs and they are supposed to be read in conjunction.

The focus on the PRCs is valuable because historically international investment

law and international human rights law were seen as two separate fields of law with no intersection. However, today, as the understanding of human rights is significantly evolving, the link between investments and human rights is becoming all the more evident. Investments – in all sectors but especially the extractive sector- can adversely impact to a significant extend, environmental degradation and human rights, lives of local and indigenous communities and marginalized and vulnerable groups. Rightly so, as the first part of the commentary on UNGPs, the second part, especially within the scope of PRC 7, Tehtena Mebratu-Tsegaye and Solina Kennedy highlight the importance of meaningful stakeholder engagement with the (potentially) affected stakeholders and the ways to design more inclusive community involvement strategies.

Secondly, PRCs is a great opportunity to provide guidance to increase the effectiveness and efficiency of the contractual clauses used in investment contracts. Contractual clauses are the most widely used tools among businesses to pledge and ensure human rights compliance in their activities (see p 63). However, the effectiveness of these clauses is rather limited. Therefore, this wide use must be seen as an advantage and be built upon. In other words, the clauses must be structured in such a way that they do not leave unnecessary wiggle room for the companies and successfully cover the governance gaps.

Lastly, the importance of human rights impact assessments by investors before, during and after a project is a common narrative through the part on the PRCs. This emphasis is important as we are on the verge of adopting hard laws on human rights due diligence that may successfully enforce companies to be more engaging, robust and effective when they address human rights concerns. It has to be borne in mind that investors are also businesses enterprises, and they also must conduct their own Human Rights Due Diligence regarding their projects. In this regard, it is sometimes even the case that investors have more adverse impacts than other types of business actors because of their indirect impact via the projects they finance. Thus, the engagement of the investors with human rights is crucial for effective human rights protection.

Overall, the commentary is a must-have for everyone who is working on business and human rights. The UNGPs constitute the base of all the work that has been done over the years in the field. Thus, to be able to comprehend what business and human rights mean and to build on them, it is essential to examine the UNGPs in detail, which is what the commentary provides.